TITLE 12—BANKS AND BANKING

CHAPTER 1—THE COMPTROLLER OF THE CURRENCY

§ 1. Office of Comptroller of the Currency

There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by

United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal Reserve notes, except for the cancellation and destruction, and accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for circulation, the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury. The Comptroller of the Currency shall have the same authority over matters within the jurisdiction of the Comptroller as the Director of the Office of Thrift Supervision has over matters within the Director's jurisdiction under section 1462a(b)(3) of this title. The Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency.

(R.S. §324; Dec. 23, 1913, ch. 6, §10, 38 Stat. 261; June 3, 1922, ch. 205, 42 Stat. 621; Aug. 23, 1935, ch. 614, title II, §203(a), 49 Stat. 704; Pub. L. 89–427, §1, May 20, 1966, 80 Stat. 161; Pub. L. 103–325, title III, §331(b)(2), Sept. 23, 1994, 108 Stat. 2232.)

REFERENCES IN TEXT

The bureau, referred to in text, is known as the Office of the Comptroller of the Currency.

CODIFICATION

R.S. §324 derived from act June 3, 1864, ch. 106, §1, 13 Stat. 99, which was the National Bank Act. See section 38 of this title.

Section is comprised of R.S. §324, as amended by the eighth paragraph of act Dec. 23, 1913, §10.

AMENDMENTS

1994—Pub. L. 103–325 inserted at end ''The Comptroller of the Currency shall have the same authority over matters within the jurisdiction of the Comptroller as the Director of the Office of Thrift Supervision has over matters within the Director's jurisdiction under section 1462a(b)(3) of this title. The Secretary of the Treasury may not delay or prevent the issuance of any rule or the promulgation of any regulation by the Comptroller of the Currency.''

1966—Pub. L. 89–427 inserted exception relating to cancellation and destruction, and accounting with respect to the cancellation and destruction, of Federal Reserve notes unfit for circulation.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, were not included in transfer of functions of officers, agencies, and employees of Department of the Treasury to Secretary of the Treasury, made by Reorg. Plan No. 26 of 1950, §1, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280. See section 321(c)(2) of Title 31, Money and Finance.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 31 section 307.

§ 2. Comptroller of the Currency; appointment; term

The Comptroller of the Currency shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate.

(R.S. §325; Aug. 23, 1935, ch. 614, title II, §209, 49 Stat. 707.)

CODIFICATION

R.S. §325 derived from act June 3, 1964, ch. 106, §1, 13 Stat. 99, which was the National Bank Act. See section 38 of this title.

Provisions of this section which prescribed the annual basic compensation of the Comptroller of the Currency were omitted to conform to the provisions of the Executive Schedule. See section 5314 of Title 5, Government Organization and Employees.

AMENDMENTS

1935—Act Aug. 23, 1935, struck out ''on the recommendation of the Secretary of the Treasury'' after ''President'', where first appearing, and changed the salary from ''$5,000 a year'' to ''$15,000 a year''.

REPEALS

Act Oct. 15, 1949, ch. 695, §4, 63 Stat. 880, formerly cited as a credit to this section, was repealed by Pub. L. 89–554, §8(a), Sept. 6, 1966, 80 Stat. 655.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, were not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Appointing power, see Const. Art. II, §2, cl. 2.

Compensation of Comptroller, see section 5314 of Title 5, Government Organization and Employees.

§ 3. Oath of Comptroller

The Comptroller of the Currency shall, within fifteen days from the time of notice of his appointment, take and subscribe the oath of office.

(R.S. §326; Pub. L. 86–251, §1(d), Sept. 9, 1959, 73 Stat. 488; Pub. L. 92–310, title II, §223(a), June 6, 1972, 86 Stat. 206.)

CODIFICATION

R.S. §326 derived from act June 3, 1864, ch. 106, §1, 13 Stat. 99, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1972—Pub. L. 92–310 struck out provisions which required the Comptroller to give a bond in the sum of $250,000.

1959—Pub. L. 86–251 increased the surety bond requirement from $100,000 to $250,000.

CROSS REFERENCES

Oath of office, see Const. Art. VI, cl. 3; section 3331 of Title 5, Government Organization and Employees.

§ 4. Deputy Comptrollers

The Secretary of the Treasury shall appoint no more than four Deputy Comptrollers of the Currency, one of whom shall be designated First Deputy Comptroller of the Currency, and shall fix their salaries. Each Deputy Comptroller shall take the oath of office and shall perform such duties as the Comptroller shall direct. During a vacancy in the office or during the absence or disability of the Comptroller, each Deputy Comptroller shall possess the power and perform

the duties attached by law to the office of the Comptroller under such order of succession following the First Deputy Comptroller as the Comptroller shall direct.

(R.S. § 327; Mar. 4, 1923, ch. 252, § 209(b), 42 Stat. 1467; Pub. L. 86–251, § 1(a), Sept. 9, 1959, 73 Stat. 487; Pub. L. 92–310, title II, § 223(b), June 6, 1972, 86 Stat. 206.)

CODIFICATION

R.S. § 327 derived from act June 3, 1864, ch. 106, § 1, 13 Stat. 99, which was the National Bank Act. See section 38 of this title.

R.S. § 327, contained after the word ''Secretary'' the following ''who shall be entitled to a salary of two thousand five hundred dollars a year, and'' which was omitted from this section on authority of act Mar. 4, 1923, § 209(b), fourth sentence, which was classified to section 9a of this title and regulated the salaries of deputy comptrollers.

AMENDMENTS

1972—Pub. L. 92–310 struck out provisions which required each Deputy Comptroller to give a bond in the sum of $100,000.

1959—Pub. L. 86–251 provided for the appointment of four Deputy Comptrollers instead of one, the designation of one as the First Deputy, the fixing of salaries, increase in surety bond requirement from $50,000 to $100,000 and order of succession.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Oath of office, see Const. Art. VI, cl. 3; section 3331 of Title 5, Government Organization and Employees.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 9 of this title.

§ 4a. Delegation of authority by Comptroller

The Comptroller of the Currency may delegate to any duly authorized employee, representative, or agent any power vested in the office by law.

(R.S. § 327A, as added Pub. L. 96–221, title VII, § 707(a), Mar. 31, 1980, 94 Stat. 188.)

§§ 5, 6. Repealed. Pub. L. 86–251, § 1(b), (c)(1), Sept. 9, 1959, 73 Stat. 487, 488

Section 5, act Mar. 4, 1909, ch. 297, § 1, 35 Stat. 867, related to appointment, succession in office and penal bond of assistant deputy comptroller. See section 4 of this title.

Section 6, act Mar. 4, 1923, ch. 252, title II, § 209(b) (pt.), 42 Stat. 1467, related to appointment, oath of office, penal bond, assigned duties and administration of national agricultural credit corporation provisions of third Deputy Comptroller. See section 4 of this title.

§ 7. Chief of examining division

The Comptroller of the Currency may designate a national bank examiner to act as chief of the examining division in his office.

(Jan. 3, 1923, ch. 22, 42 Stat. 1096.)

CODIFICATION

Section is based on Treasury Department Appropriation Act, 1924, act Jan. 3, 1923.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SIMILAR PROVISIONS

Similar provisions were contained in act Feb. 17, 1922, ch. 55, 42 Stat. 375, and in earlier appropriation acts.

§ 8. Clerks

The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the comptroller shall direct.

(R.S. § 328.)

CODIFICATION

R.S. § 328 derived from act June 3, 1864, ch. 106, § 1, 13 Stat. 100, which was the National Bank Act. See section 38 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Classification of civilian employees, see section 5101 et seq. of Title 5, Government Organization and Employees.

§ 9. Additional examiners, clerks, and other employees

The Comptroller of the Currency is authorized to employ such additional examiners, clerks, and other employees as he deems necessary to carry out the provisions of sections 4, 6, 9, 10, 1151 to 1318, and 1322 of this title and to assign to duty in the office of his bureau in Washington such examiners and assistant examiners as he shall deem necessary to assist in the performance of the work of that bureau.

(Mar. 4, 1923, ch. 252, title II, § 209(b), 42 Stat. 1467.)

REFERENCES IN TEXT

Section 6, referred to in text, was repealed by Pub. L. 86–251, § 1(c)(1), Sept. 9, 1959, 73 Stat. 488.

Sections 1151, 1161 to 1163, 1171, 1172, 1181, 1182, 1191, 1201, 1202, 1211 to 1215, 1221 to 1223, 1231, 1232, 1241 to 1244, 1246, 1247, 1249, 1251, 1261, 1271, 1281 to 1283, 1291 to 1293, 1301 to 1303, and 1322 of this title, included within the reference to sections 1151 to 1318, and 1322 of this title, were repealed by Pub. L. 86–230, § 24, Sept. 8, 1959, 73 Stat. 466.

Section 1151a, included within the reference to sections 1151 to 1318, was repealed by Pub. L. 92–181, title V, § 5.26(a), Dec. 10, 1971, 85 Stat. 624.

Sections 1245, 1248, and 1311 to 1318, included within the reference to sections 1151 to 1318 of this title, were repealed by act June 25, 1948, ch. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948.

The bureau, referred to in text, is known as the Office of the Comptroller of the Currency.

CODIFICATION

Section is comprised of subsec. (b), third sentence, of section 209 of act Mar. 4, 1923. For classification to this title of other provisions of section 209, see Tables.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not

included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 9a. Repealed. Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 645

Section, act Mar. 4, 1923, ch. 252, title II, § 209(b), 42 Stat. 1467, authorized Comptroller to fix in advance pay of deputy comptrollers, examiners, clerks, and certain other employees.

§ 10. Salaries of Deputy Comptrollers, examiners, and other employees as part of bank examination expenses

The salaries of the Deputy Comptrollers and of all national bank examiners and assistant examiners assigned to duty in the office of the bureau in Washington in connection with the supervision of national banks shall be considered part of the expenses of the examinations provided for by subchapter XV of chapter 3 of this title.

(Mar. 4, 1923, ch. 252, title II, § 209(b), 42 Stat. 1467; Pub. L. 86–251, § 1(c)(2), Sept. 9, 1959, 73 Stat. 488.)

REFERENCES IN TEXT

Subchapter XV [§ 481 et seq.] of chapter 3 of this title, referred to in text, was in the original a reference to section 5240 of the Revised Statutes.

CODIFICATION

Section is comprised of subsec. (b), fifth sentence, of section 209 of act Mar. 4, 1923. For classification to this title of other provisions of section 209, see Tables.

AMENDMENTS

1959—Pub. L. 86–251 included all Deputy Comptrollers instead of only two deputy comptrollers and struck out provisions deeming the salaries of deputy comptroller, examiners, assistant examiners, clerks and other employees as expenses of administration of national agricultural credit corporation provisions and considering the salary of the additional deputy comptroller as partly an expense of administration in proportion to time spent in such administration.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 9 of this title.

§ 11. Interest in national banks

It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States.

(R.S. § 329.)

CODIFICATION

R.S. § 329 derived from act June 3, 1864, ch. 106, § 1, 13 Stat. 99, which was the National Bank Act. See section 38 of this title.

§ 12. Seal of Comptroller

The seal devised by the Comptroller of the Currency for his office, and approved by the Secretary of the Treasury, shall continue to be the seal of office of the comptroller, and may be renewed when necessary. A description of the seal, with an impression thereof, and a certificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State.

(R.S. § 330; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 317.)

CODIFICATION

R.S. § 330 derived from act June 3, 1864, ch. 106, § 2, 13 Stat. 100, which was the National Bank Act. See section 38 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 13. Rooms for Currency Bureau

There shall be assigned, from time to time, to the Comptroller of the Currency, by the Secretary of the Treasury, suitable rooms in the Treasury Building for conducting the business of the Currency Bureau, containing safe and secure fireproof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily in the possession of engravers or printers, and other valuable things belonging to his department; and the Comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the business of his office.

(R.S. § 331.)

REFERENCES IN TEXT

The bureau, referred to in text, is known as the Office of the Comptroller of the Currency.

CODIFICATION

R.S. § 331 derived from act June 3, 1864, ch. 106, § 3, 13 Stat. 100, which was the National Bank Act. See section 38 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 14. Report of Comptroller

The Comptroller of the Currency shall make an annual report to Congress.

(R.S. § 333; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 317; Aug. 7, 1946, ch. 770, § 1(39), 60 Stat. 869.)

CODIFICATION

R.S. § 333 derived from acts June 3, 1864, ch. 106, § 61, 13 Stat. 117, and Feb. 19, 1873, ch. 166, 17 Stat. 466. Act June 3, 1864, was the National Bank Act. See section 38 of this title.

AMENDMENTS

1946—Act Aug. 7, 1946, repealed in the opening clause, the requirement that the report to Congress shall be submitted at the commencement of its session, and repealed all provisions prescribing contents of the exhibits in the report.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 36 of this title.

§ 15. Repealed. Aug. 7, 1946, ch. 770, § 1(40, 50), 60 Stat. 869, 870

Section, act Apr. 28, 1902, ch. 594, §1, 32 Stat. 138, required inclusion of expenses of liquidation of national banks in annual report of Comptroller of the Currency.

CHAPTER 2—NATIONAL BANKS

SUBCHAPTER I—ORGANIZATION AND GENERAL PROVISIONS

SUBCHAPTER II—CAPITAL, STOCK, AND STOCKHOLDERS

SUBCHAPTER III—DIRECTORS

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

NATIONAL BANK ACT REFERRED TO IN OTHER SECTIONS

Sections 21 et seq. of this title are referred to in sections 35, 40, 41, 215c, 377, 501a, 1440, 1467a, 1817, 2254, 3102 of this title; title 18 section 334; title 28 section 1348.

SUBCHAPTER I—ORGANIZATION AND GENERAL PROVISIONS

§ 21. Formation of national banking associations; incorporators; articles of association

Associations for carrying on the business of banking under title 62 of the Revised Statutes may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

(R.S. § 5133.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in text, was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. § 5133 derived from act June 3, 1864, ch. 106, § 5, 13 Stat. 100, which was the National Bank Act. See section 38 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 21a. Amendment of articles of association

Except as otherwise specifically provided by law, or by the articles of association of the particular national banking association, the articles of association of a national banking association may be amended with respect to any lawful matter, and any action requiring the approval of the stockholders of such association may be had by the approving vote of the holders of a majority of the voting shares of the stock of the association obtained at a meeting of the stockholders called and held pursuant to notice given by mail at least ten days prior to the meeting or pursuant to a waiver of such notice given by all stockholders entitled to receive notice of such meeting. A certified copy of every amendment to the articles of association adopted by the shareholders of a national banking association shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

(Pub. L. 86–230, § 13, Sept. 8, 1959, 73 Stat. 458.)

§ 22. Organization certificate

The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall include the word ''national''.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or District, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of title 62 of the Revised Statutes.

(R.S. § 5134; Pub. L. 86–230, § 25, Sept. 8, 1959, 73 Stat. 466; Pub. L. 97–320, title IV, § 405(b), Oct. 15, 1982, 96 Stat. 1512.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in par. Fifth, was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. § 5134 derived from act June 3, 1864, ch. 106, § 6, 13 Stat. 101, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1982—Par. First. Pub. L. 97–320 struck out ''and be subject to the approval of the Comptroller of the Currency'' after ''national''.

1959—Par. First. Pub. L. 86–230 substituted ''which named shall include the word 'national' and be'' for ''which name shall be''.

CROSS REFERENCES

Business, transaction in place specified in organization certificate, see section 81 of this title.

Change of name or location, see section 30 of this title.

§ 23. Acknowledgment and filing of certificate

The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

(R.S. § 5135.)

CODIFICATION

R.S. § 5135 derived from act June 3, 1864, ch. 106, § 6, 13 Stat. 101, which was the National Bank Act. See section 38 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

First. To adopt and use a corporate seal.

Second. To have succession from February 25, 1927, or from the date of its organization if organized after February 25, 1927, until such time as it be dissolved by the act of its shareholders owning two-thirds of its stock, or until its franchise becomes forfeited by reason of violation of law, or until terminated by either a general or a special Act of Congress or until its affairs be placed in the hands of a receiver and finally wound up by him.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, bylaws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock; *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. In no event shall the total amount of the investment securities of any one obligor or maker, held by the association for its own account, exceed at any time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund, except that this limitation shall not require any association to dispose of any securities lawfully held by it on August 23, 1935. As used in this section the term ''investment securities'' shall mean marketable obligations, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term ''investment securities'' as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association for its own account of any shares of stock of any corporation. The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or obligations of the Washington Metropolitan Area Transit Authority which are guaranteed by the Secretary of Transportation under section 9 of the National Capital Transportation Act of 1969 [D.C. Code, §1–2458], or obligations issued under authority of the Federal Farm Loan Act, as amended, or issued by the thirteen banks for cooperatives or any of them or the Federal Home Loan Banks, or obligations which are insured by the Secretary of Housing and Urban Development under title XI of the National Housing Act [12 U.S.C. 1749aaa et seq.] or obligations which are insured by the Secretary of Housing and Urban Development (hereinafter in this sentence referred to as the ''Secretary'') pursuant to section 207 of the National Housing Act [12 U.S.C. 1713], if the debentures to be issued in payment of such insured obligations are guaranteed as to principal and interest by the United States, or obligations, participations, or other instruments of or issued by the Federal National Mortgage Association, or the Government National Mortgage Association, or mortgages, obligations or other securities which are or ever have been sold by the Federal Home Loan Mortgage Corporation pursuant to section 305 or section 306 of the Federal Home Loan Mortgage Corporation Act [12 U.S.C. 1454 or 1455], or obligations of the Federal Financing Bank or obligations of the Environmental Financing Authority, or obligations or other instruments or securities of the Student Loan Marketing Association, or such obligations of any local public agency (as defined in section 110(h) of the Housing Act of 1949 [42 U.S.C. 1460(h)]) as are secured by an agreement between the local public agency and the Secretary in which the local public agency agrees to borrow from said Secretary, and said Secretary agrees to lend to said local public agency, monies in an aggregate amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay, when due, the interest on and all installments (including the final installment) of the principal of such obligations, which monies under the terms of said agreement are required to be used for such payments, or such obligations of a public housing agency (as defined in the United States Housing Act of 1937, as amended [42 U.S.C. 1437 et seq.]) as are secured (1) by an agreement between the public housing agency and the Secretary in which the public housing agency agrees to borrow from the Secretary, and the Secretary agrees to lend to the public housing agency, prior to the maturity of such obligations, monies in an amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay the principal of such obligations with interest to maturity thereon, which monies under the terms of said agreement are required to be used for the purpose of paying the principal of and the interest on such obligations at their maturity, (2) by a pledge of annual contributions under an annual contributions contract between such public housing agency and the Secretary if such contract shall contain the covenant by the Secretary which is authorized by subsection (g) of section 6 of the United States Housing Act of 1937, as amended [42 U.S.C. 1437d(g)], and if the maximum sum and the maximum period specified in such contract pursuant to said subsection 6(g) [42 U.S.C. 1437d(g)] shall not be less than the annual amount and the period for payment which are requisite to provide for the payment when due of all installments of principal and interest on such obligations, or (3) by a pledge of both annual contributions under an annual contributions contract containing the covenant by the Secretary which is authorized by section 6(g) of the United States Housing Act of 1937 [42 U.S.C. 1437d(g)], and a loan under an agreement between the local public housing agency and the Secretary in which the public housing agency agrees to borrow from the Secretary, and the Secretary agrees to lend to the public housing agency, prior to the maturity of the obligations involved, moneys in an amount which (together with any other moneys irrevocably committed under the annual contributions contract to the payment of principal and interest on such obli-

gations) will suffice to provide for the payment when due of all installments of principal and interest on such obligations, which moneys under the terms of the agreement are required to be used for the purpose of paying the principal and interest on such obligations at their maturity: *Provided*, That in carrying on the business commonly known as the safe-deposit business the association shall not invest in the capital stock of a corporation organized under the law of any State to conduct a safe-deposit business in an amount in excess of 15 per centum of the capital stock of the association actually paid in and unimpaired and 15 per centum of its unimpaired surplus. The limitations and restrictions herein contained as to dealing in and underwriting investment securities shall not apply to obligations issued by the International Bank for Reconstruction and Development, the European Bank for Reconstruction and Development, the Inter-American Development Bank[1] Bank for Economic Cooperation and Development in the Middle East and North Africa,,[2] the North American Development Bank, the Asian Development Bank, the African Development Bank, the Inter-American Investment Corporation, or the International Finance Corporation,,[2] or obligations issued by any State or political subdivision or any agency of a State or political subdivision for housing, university, or dormitory purposes, which are at the time eligible for purchase by a national bank for its own account, nor to bonds, notes and other obligations issued by the Tennessee Valley Authority or by the United States Postal Service: *Provided*, That no association shall hold obligations issued by any of said organizations as a result of underwriting, dealing, or purchasing for its own account (and for this purpose obligations as to which it is under commitment shall be deemed to be held by it) in a total amount exceeding at any one time 10 per centum of its capital stock actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. Notwithstanding any other provision in this paragraph, the association may purchase for its own account shares of stock issued by a corporation authorized to be created pursuant to title IX of the Housing and Urban Development Act of 1968 [42 U.S.C. 3931 et seq.], and may make investments in a partnership, limited partnership, or joint venture formed pursuant to section 907(a) or 907(c) of that Act [42 U.S.C. 3937(a) or 3937(c)]. Notwithstanding any other provision of this paragraph, the association may purchase for its own account shares of stock issued by any State housing corporation incorporated in the State in which the association is located and may make investments in loans and commitments for loans to any such corporation: *Provided*, That in no event shall the total amount of such stock held for its own account and such investments in loans and commitments made by the association exceed at any time 5 per centum of its capital stock actually paid in and unimpaired plus 5 per centum of its unimpaired surplus fund. Notwithstanding any other provision in this paragraph, the association may purchase for its own account shares of stock issued by a corporation organized solely for the purpose of making loans to farmers and ranchers for agricultural purposes, including the breeding, raising, fattening, or marketing of livestock. However, unless the association owns at least 80 per centum of the stock of such agricultural credit corporation the amount invested by the association at any one time in the stock of such corporation shall not exceed 20 per centum of the unimpaired capital and surplus of the association: *Provided further*, That notwithstanding any other provision of this paragraph, the association may purchase for its own account shares of stock of a bank insured by the Federal Deposit Insurance Corporation or a holding company which owns or controls such an insured bank if the stock of such bank or company is owned exclusively (except to the extent directors' qualifying shares are required by law) by depository institutions or depository institution holding companies (as defined in section 1813 of this title) and such bank or company and all subsidiaries thereof are engaged exclusively in providing services to or for other depository institutions, their holding companies, and the officers, directors, and employees of such institutions and companies, and in providing correspondent banking services at the request of other depository institutions or their holding companies (also referred to as a ''banker's bank''), but in no event shall the total amount of such stock held by the association in any bank or holding company exceed at any time 10 per centum of the association's capital stock and paid in and unimpaired surplus and in no event shall the purchase of such stock result in an association's acquiring more than 5 per centum of any class of voting securities of such bank or company. The limitations and restrictions contained in this paragraph as to an association purchasing for its own account investment securities shall not apply to securities that (A) are offered and sold pursuant to section 4(5) of the Securities Act of 1933 (15 U.S.C. 77d(5)); (B) are small business related securities (as defined in section 3(a)(53) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(53)]); or (C) are mortgage related securities (as that term is defined in section 3(a)(41) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(41)).[3] The exception provided for the securities described in subparagraphs (A), (B), and (C) shall be subject to such regulations as the Comptroller of the Currency may prescribe, including regulations prescribing minimum size of the issue (at the time of initial distribution) or minimum aggregate sales prices, or both.

A national banking association may deal in, underwrite, and purchase for such association's own account qualified Canadian government obligations to the same extent that such association may deal in, underwrite, and purchase for such association's own account obligations of the United States or general obligations of any State or of any political subdivision thereof. For purposes of this paragraph—

(1) the term ''qualified Canadian government obligations'' means any debt obligation which

[1] So in original. Probably should be followed by a comma.

[2] So in original.

[3] So in original. The period probably should be preceded by an additional closing parenthesis.

is backed by Canada, any Province of Canada, or any political subdivision of any such Province to a degree which is comparable to the liability of the United States, any State, or any political subdivision thereof for any obligation which is backed by the full faith and credit of the United States, such State, or such political subdivision, and such term includes any debt obligation of any agent of Canada or any such Province or any political subdivision of such Province if—

(A) the obligation of the agent is assumed in such agent's capacity as agent for Canada or such Province or such political subdivision; and

(B) Canada, such Province, or such political subdivision on whose behalf such agent is acting with respect to such obligation is ultimately and unconditionally liable for such obligation; and

(2) the term ''Province of Canada'' means a Province of Canada and includes the Yukon Territory and the Northwest Territories and their successors.

Eighth. To contribute to community funds, or to charitable, philanthropic, or benevolent instrumentalities conducive to public welfare, such sums as its board of directors may deem expedient and in the interests of the association, if it is located in a State the laws of which do not expressly prohibit State banking institutions from contributing to such funds or instrumentalities.

Ninth. To issue and sell securities which are guaranteed pursuant to section 1721(g) of this title.

Tenth. To invest in tangible personal property, including, without limitation, vehicles, manufactured homes, machinery, equipment, or furniture, for lease financing transactions on a net lease basis, but such investment may not exceed 10 percent of the assets of the association.

Eleventh. To make investments designed primarily to promote the public welfare, including the welfare of low- and moderate-income communities or families (such as by providing housing, services, or jobs). A national banking association may make such investments directly or by purchasing interests in an entity primarily engaged in making such investments. An association shall not make any such investment if the investment would expose the association to unlimited liability. The Comptroller of the Currency shall limit an association's investments in any 1 project and an association's aggregate investments under this paragraph. An association's aggregate investments under this paragraph shall not exceed an amount equal to the sum of 5 percent of the association's capital stock actually paid in and unimpaired and 5 percent of the association's unimpaired surplus fund, unless the Comptroller determines by order that the higher amount will pose no significant risk to the affected deposit insurance fund, and the association is adequately capitalized. In no case shall an association's aggregate investments under this paragraph exceed an amount equal to the sum of 10 percent of the association's capital stock actually paid in and unimpaired and 10 percent of the association's unimpaired surplus fund.

(R.S. § 5136; July 1, 1922, ch. 257, § 1, 42 Stat. 767; Feb. 25, 1927, ch. 191, § 2, 44 Stat. 1226; June 16, 1933, ch. 89, § 16, 48 Stat. 184; Aug. 23, 1935, ch. 614, title III, § 308, 49 Stat. 709; Feb. 3, 1938, ch. 13, § 13, 52 Stat. 26; June 11, 1940, ch. 301, 54 Stat. 261; June 29, 1949, ch. 276, § 1, 63 Stat. 298; July 15, 1949, ch. 338, title VI, § 602(a), 63 Stat. 439; Apr. 9, 1952, ch. 169, 66 Stat. 49; Aug. 2, 1954, ch. 649, title II, § 203, 68 Stat. 622; Aug. 23, 1954, ch. 834, § 2, 68 Stat. 771; July 26, 1956, ch. 741, title II, § 201(c), 70 Stat. 667; Pub. L. 86–137, § 2, Aug. 6, 1959, 73 Stat. 285; Pub. L. 86–147, § 10, Aug. 7, 1959, 73 Stat. 301; Pub. L. 86–230, § 1(a), Sept. 8, 1959, 73 Stat. 457; Pub. L. 86–278, Sept. 16, 1959, 73 Stat. 563; Pub. L. 86–372, title IV, § 420, Sept. 23, 1959, 73 Stat. 679; Pub. L. 88–560, title VII, § 701(c), Sept. 2, 1964, 78 Stat. 800; Pub. L. 89–369, § 10, Mar. 16, 1966, 80 Stat. 72; Pub. L. 89–754, title V, § 504(a)(1), Nov. 3, 1966, 80 Stat. 1277; Pub. L. 90–19, § 27(a), May 25, 1967, 81 Stat. 28; Pub. L. 90–448, title VIII, §§ 804(c), 807(j), title IX, § 911, title XVII, § 1705(h), Aug. 1, 1968, 82 Stat. 543, 545, 550, 605; Pub. L. 91–375, § 6(d), Aug. 12, 1970, 84 Stat. 776; Pub. L. 92–318, title I, § 133(c)(1), June 23, 1972, 86 Stat. 269; Pub. L. 91–143, § 12(b), Dec. 9, 1969, as added Pub. L. 92–349, title I, § 101, July 13, 1972, 86 Stat. 466; Pub. L. 92–500, § 12(n), Oct. 18, 1972, 86 Stat. 902; Pub. L. 93–100, § 5(c), Aug. 16, 1973, 87 Stat. 344; Pub. L. 93–224, § 14, Dec. 29, 1973, 87 Stat. 941; Pub. L. 93–234, title II, § 207, Dec. 31, 1973, 87 Stat. 984; Pub. L. 93–383, title II, § 206, title VIII, § 805(c)(1), Aug. 22, 1974, 88 Stat. 668, 726; Pub. L. 96–221, title VII, § 711, Mar. 31, 1980, 94 Stat. 189; Pub. L. 97–35, title XIII, § 1342(a), Aug. 13, 1981, 95 Stat. 743; Pub. L. 97–320, title IV, § 404(b), Oct. 15, 1982, 96 Stat. 1511; Pub. L. 97–457, § 18, Jan. 12, 1983, 96 Stat. 2509; Pub. L. 98–440, title I, § 105(c), Oct. 3, 1984, 98 Stat. 1691; Pub. L. 98–473, title I, § 101(1) [title I, § 101], Oct. 12, 1984, 98 Stat. 1884, 1885; Pub. L. 100–86, title I, § 108, Aug. 10, 1987, 101 Stat. 579; Pub. L. 100–449, title III, § 308, Sept. 28, 1988, 102 Stat. 1877; Pub. L. 101–513, title V, § 562(c)(10)(B), (e)(1)(B), Nov. 5, 1990, 104 Stat. 2036, 2037; Pub. L. 102–485, § 6(a), Oct. 23, 1992, 106 Stat. 2774; Pub. L. 103–182, title V, § 541(h)(1), Dec. 8, 1993, 107 Stat. 2167; Pub. L. 103–325, title II, § 206(c), title III, §§ 322(a)(1), 347(b), Sept. 23, 1994, 108 Stat. 2199, 2226, 2241; Pub. L. 104–208, div. A, title I, § 101(c) [title VII, § 710(b)], title II, § 2704(d)(7), Sept. 30, 1996, 110 Stat. 3009–121, 3009–181, 3009–489.)

AMENDMENT OF PARAGRAPH ELEVENTH

Pub. L. 104–208, div. A, title II, § 2704(c), (d)(7), Sept. 30, 1996, 110 Stat. 3009–487, 3009–489, provided that, effective Jan. 1, 1999, if no insured depository institution is a savings association on that date, paragraph Eleventh of this section is amended in the 5th sentence, by striking ''affected deposit insurance fund'' and inserting ''Deposit Insurance Fund''.

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in par. Seventh, was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475,

656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§5133 to 5244 to the Code, see Tables.

The Federal Farm Loan Act, referred to in par. Seventh, is act July 17, 1916, ch. 245, 39 Stat. 360, which was classified to section 641 et seq. of this title prior to its repeal by Pub. L. 92–181, §5.26(a), Dec. 10, 1971, 85 Stat. 624. See chapter 23 (§2001 et seq.) of this title.

The National Housing Act, referred to in par. Seventh, is act June 27, 1934, ch. 847, 48 Stat. 1246, as amended. Title XI of the National Housing Act is title XI of act June 27, 1934, ch. 847, as added by act Nov. 3, 1966, Pub. L. 89–754, title V, §502(a), 80 Stat. 1274, which is classified generally to subchapter IX–B (§1749aaa et seq.) of chapter 13 of this title. For complete classification of this Act to the Code, see section 1701 of this title and Tables.

Section 110 of the Housing Act of 1949 [42 U.S.C. 1460], referred to in par. Seventh, was omitted from the Code pursuant to section 5316 of Title 42, The Public Health and Welfare, which terminated authority to make grants or loans under title I of that Act [42 U.S.C. 1450 et seq.] after Jan. 1, 1975.

The United States Housing Act of 1937, referred to in par. Seventh, is act Sept. 1, 1937, ch. 896, as revised generally by Pub. L. 93–383, title II, Aug. 22, 1974, 88 Stat. 653, and is classified to chapter 8 (§1437 et seq.) of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 1437 of Title 42 and Tables.

The Housing and Urban Development Act of 1968, referred to in par. Seventh, is Pub. L. 90–448, Aug. 1, 1968, 82 Stat. 476, as amended. Title IX of the Housing and Urban Development Act is classified principally to chapter 49 (§3931 et seq.) of Title 42. For complete classification of this Act to the Code, see Short Title of 1968 Amendment note set out under section 1701 of this title and Tables.

CODIFICATION

Amendment by Pub. L. 98–473 is based on section 211(a) of title II of S. 2416, as introduced in the Senate on Mar. 13, 1984, which was enacted into permanent law by section 101(1) of Pub. L. 98–473.

R.S. §5136 derived from act June 3, 1864, ch. 106, §8, 13 Stat. 101, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1996—Par. Seventh. Pub. L. 104–208, §101(c) [§710(b)], in seventh sentence, inserted ''Bank for Economic Cooperation and Development in the Middle East and North Africa,'' after ''the Inter-American Development Bank''.

1994—Par. Seventh. Pub. L. 103–325, §347(b), in last sentence of first par., substituted ''(15 U.S.C. 78c(a)(41)). The exception provided for the securities described in subparagraphs (A), (B), and (C) shall be subject to such regulations'' for ''(15 U.S.C. 78c(a)(41))), subject to such regulations''.

Pub. L. 103–325, §322(a)(1)(A), in fifth proviso inserted ''or depository institution holding companies (as defined in section 1813 of this title)'' after ''(except to the extent directors' qualifying shares are required by law) by depository institutions''.

Pub. L. 103–325, §322(a)(1)(B), which directed substitution in fifth proviso of ''services to or for other depository institutions, their holding companies, and the officers, directors, and employees of such institutions and companies, and in providing correspondent banking services at the request of other depository institutions or their holding companies (also referred to as a 'banker's bank')'' for ''services for other depository institutions and their officers, directors and employees'', was executed by making the substitution for ''services for other depository institutions and their officers, directors, and employees'' to reflect the probable intent of Congress.

Pub. L. 103–325, §206(c), substituted ''(B) are small business related securities (as defined in section 3(a)(53) of the Securities Exchange Act of 1934); or (C) are mortgage related securities'' for ''or (B) are mortgage related securities''.

1993—Par. Seventh. Pub. L. 103–182 inserted ''the North American Development Bank,'' after ''Inter-American Development Bank,''.

1992—Par. Eleventh. Pub. L. 102–485 added par. Eleventh.

1990—Par. Seventh. Pub. L. 101–513 inserted ''the European Bank for Reconstruction and Development,'' before ''the Inter-American Development Bank,'' and substituted ''the African Development Bank, the Inter-American Investment Corporation, or the International Finance Corporation,'' for ''the African Development Bank or the Inter-American Investment Corporation,''.

1988—Par. Seventh. Pub. L. 100–449 inserted provisions authorizing national banking associations to deal in, underwrite, and purchase Canadian government obligations for the association's own account.

1987—Par. Tenth. Pub. L. 100–86 added par. Tenth.

1984—Par. Seventh. Pub. L. 98–473 inserted reference to the Inter-American Investment Corporation.

Pub. L. 98–440 inserted provision that the limitations and restrictions contained in this paragraph as to an association purchasing investment securities for its own account shall not apply to securities offered and sold pursuant to section 15 U.S.C. 77d(5), or that are mortgage related securities (as defined in 15 U.S.C. 78c(a)(41)), subject to such regulations as the Comptroller of the Currency may prescribe.

1983—Par. Seventh. Pub. L. 97–457 substituted ''10 per centum of the association's'' for ''10 per centum of its'' after ''exceed at any time''.

1982—Par. Seventh. Pub. L. 97–320 substituted ''*Provided further*, That notwithstanding any other provision of this paragraph, the association may purchase for its own account shares of stock of a bank insured by the Federal Deposit Insurance Corporation or a holding company which owns or controls such an insured bank if the stock of such bank or company is owned exclusively (except to the extent directors' qualifying shares are required by law) by depository institutions and such bank or company and all subsidiaries thereof are engaged exclusively in providing services for other depository institutions and their officers, directors, and employees, but in no event shall the total amount of such stock held by the association in any bank or holding company exceed at any time 10 per centum of its capital stock and paid in and unimpaired surplus and in no event shall the purchase of such stock result in an association's acquiring more than 5 per centum of any class of voting securities of such bank or company'' for ''*Provided further*, That, notwithstanding any other provision of this paragraph, the association may purchase for its own account shares of stock of a bank insured by the Federal Deposit Insurance Corporation if the stock of such bank is owned exclusively by other banks (except to the extent State law requires directors qualifying shares) and if such bank is engaged exclusively in providing banking services for other banks and their officers, directors, or employees, but in no event shall the total amount of such stock held by the association exceed at any time 10 per centum of its capital stock and paid in and unimpaired surplus, and in no event shall the purchase of such stock result in the association's acquiring more than 5 per centum of any class of voting securities of such bank''.

1981—Par. Seventh. Pub. L. 97–35 inserted reference to the African Development Bank.

1980—Par. Seventh. Pub. L. 96–221 inserted proviso relating to purchase of stock in bankers' banks.

1974—Par. Seventh. Pub. L. 93–383 substituted ''section 6(g) of the United States Housing Act of 1937'' for references to section 1421a(b) of title 42 wherever appearing, struck out ''either'' before ''(1)'', ''(which obligations shall have a maturity of not more than eighteen months)'' in cl. (1) and ''or'' before ''(2)'', added cl. (3), and inserted reference to mortgages, obligations, or other securities sold by the Federal Home Loan Mortgage Corporation pursuant to section 1454 or 1455 of this title.

1973—Par. Seventh. Pub. L. 93–234 authorized investments by national banks in agricultural credit corporations.

Pub. L. 93–224 inserted ''or obligations of the Federal Financing Bank'' after ''or obligations, participations, or other instruments of or issued by the Federal National Mortgage Association or the Government National Mortgage Association''.

Pub. L. 93–100 inserted provision that the association may purchase shares of stock issued by state housing corporations incorporated in the state in which the association is located and make investments in loans and commitments for loans to such corporations with certain limitations.

1972—Par. Seventh. Pub. L. 92–500 inserted ''or obligations of the Environmental Financing Authority'' after ''Government National Mortgage Association''.

Pub. L. 92–349 inserted provisions that limitations and restrictions contained in this section as to dealing in and underwriting investment securities shall not apply to obligations of the Washington Metropolitan Area Transit Authority which are guaranteed by the Secretary of Transportation under section 9 of the National Capital Transportation Act of 1969.

Pub. L. 92–318 included obligations or other instruments or securities of the Student Loan Marketing Association.

1970—Par. Seventh. Pub. L. 91–375 made limitations and restrictions contained in this section as to dealing in and underwriting investment securities inapplicable to bonds, notes and other obligations issued by the United States Postal Service.

1968—Par. Seventh. Pub. L. 90–448, § 807(j), inserted ''or the Government National Mortgage Association'' after ''Federal National Mortgage Association''.

Pub. L. 90–448, § 911, authorized the association to purchase for its own account shares of stock issued by a corporation authorized to be created pursuant to sections 3931–3940 of title 42, and to make investments in a partnership, limited partnership, or joint venture formed pursuant to section 3937(a) or 3937(c) of title 42.

Pub. L. 90–448, § 1705(h), included obligations issued by any State or political subdivision or any agency of a State or political subdivision for housing, university, or dormitory purposes.

Par. Ninth. Pub. L. 90–448, § 804(c), added par. Ninth.

1967—Par. Seventh. Pub. L. 90–19 substituted ''Secretary of Housing and Urban Development (hereafter in this sentence referred to as the 'Secretary')'' for ''Federal Housing Administrator''; and ''Secretary'' for ''Housing and Home Finance Administrator'' after ''local public agency and the'', for ''Administrator'' in two instances just before ''agrees to lend'', and for ''Public Housing Administration'' wherever appearing in cls. (1) and (2), respectively.

1966—Par. Seventh. Pub. L. 89–754 made limitations and restrictions for dealing, underwriting, and purchasing for its own account of investment securities inapplicable to obligations which are insured by Secretary of Housing and Urban Development under provisions relating to mortgage insurance for group practice facilities.

Pub. L. 89–369 inserted provisions that limitations and restrictions contained in this section as to dealing in and underwriting investment securities shall not apply to obligations issued by the Asian Development Bank.

1964—Par. Seventh. Pub. L. 88–560 substituted ''or obligations, participations, or other instruments of or issued by the Federal National Mortgage Association'' for ''or obligations of the Federal National Mortgage Association''.

1959—Par. Seventh. Pub. L. 86–372 substituted ''monies in an aggregate amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay, when due, the interest on and all installments (including the final installment) of the principal of such obligations, which monies under the terms of said agreement are required to be used for such payments'' for ''prior to the maturity of such obligations (which obligations shall have a maturity of not more than eighteen months), monies in an amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay the principal of such obligations with interest to maturity thereon, which monies under the terms of said agreement are required to be used for the purpose of paying the principal of and the interest on such obligations at their maturity'' after ''local public agency,''.

Pub. L. 86–278 substituted ''any'' for ''either'' before ''of said organizations'' in last sentence.

Pub. L. 86–230 struck out ''or the Home Owners' Loan Corporation'' after ''Federal Home Loan Banks''.

Pub. L. 86–147 inserted provisions that limitations and restrictions contained in this section as to dealing in and underwriting investment securities shall not apply to obligations issued by the Inter-American Development Bank.

Pub. L. 86–137 inserted provisions that limitations and restrictions contained in this section as to dealing in and underwriting investment securities shall not apply to bonds, notes and other obligations issued by the Tennessee Valley Authority.

1959—Par. Seventh. Pub. L. 86–372 substituted ''monies in an aggregate amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay, when due, the interest on and all installments (including the final installment) of the principal of such obligations, which monies under the terms of said agreement are required to be used for such payments'' for ''prior to the maturity of such obligations (which obligations shall have a maturity of not more than eighteen months), monies in an amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay the principal of such obligations with interest to maturity thereon, which monies under the terms of said agreement are required to be used for the purpose of paying the principal of and the interest on such obligations at their maturity'' following ''local public agency,''.

Pub. L. 86–278 substituted ''any'' for ''either'' before ''of said organizations'' in last sentence.

Pub. L. 86–230 struck out ''or the Home Owners' Loan Corporation'' after ''Federal Home Loan Banks''.

Pub. L. 86–147 inserted provisions that limitations and restrictions contained in this section as to dealing in and underwriting investment securities shall not apply to obligations issued by the Inter-American Development Bank.

Pub. L. 86–137 inserted provisions that limitations and restrictions contained in this section as to dealing in and underwriting investment securities shall not apply to bonds, notes and other obligations issued by the Tennessee Valley Authority.

1956—Par. Seventh. Act July 26, 1956, removed restriction which prohibited a national bank from investing in obligations of the thirteen banks for cooperatives an amount exceeding 10 percent of its capital stock actually paid in and unimpaired and 10 percent of its unimpaired surplus.

1954—Par. Seventh. Act Aug. 23, 1954, substituted ''thirteen banks for cooperatives organized under the Farm Credit Act of 1933, or any of them'' for ''Central Bank for Cooperatives'' in last sentence.

Act Aug. 2, 1954, substituted ''or obligations of the Federal National Mortgage Association'' for ''or obligations of national mortgage associations'' in sixth sentence.

1952—Par. Seventh. Act Apr. 9, 1952, enabled national banks and State member banks of the Federal Reserve System to receive compensation in the distribution of debentures issued by the Central Bank for Cooperation.

1949—Par. Seventh. Act July 15, 1949, inserted, in next to last sentence, ''or such obligations of any local public agency (as defined in section 110(h) of the Housing Act of 1949) as are secured by an agreement between the local public agency and the Housing and Home Finance Administrator in which the local public agency agrees

to borrow from said Administrator, and said Administrator agrees to lend to said local public agency, prior to the maturity of such obligations (which obligations shall have a maturity of not more than eighteen months), monies in an amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay the principal of such obligations with interest to maturity thereon, which monies under the terms of said agreement are required to be used for the purpose of paying the principal of and the interest on such obligations at their maturity, or such obligations of a public housing agency (as defined in the United States Housing Act of 1937, as amended) as are secured either (1) by an agreement between the public housing agency and the Public Housing Administration in which the public housing agency agrees to borrow from the Public Housing Administration, and the Public Housing Administration agrees to lend to the public housing agency, prior to the maturity of such obligations (which obligations shall have a maturity of not more than eighteen months), monies in an amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay the principal of such obligations with interest to maturity thereon, which monies under the terms of said agreement are required to be used for the purpose of paying the principal of and the interest on such obligations at their maturity, or (2) by a pledge of annual contributions under an annual contributions contract between such public housing agency and the Public Housing Administration if such contract shall contain the covenant by the Public Housing Administration which is authorized by subsection (b) of section 22 of the United States Housing Act of 1937, as amended, and if the maximum sum and the maximum period specified in such contract pursuant to said subsection 22(b) shall not be less than the annual amount and the period for payment, which are requisite to provide for the payment when due of all installments of principal and interest on such obligations''.

Act June 29, 1949, inserted last sentence to permit national banks and State member banks of the Federal Reserve System to deal in and underwrite obligations issued by the International Bank subject to certain limitations.

1940—Par. Eighth. Act June 11, 1940, added par. Eighth.

1938—Par. Seventh. Act Feb. 3, 1938, inserted ''or obligations of national mortgage associations'' in last sentence.

1935—Par. Seventh. Act Aug. 23, 1935, amended second, fourth, and last sentences.

1933—Act June 16, 1933, among other changes, struck out closing paragraph prohibiting transaction of any business by association prior to authorization by Comptroller, except that necessarily preliminary to organization.

1927—Act Feb. 25, 1927, struck out definite period of succession in par. Second, and inserted provisos in par. Seventh.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 2704(d)(7) of Pub. L. 104–208 effective Jan. 1, 1999, if no insured depository institution is a savings association on that date, see section 2704(c) of Pub. L. 104–208, set out as a note under section 1821 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Section 347(d) of Pub. L. 103–325 provided that: ''The amendments made by this section [amending this section and section 78c of Title 15, Commerce and Trade] shall become effective upon the date of promulgation of final regulations under subsection (c) [set out below].''

EFFECTIVE AND TERMINATION DATES OF 1988 AMENDMENT

Amendment by Pub. L. 100–449 effective on date United States-Canada Free-Trade Agreement enters into force (Jan. 1, 1989), and to cease to have effect on date Agreement ceases to be in force, see section 501(a), (c) of Pub. L. 100–449, set out in a note under section 2112 of Title 19, Customs Duties.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97–35 effective Aug. 13, 1981, see section 1372 of Pub. L. 97–35, set out as an Effective Date note under section 290i of Title 22, Foreign Relations and Intercourse.

EFFECTIVE DATE OF 1973 AMENDMENTS

Amendment by Pub. L. 93–224 effective Dec. 29, 1973, see section 20 of Pub. L. 93–224, set out as an Effective Date note under section 2281 of this title.

Amendment by Pub. L. 93–100 effective Aug. 16, 1973, see section 8 of Pub. L. 93–100, set out as an Effective Date note under section 1469 of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

For effective date of amendment by Pub. L. 91–375, see section 15(a) of Pub. L. 91–375, set out as an Effective Date note preceding section 101 of Title 39, Postal Service.

EFFECTIVE DATE OF 1968 AMENDMENT

For effective date of amendment by title VIII of Pub. L. 90–448, see section 808 of Pub. L. 90–448, set out as an Effective Date note under section 1716b of this title.

EFFECTIVE DATE OF 1956 AMENDMENT

Amendment by act July 26, 1956, effective Jan. 1, 1957, see section 202(a) of act July 26, 1956.

EFFECTIVE DATE OF 1933 AMENDMENT

Section 16 of act June 16, 1933, provided that restrictions of this section as to dealing in investment securities shall take effect one year after June 16, 1933.

REGULATIONS

Section 347(c) of Pub. L. 103–325 provided that: ''Not later than 1 year after the date of enactment of this Act [Sept. 23, 1994], the Comptroller of the Currency shall promulgate final regulations, in accordance with the thirteenth sentence of Paragraph Seventh of section 5136 of the Revised Statutes [this section] (as amended by subsection (b)), to carry out the amendments made by this section [amending this section and section 78c of Title 15, Commerce and Trade].'' [Final regulations implementing these amendments were published in the Federal Register on Dec. 2, 1996 [61 F.R. 63972], effective Dec. 31, 1996.]

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

ABOLITION OF HOME OWNERS' LOAN CORPORATION

For dissolution and abolishment of Home Owners' Loan Corporation, by act June 30, 1953, ch. 170, § 21, 67 Stat. 126, see note set out under section 1463 of this title.

CROSS REFERENCES

Definition of State and State housing corporation, see section 1470 of this title.

Home Owners' Loan Corporation, termination of functions, see section 712a of Title 15, Commerce and Trade.

Investment of customers' moneys by futures commission merchants in investment securities, see section 6d of Title 7, Agriculture.

National Housing Act, applicability of this section to, see section 1733 of this title.

State member banks of Federal Reserve System, dealings in investment securities as subject to limita-

tions and conditions of par. ''Seventh'' of this section, see section 335 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 335, 371c, 378, 1464, 1733, 1841, 1843, 3102, 3201 of this title; title 22 section 286k–2.

§ 25. Omitted

CODIFICATION

Section, act July 1, 1922, ch. 257, § 2, 42 Stat. 767, repealed all acts extending the period of succession of national banking associations for 20 years, and made paragraph Second of section 24 applicable in that respect.

§ 25a. Participation by national banks in lotteries and related activities

(a) Prohibited activities

A national bank may not—

(1) deal in lottery tickets;

(2) deal in bets used as a means or substitute for participation in a lottery;

(3) announce, advertise, or publicize the existence of any lottery;

(4) announce, advertise, or publicize the existence or identity of any participant or winner, as such, in a lottery.

(b) Use of banking premises prohibited

A national bank may not permit—

(1) the use of any part of any of its banking offices by any persons for any purpose forbidden to the bank under subsection (a) of this section, or

(2) direct access by the public from any of its banking offices to any premises used by any person for any purpose forbidden to the bank under subsection (a) of this section.

(c) Definitions

As used in this section—

(1) The term ''deal in'' includes making, taking, buying, selling, redeeming, or collecting.

(2) The term ''lottery'' includes any arrangement whereby three or more persons (the ''participants'') advance money or credit to another in exchange for the possibility or expectation that one or more but not all of the participants (the ''winners'') will receive by reason of their advances more than the amounts they have advanced, the identity of the winners being determined by any means which includes—

(A) a random selection;

(B) a game, race, or contest; or

(C) any record or tabulation of the result of one or more events in which any participant has no interest except for its bearing upon the possibility that he may become a winner.

(3) The term ''lottery ticket'' includes any right, privilege, or possibility (and any ticket, receipt, record, or other evidence of any such right, privilege, or possibility) of becoming a winner in a lottery.

(d) Lawful banking services connected with operation of lotteries

Nothing contained in this section prohibits a national bank from accepting deposits or cashing or otherwise handling checks or other negotiable instruments, or performing other lawful banking services for a State operating a lottery, or for an officer or employee of that State who is charged with the administration of the lottery.

(e) Regulations; enforcement

The Comptroller of the Currency shall issue such regulations as may be necessary to the strict enforcement of this section and the prevention of evasions thereof.

(R.S. § 5136A, as added Pub. L. 90–203, § 1(a), Dec. 15, 1967, 81 Stat. 608.)

EFFECTIVE DATE

Section 6 of Pub. L. 90–203 provided that: ''The amendments made by this Act [adding this section, sections 339, 1730c, and 1829a of this title, and section 1306 of Title 18, Crimes and Criminal Procedure] shall take effect on April 1, 1968.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 18 section 1306.

§ 26. Comptroller to determine if association can commence business

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in title 62 of the Revised Statutes, and the association transmitting the same notifies the comptroller that all of its capital stock has been duly paid in, and that such association has complied with all the provisions of title 62 of the Revised Statutes required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of title 62 of the Revised Statutes required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking.

(R.S. § 5168; Pub. L. 86–230, § 2, Sept. 8, 1959, 73 Stat. 457.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in text, was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. § 5168 derived from act June 3, 1864, ch. 106, § 17, 13 Stat. 104, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1959—Pub. L. 86–230 substituted ''all'' for ''at least 50 per centum'' before ''of its capital stock''.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Conversion of national banks into State banks, see sections 214 to 214c of this title.

§ 27. Certificate of authority to commence banking

(a) If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by title 62 of the Revised Statutes. A National Bank Association, to which the Comptroller of the Currency has heretofore issued or hereafter issues such certificate, is not illegally constituted solely because its operations are or have been required by the Comptroller of the Currency to limited to those of a trust company and activities related thereto.

(b)(1) The Comptroller of the Currency may also issue a certificate of authority to commence the business of banking pursuant to this section to a national banking association which is owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or depository institution holding companies and is organized to engage exclusively in providing services to or for other depository institutions, their holding companies, and the officers, directors, and employees of such institutions and companies, and in providing correspondent banking services at the request of other depository institutions or their holding companies (also referred to as a ''banker's bank'').

(2) Any national banking association chartered pursuant to paragraph (1) shall be subject to such rules, regulations, and orders as the Comptroller deems appropriate, and, except as otherwise specifically provided in such rules, regulations, or orders, shall be vested with or subject to the same rights, privileges, duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the national banking laws to a national bank.

(R.S. § 5169; Pub. L. 95–630, title XV, § 1504, Nov. 10, 1978, 92 Stat. 3713; Pub. L. 96–221, title VII, § 712(a), (c), Mar. 31, 1980, 94 Stat. 189, 190; Pub. L. 97–320, title IV, § 404(a), Oct. 15, 1982, 96 Stat. 1511; Pub. L. 103–325, title III, § 322(a)(2), Sept. 23, 1994, 108 Stat. 2227.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in subsec. (a), was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. § 5169 derived from act June 3, 1864, ch. 106, §§ 12, 18, 13 Stat. 102, 104, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1994—Subsec. (b)(1). Pub. L. 103–325, § 322(a)(2)(A), inserted ''or depository institution holding companies'' after ''by other depository institutions''.

Pub. L. 103–325, § 322(a)(2)(B), which directed substitution of ''services to or for other depository institutions, their holding companies, and the officers, directors, and employees of such institutions and companies, and in providing correspondent banking services at the request of other depository institutions or their holding companies (also referred to as a 'banker's bank')'' for ''services for other depository institutions and their officers, directors and employees'', was executed by making the substitution for ''services for other depository institutions and their officers, directors, and employees'' to reflect the probable intent of Congress.

1982—Pub. L. 97–320 designated existing provisions as subsec. (a) and added subsec. (b).

1980—Pub. L. 96–221, § 712(a), (c), temporarily inserted provisions relating to treatment of national banking associations as additional banks within the contemplation of section 1842 of this title. See Termination Date of 1980 Amendment note below.

1978—Pub. L. 95–630 inserted provision that a National Bank Association, to which the Comptroller of the Currency has heretofore issued or hereafter issues such certificate, is not illegally constituted solely because its operations are or have been required by the Comptroller of the Currency to be limited to those of a trust company and activities related thereto.

TERMINATION DATE OF 1980 AMENDMENT

Section 712(c) of Pub. L. 96–221 provided that: ''The amendments made by this section [amending this section and section 1842 of this title] are hereby repealed on October 1, 1981.''

EFFECTIVE DATE OF 1978 AMENDMENT

Section 1505 of Pub. L. 95–630 provided that: ''This title [amending this section and sections 1715z–10 and 2902 of this title and amending provisions set out as a note under section 1666f of Title 15, Commerce and Trade] shall take effect upon enactment [Nov. 10, 1978].''

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Conversion of national banks into State banks, see sections 214 to 214c of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1464 of this title.

§ 28. Repealed. Pub. L. 103–325, title VI, § 602(e)(1), Sept. 23, 1994, 108 Stat. 2291

Section, R.S. § 5170, required publication of certificate of authority to commence banking for 60 days after issuance.

CODIFICATION

R.S. § 5170 derived from act June 3, 1864, ch. 106, § 18, 13 Stat. 104, which was the National Bank Act. See section 38 of this title.

§ 29. Power to hold real property

A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years except as otherwise provided in this section.

For real estate in the possession of a national banking association upon application by the association, the Comptroller of the Currency may approve the possession of any such real estate by such association for a period longer than five years, but not to exceed an additional five years, if (1) the association has made a good faith attempt to dispose of the real estate within the five-year period, or (2) disposal within the five-year period would be detrimental to the association. Upon notification by the association to the Comptroller of the Currency that such conditions exist that require the expenditure of funds for the development and improvement of such real estate, and subject to such conditions and limitations as the Comptroller of the Currency shall prescribe, the association may expend such funds as are needed to enable such association to recover its total investment.

Notwithstanding the five-year holding limitation of this section or any other provision of title 62 of the Revised Statutes, any national banking association which on October 15, 1982, held, directly or indirectly, real estate, including any subsurface rights or interests therein, that since December 31, 1979, had not been valued on the books of such association for more than a nominal amount, may continue to hold such real estate, rights, or interests for such longer period of time as would be permitted a State chartered bank by the law of the State in which the association is located if the aggregate amount of earnings from such real estate, rights, or interests is separately disclosed in the annual financial statements of the association.

(R.S. § 5137; Feb. 25, 1927, ch. 191, § 3, 44 Stat. 1227; Pub. L. 96–221, title VII, § 701(a), Mar. 31, 1980, 94 Stat. 186; Pub. L. 97–25, title III, § 302, July 27, 1981, 95 Stat. 145; Pub. L. 97–320, title IV, § 413, Oct. 15, 1982, 96 Stat. 1521.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in last par., was in the original ''this title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. § 5137 derived from act June 3, 1864, ch. 106, § 28, 13 Stat. 107, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1982—Pub. L. 97–320 substituted ''Notwithstanding the five-year holding limitation of this section or any other provision of title 62 of the Revised Statutes, any national banking association which on October 15, 1982, held, directly or indirectly, real estate, including any subsurface rights or interests therein, that since December 31, 1979, had not been valued on the books of such association for more than a nominal amount, may continue to hold such real estate, rights, or interests for such longer period of time as would be permitted a State chartered bank by the law of the State in which the association is located if the aggregate amount of earnings from such real estate, rights, or interests is separately disclosed in the annual financial statements of the association'' for ''Notwithstanding any other provision of this section, any national banking association which, on July 27, 1981, held title to and possession of real estate which was carried on the association's books at a nominal value on December 31, 1979, may continue to hold such real estate until December 31, 1982, if the earnings from such real estate are separately disclosed in the financial statements of the association''.

1981—Pub. L. 97–25 inserted provision that any national banking association which, on July 27, 1981, held title to and possession of real estate which was carried on the association's books at a nominal value on December 31, 1979, may continue to hold such real estate until December 31, 1982, if the earnings from such real estate are separately disclosed in the financial statements of the association.

1980—Pub. L. 96–221 inserted provisions relating to authorization to hold real estate in the possession of a national banking association upon application by the association.

1927—Par. First. Act Feb. 25, 1927, struck out ''immediate,'' before ''accommodation,'' in par. First.

CROSS REFERENCES

Corporate powers of associations, see section 24 of this title.

Real estate, forest tract, construction and commercial loans by national banking associations, see section 371 of this title.

§ 30. Change of name or location

(a) Name change

Any national banking association, upon written notice to the Comptroller of the Currency, may change its name, except that such new name shall include the word ''National''.

(b) Location change

Any national banking association, upon written notice to the Comptroller of the Currency, may change the location of its main office to any authorized branch location within the limits of the city, town, or village in which it is situated, or, with a vote of shareholders owning two-thirds of the stock of such association for a relocation outside such limits and upon receipt of a certificate of approval from the Comptroller of the Currency, to any other location within or outside the limits of the city, town, or village in which it is located, but not more than thirty miles beyond such limits.

(c) Coordination with section 36 of this title

In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State from which the bank relocated such office only to the extent authorized in section 36(e)(2) of this title.

(May 1, 1886, ch. 73, §2, 24 Stat. 18; Pub. L. 86–230, §3, Sept. 8, 1959, 73 Stat. 457; Pub. L. 97–320, title IV, §405(a), Oct. 15, 1982, 96 Stat. 1512; Pub. L. 97–457, §19(a), Jan. 12, 1983, 96 Stat. 2509; Pub. L. 103–328, title I, §102(b)(2), Sept. 29, 1994, 108 Stat. 2350.)

AMENDMENTS

1994—Subsec. (c). Pub. L. 103–328 added subsec. (c).

1983—Subsec. (b). Pub. L. 97–457 inserted ''for a relocation outside such limits'' after ''stock of such association''.

1982—Pub. L. 97–320 designated existing provisions as subsec. (a), substituted provisions permitting a change of name upon written notice to the Comptroller, such new name to include ''National'', for provisions permitting a change of name or location of the main office, with approval of the Comptroller, within city limits, etc., or outside such limits by vote of shareholders, such change to be validated by certificate of approval, and added subsec. (b).

1959—Pub. L. 86–230 required approval of Comptroller of the Currency before a national bank could change location of its main office within the limitations of the city, town, or village in which it is situated.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Conversion of national banks into State banks, see sections 214 to 214c of this title.

§ 31. Rights and liabilities as affected by change of name

All debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name.

(May 1, 1886, ch. 73, §3, 24 Stat. 19.)

§ 32. Liabilities and suits as affected by change of name or location

Nothing contained in sections 30 and 31 of this title shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested.

(May 1, 1886, ch. 73, §4, 24 Stat. 19.)

§§ 33 to 34c. Transferred

CODIFICATION

Act Nov. 7, 1918, ch. 209, 40 Stat. 1043, as amended, formerly classified to sections 33 to 34c of this title, which related to consolidation and merger of national banking associations and such associations and State banks, was completely amended by Pub. L. 86–230, §20, Sept. 8 1959 73 Stat. 460, and is classified to sections 215 to 215b of this title.

Section 33, acts Nov. 7, 1918, ch. 209, §1, 40 Stat. 1043; June 16, 1933, ch. 89, §24(a), 48 Stat. 190; Aug. 23, 1935, ch. 614, §330, 49 Stat. 718, related to consolidation of national banks, capital stock, dissenting shareholders, notice and valuation of shares. See section 215 of this title.

Section 34, act Nov. 7, 1918, ch. 209, §2, 40 Stat. 1044, related to effect of consolidation on rights and liabilities. See section 215 of this title.

Section 34a, act Nov. 7, 1918, ch. 209, §3, as added Feb. 25, 1927, ch. 191, §1, 44 Stat. 1225, and amended June 16, 1933, ch. 89 §24, 48 Stat. 190; Aug. 23, 1935, ch. 614, §331, 49 Stat. 719; July 14, 1952, ch. 722, §2, 66 Stat. 601, related to consolidation of State bank, etc. with national bank, capital stock and dissenting shareholders. See section 215 of this title.

Section 34b, act Nov. 7, 1918, ch. 209, §4, as added July 14, 1952, ch. 722, §1, 66 Stat. 599, related to merger of national banking associations or State banks into national banking associations. See section 215a of this title.

Section 34c, act Nov. 7, 1918, ch. 209, §5, as added July 14, 1952, ch. 722, §1, 66, Stat. 601, related to definitions. See section 215b of this title.

§ 35. Organization of State banks as national banking associations

Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than 51 per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with a name that contains the word ''national'': *Provided, however*, That said conversion shall not be in contravention of the State law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of 51 per centum of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the association until others are elected or appointed

in accordance with the provisions of the statutes of the United States. When the Comptroller has given to such bank or banking association a certificate that the provisions of this Act have been complied with, such bank or banking association, and all its stockholders, officers, and employees shall have the same powers and privileges and shall be subject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed by the Federal Reserve Act [12 U.S.C. 221 et seq.] and the National Banking Act for associations originally organized as national banking associations.

The Comptroller of the Currency may, in his discretion and subject to such conditions as he may prescribe, permit such converting bank to retain and carry at a value determined by the Comptroller such of the assets of such converting bank as do not conform to the legal requirements relative to assets acquired and held by national banking associations.

(R.S. § 5154; Dec. 23, 1913, ch. 6, § 8, 38 Stat. 258; Aug. 23, 1935, ch. 614, title III, § 312, 49 Stat. 711; Pub. L. 97–457, § 19(b), Jan. 12, 1983, 96 Stat. 2509.)

REFERENCES IN TEXT

This Act, referred to in first par., may refer to the Federal Reserve Act, act Dec. 23, 1913, from which this wording is derived; or section 5154 of the Revised Statutes which the Federal Reserve Act amended; or act June 3, 1864, from which R.S. § 5154 was derived; or Congress might have intended to refer to the preceding provisions of the 1913 amendment. Similar reference in R.S. § 5154 prior to 1913 amendment was to ''this Title,'' meaning title 62 of the Revised Statutes, which title comprised the National Bank Act (June 3, 1864, ch. 106, 13 Stat. 99). See section 38 of this title. Note also specific reference to the Federal Reserve Act and the National Banking Act in first par.

The Federal Reserve Act, referred to in text, is act Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended, which is classified principally to chapter 3 (§ 221 et seq.) of this title. For complete classification of this Act to the Code, see References in Text note set out under section 226 of this title and Tables.

The National Banking Act, referred to in text, is probably intended to be a reference to the National Bank Act, act June 3, 1864, ch. 106, 13 Stat. 99, as amended, which is classified principally to chapter 2 (§ 21 et seq.) of this title. For complete classification of this Act to the Code see References in Text note set out under section 38 of this title.

CODIFICATION

R.S. § 5154 derived from act June 3, 1864, ch. 106, § 44, 13 Stat. 112, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1983—Pub. L. 97–457 substituted ''with a name that contains the word 'national' '' for ''with any name approved by the Comptroller of the Currency'' after ''national banking association,''.

1935—Act Aug. 23, 1935, added last par.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Conversion of national banks into State banks, see sections 214 to 214c of this title.

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) Lawful and continuous operation

A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b) Converted State banks

(1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the ''resulting bank''), resulting from the consolidation of a national bank (referred to in this paragraph as the ''national bank'') under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the

consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term ''consolidation'' includes a merger.

(c) New branches

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) Branches resulting from interstate merger transactions

A national bank resulting from an interstate merger transaction (as defined in section 1831u(f)(6) of this title) may maintain and operate a branch in a State other than the home State (as defined in subsection (g)(3)(B) of this section) of such bank in accordance with section 1831u of this title.

(e) Exclusive authority for additional branches

(1) In general

Effective June 1, 1997, a national bank may not acquire, establish, or operate a branch in any State other than the bank's home State (as defined in subsection (g)(3)(B) of this section) or a State in which the bank already has a branch unless the acquisition, establishment, or operation of such branch in such State by such national bank is authorized under this section or section 1823(f), 1823(k), or 1831u of this title.

(2) Retention of branches

In the case of a national bank which relocates the main office of such bank from 1 State to another State after May 31, 1997, the bank may retain and operate branches within the State which was the bank's home State (as defined in subsection (g)(3)(B) of this section) before the relocation of such office only to the extent the bank would be authorized, under this section or any other provision of law referred to in paragraph (1), to acquire, establish, or commence to operate a branch in such State if—

(A) the bank had no branches in such State; or

(B) the branch resulted from—

(i) an interstate merger transaction approved pursuant to section 1831u of this title; or

(ii) a transaction after May 31, 1997, pursuant to which the bank received assistance from the Federal Deposit Insurance Corporation under section 1823(c) of this title.

(f) Law applicable to interstate branching operations

(1) Law applicable to national bank branches

(A) In general

The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except—

(i) when Federal law preempts the application of such State laws to a national bank; or

(ii) when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in comparison with the effect the application of such State laws would have with respect to branches of a bank chartered by the host State.

(B) Enforcement of applicable State laws

The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency.

(C) Review and report on actions by Comptroller

The Comptroller of the Currency shall conduct an annual review of the actions it has taken with regard to the applicability of State law to national banks (or their branches) during the preceding year, and

shall include in its annual report required under section 14 of this title the results of the review and the reasons for each such action. The first such review and report after July 3, 1997, shall encompass all such actions taken on or after January 1, 1992.

(2) Treatment of branch as bank

All laws of a host State, other than the laws regarding community reinvestment, consumer protection, fair lending, establishment of intrastate branches, and the application or administration of any tax or method of taxation, shall apply to a branch (in such State) of an out-of-State national bank to the same extent as such laws would apply if the branch were a national bank the main office of which is in such State.

(3) Rule of construction

No provision of this subsection may be construed as affecting the legal standards for preemption of the application of State law to national banks.

(g) State "opt-in" election to permit interstate branching through de novo branches

(1) In general

Subject to paragraph (2), the Comptroller of the Currency may approve an application by a national bank to establish and operate a de novo branch in a State (other than the bank's home State) in which the bank does not maintain a branch if—

(A) there is in effect in the host State a law that—

(i) applies equally to all banks; and

(ii) expressly permits all out-of-State banks to establish de novo branches in such State; and

(B) the conditions established in, or made applicable to this paragraph by, paragraph (2) are met.

(2) Conditions on establishment and operation of interstate branch

(A) Establishment

An application by a national bank to establish and operate a de novo branch in a host State shall be subject to the same requirements and conditions to which an application for an interstate merger transaction is subject under paragraphs (1), (3), and (4) of section 1831u(b) of this title.

(B) Operation

Subsections (c) and (d)(2) of section 1831u of this title shall apply with respect to each branch of a national bank which is established and operated pursuant to an application approved under this subsection in the same manner and to the same extent such provisions of such section 1831u of this title apply to a branch of a national bank which resulted from an interstate merger transaction approved pursuant to such section 1831u of this title.

(3) Definitions

The following definitions shall apply for purposes of this section:

(A) De novo branch

The term ''de novo branch'' means a branch of a national bank which—

(i) is originally established by the national bank as a branch; and

(ii) does not become a branch of such bank as a result of—

(I) the acquisition by the bank of an insured depository institution or a branch of an insured depository institution; or

(II) the conversion, merger, or consolidation of any such institution or branch.

(B) Home State

The term ''home State'' means the State in which the main office of a national bank is located.

(C) Host State

The term ''host State'' means, with respect to a bank, a State, other than the home State of the bank, in which the bank maintains, or seeks to establish and maintain, a branch.

(h) Repealed. Pub. L. 104–208, div. A, title II, § 2204, Sept. 30, 1996, 110 Stat. 3009–405

(i) Prior approval of branch locations

No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(j) "Branch" defined

The term ''branch'' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent. The term ''branch'', as used in this section, does not include an automated teller machine or a remote service unit.

(k) Branches in foreign countries, dependencies, or insular possessions

This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended [12 U.S.C. 601 et seq.], authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

***(l)* "State bank" and "bank" defined**

The words ''State bank,'' ''State banks,'' ''bank,'' or ''banks,'' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

(R.S. § 5155; Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1228; June 16, 1933, ch. 89, § 23, 48 Stat. 189; Aug. 23, 1935, ch. 614, title III, § 305, 49 Stat. 708; July 15, 1952, ch. 753, § 2(b), 66 Stat. 633; Pub. L. 87–721, Sept. 28, 1962, 76 Stat. 667; Pub. L. 103–328, title I, §§ 102(b)(1), 103(a), Sept. 29, 1994, 108 Stat. 2349, 2352; Pub. L. 104–208, div. A, title II, §§ 2204, 2205(a), Sept. 30, 1996, 110 Stat. 3009–405; Pub. L. 105–24, § 2(b), July 3, 1997, 111 Stat. 239.)

REFERENCES IN TEXT

Section 25 of the Federal Reserve Act, as amended, referred to in subsec. (k), is classified to subchapter I (§ 601 et seq.) of chapter 6 of this title.

CODIFICATION

R.S. § 5155 derived from act Mar. 3, 1865, ch. 78, § 7, 13 Stat. 484.

AMENDMENTS

1997—Subsec. (f)(1)(C). Pub. L. 105–24 added subpar. (C).

1996—Subsec. (h). Pub. L. 104–208, § 2204, struck out subsec. (h) which read as follows: ''The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.''

Subsec. (j). Pub. L. 104–208, § 2205(a), inserted at end ''The term 'branch', as used in this section, does not include an automated teller machine or a remote service unit.''

1994—Subsecs. (d) to (f). Pub. L. 103–328, § 102(b)(1)(B), added subsecs. (d) to (f). Former subsecs. (d) to (f) redesignated (h) to (j), respectively.

Subsec. (g). Pub. L. 103–328, § 103(a), added subsec. (g).

Pub. L. 103–328, § 102(b)(1)(A), redesignated subsec. (g) as (k).

Subsecs. (h) to (*l*). Pub. L. 103–328, § 102(b)(1)(A), redesignated subsecs. (d) to (h) as (h) to (*l*), respectively.

1962—Subsec. (b). Pub. L. 87–721 substituted provisions permitting a national bank resulting from the conversion of a State bank to retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office might be established as a new branch of the resulting national bank, and is approved by the Comptroller for continued operation as a branch of the resulting bank, or any office which was a branch of any bank on Feb. 25, 1927, or any office which is approved by the Comptroller for continued operation as a branch, and a national bank resulting from consolidation of a national bank under whose charter the consolidation is effected with another bank or banks to retain and operate any office which, immediately prior to consolidation, was in operation as a main office or branch office of any bank (other than the national bank) participating in the consolidation if it might be established as a new branch of the resulting bank, and if the Comptroller approves of its continued operation, or was in operation as a branch of any bank participating in the consolidation and which, on Feb. 25, 1927, was in operation as a branch of any bank, or was in operation as a branch of the national bank and which, on Feb. 25, 1927, was not in operation as a branch of any bank, if the Comptroller approves of its continued operation, for provisions which permitted State banks converted into or consolidated with national banking associations after Feb. 25, 1927, or two or more national banking associations which are consolidated, to retain and operate only those branches which may have been in lawful operation on Feb. 25, 1927, and inserted provisions prohibiting the Comptroller from granting approval under clauses (1)(C) and (2)(C) if a State bank resulting from the conversion or consolidation would be prohibited by law of the State from retaining and operating as a branch an identically situated office which was a branch of the national bank or State bank immediately prior to the conversion or consolidation.

1952—Subsec. (c). Act July 15, 1952, struck out the minimum capital requirement for the establishment of branches by national banks.

1935—Subsec. (c). Act Aug. 23, 1935, inserted second sentence and substituted ''Except as provided in the immediately preceding sentence, no'' for ''No'' in last sentence.

1933—Subsecs. (c), (d). Act June 16, 1963, amended subsecs. (c) and (d).

1927—Act Feb. 25, 1927, amended section generally.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

RIGHT OF STATE TO OPT OUT

Nothing in Pub. L. 105–24 to alter right of States under section 525 of Pub. L. 96–221, see section 3 of Pub. L. 105–24, set out as a note under section 1831a of this title.

APPLICABILITY OF MCFADDEN ACT TO PRESENT FINANCIAL ENVIRONMENT; REPORT AND RECOMMENDATIONS BY PRESIDENT TO CONGRESS

Pub. L. 95–369, § 14, Sept. 17, 1978, 92 Stat. 625, provided for a report to Congress by the President, not later than one year after Sept. 17, 1978, containing recommendations concerning the applicability of the McFadden Act [Feb. 25, 1927, ch. 191, 44 Stat. 1224] to the then current financial, banking, and economic environment.

CROSS REFERENCES

Conversion of national banks into State banks, see sections 214 to 214c of this title.

Place of business, see section 81 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 30, 43, 81, 93a, 1820, 3103 of this title.

§ 37. Associations governed by chapter

The provisions of chapters 2, 3, and 4 of title 62 of the Revised Statutes, which are expressed without restrictive words, as applying to ''national banking associations,'' or to ''associations,'' apply to all associations organized to carry on the business of banking under any Act of Congress.

(R.S. § 5157.)

REFERENCES IN TEXT

Chapters 2, 3, and 4 of title 62 of the Revised Statutes, referred to in text, was in the original ''chapters two, three, and four of this Title,'' meaning chapters 2, 3, and 4 of title 62 of the Revised Statutes, consisting of R.S. §§ 5157 to 5244, which are classified to sections 26 to 28, 37, 43, 55, 56, 60, 62, 81, 83 to 86, 89, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 163, 164, 168 to 175, 181 to 186, 192 to 196, 481 to 485, 501, 541, 547, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5157 to 5244 to the Code, see Tables.

CROSS REFERENCES

Federal Home Loan Bank, see section 1421 et seq. of this title.

Federal Reserve System, see section 221 et seq. of this title.

§ 38. The National Bank Act

The Act entitled ''An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,'' approved June 3, 1864, shall be known as ''The National Bank Act.''

(June 20, 1874, ch. 343, § 1, 18 Stat. 123.)

REFERENCES IN TEXT

The National Bank Act, referred to in text, is act June 3, 1864, ch. 106, 13 Stat. 99, as amended. The act was incorporated into the Revised Statutes as R.S. §§ 324 to 331, 333, 380, 563, 629, 736, 884, 885, 3473, 3475, 3651, 5133 to 5154, 5156, 5158 to 5170, 5172, 5173, 5175, 5177, 5182 to 5184, 5187, 5189, 5190 to 5192, 5195 to 5204, 5206, 5209 to 5211, 5214 to 5217, 5219 to 5222, 5224 to 5242, 5417, which

are classified to sections 1 to 4, 8, 11 to 14, 21, 22 to 24, 26 to 29, 35, 39, 51, 52, 53, 54, 56, 57, 59 to 63, 66, 71, 72 to 76, 81 to 91, 93, 94, 101a, 102, 104, 107, 109, 110, 123, 124, 131 to 138, 141 to 144, 161, 165, 168 to 175, 181 to 183, 185, 186, 192 to 196, 481 to 485, 541, 544 to 546, 548, 581 and 592 of this title, section 197 of Title 19, Customs Duties, and section 543 of former Title 31, Money and Finance. See, also, sections 8, 333, 334, 471, 472, 656, and 1005 of Title 18, Crimes and Criminal Procedure, and sections 507, 1348, 1394, and 1733 of Title 28, Judiciary and Judicial Procedure.

§ 39. Reservation of rights of associations organized under Act of 1863

Nothing in title 62 of the Revised Statutes shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June 1864, in or toward the organization of any national banking association under the act of February 25, 1863; but all associations which, on the third day of June 1864, were organized or commenced to be organized under that act, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by title 62 of the Revised Statutes, notwithstanding all the steps prescribed by title 62 of the Revised Statutes for the organization of associations were not pursued, if such associations were duly organized under that act.

(R.S. § 5156.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in text, was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

Act of February 25, 1863, referred to in text, was act Feb. 25, 1863, ch. 58, 12 Stat. 665, which was the original National Bank Act, and was repealed by act June 3, 1864, ch. 106, § 62, 13 Stat. 118.

CODIFICATION

R.S. § 5156 derived from act June 3, 1864, ch. 106, § 62, 13 Stat. 118, which was the National Bank Act. See section 38 of this title.

§ 40. Virgin Islands; extension of National Bank Act

The National Bank Act, as amended [12 U.S.C. 21 et seq.], and all other Acts of Congress relating to national banks, shall, insofar as not locally inapplicable after July 19, 1932, apply to the Virgin Islands of the United States.

(July 19, 1932, ch. 508, 47 Stat. 703.)

REFERENCES IN TEXT

The National Bank Act, referred to in text, is act June 3, 1864, ch. 106, 13 Stat. 99, as amended, which is classified principally to chapter 2 (§ 21 et seq.) of this title. For complete classification of this Act to the Code, see References in Text note set out under section 38 of this title.

§ 41. Guam; extension of National Bank Act

The National Bank Act [12 U.S.C. 21 et seq.], and all other Acts of Congress relating to national banks, shall, insofar as not locally inapplicable after August 1, 1956, apply to Guam.

(Aug. 1, 1956, ch. 852, § 2, 70 Stat. 908.)

REFERENCES IN TEXT

The National Bank Act, referred to in text, is act June 3, 1864, ch. 106, 13 Stat. 99, as amended, which is classified principally to chapter 2 (§ 21 et seq.) of this title. For complete classification of this Act to the Code, see References in Text note set out under section 38 of this title.

§ 42. Territorial application

The provisions of all Acts of Congress relating to national banks shall apply in the several States, the District of Columbia, the several Territories and possessions of the United States, and the Commonwealth of Puerto Rico.

(Pub. L. 86–230, § 14, Sept. 8, 1959, 73 Stat. 458.)

CODIFICATION

Section is also set out in D.C. Code, § 47–2508.

§ 43. Interpretations concerning preemption of certain State laws

(a) Notice and opportunity for comment required

Before issuing any opinion letter or interpretive rule, in response to a request or upon the agency's own motion, that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches, or before making a determination under section 36(f)(1)(A)(ii) of this title, the appropriate Federal banking agency (as defined in section 1813 of this title) shall—

(1) publish in the Federal Register notice of the preemption or discrimination issue that the agency is considering (including a description of each State law at issue);

(2) give interested parties not less than 30 days in which to submit written comments; and

(3) in developing the final opinion letter or interpretive rule issued by the agency, or making any determination under section 36(f)(1)(A)(ii) of this title, consider any comments received.

(b) Publication required

The appropriate Federal banking agency shall publish in the Federal Register—

(1) any final opinion letter or interpretive rule concluding that Federal law preempts the application of any State law regarding community reinvestment, consumer protection, fair lending, or establishment of intrastate branches to a national bank; and

(2) any determination under section 36(f)(1)(A)(ii) of this title.

(c) Exceptions

(1) No new issue or significant basis

This section shall not apply with respect to any opinion letter or interpretive rule that—

(A) raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the courts or on which the agency has previously issued an opinion letter or interpretive rule; or

(B) responds to a request that contains no significant legal basis on which to make a preemption determination.

(2) Judicial, legislative, or intragovernmental materials

This section shall not apply with respect to materials prepared for use in judicial proceedings or submission to Congress or a Member of Congress, or for intragovernmental use.

(3) Emergency

The appropriate Federal banking agency may make exceptions to subsection (a) of this section if—

(A) the agency determines in writing that the exception is necessary to avoid a serious and imminent threat to the safety and soundness of any national bank; or

(B) the opinion letter or interpretive rule is issued in connection with—

(i) an acquisition of 1 or more banks in default or in danger of default (as such terms are defined in section 1813 of this title); or

(ii) an acquisition with respect to which the Federal Deposit Insurance Corporation provides assistance under section 1823(c) of this title.

(R.S. §5244, as added Pub. L. 103–328, title I, §114, Sept. 29, 1994, 108 Stat. 2366.)

CODIFICATION

Another R.S. §5244 is classified to section 8 of Title 33, Navigation and Navigable Waters.

SUBCHAPTER II—CAPITAL, STOCK, AND STOCKHOLDERS

§51. Requisite of capital and surplus

After this section as amended takes effect no national banking association shall be organized with a less capital than $100,000, except that such associations with a capital of not less than $50,000 may be organized in any place the population of which does not exceed six thousand inhabitants. No such association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than $200,000, except that in the outlying districts of such a city where the State laws permit the organization of State banks with a capital of $100,000 or less, national banking associations now organized or hereafter organized may, with the approval of the Comptroller of the Currency, have a capital of not less than $100,000. No such association shall hereafter be authorized to commence the business of banking until it shall have a paid-in surplus equal to 20 per centum of its capital: *Provided*, That the Comptroller of the Currency may waive this requirement as to a State bank converting into a national banking association, but each such State bank which is converted into a national banking association shall, before the declaration of a dividend on its shares of common stock, carry not less than one-half part of its net profits of the preceding half year to its surplus fund until it shall have a surplus equal to 20 per centum of its capital: *Provided*, That for the purposes of this section any amounts paid into a fund for the retirement of any preferred stock of any such converted State bank out of its net earnings for such half-year period shall be deemed to be an addition to its surplus fund if, upon the retirement of such preferred stock, the amount so paid into such retirement fund for such period may then properly be carried to surplus. In any such case the converted State bank shall be obligated to transfer to surplus the amount so paid into such retirement fund for such period on account of the preferred stock as such stock is retired.

(R.S. §5138; Mar. 14, 1900, ch. 41, §10, 31 Stat. 48; Feb. 25, 1927, ch. 191, §4, 44 Stat. 1227; June 16, 1933, ch. 89, §17(a), 48 Stat. 185; Aug. 23, 1935, ch. 614, title III, §309, 49 Stat. 709.)

CODIFICATION

R.S. §5138 derived from act June 3, 1864, ch. 106, §7, 13 Stat. 101, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1935—Act Aug. 23, 1935, added last two sentences.

1933—Act June 16, 1933, inserted in first sentence ''After this section as amended takes effect,'' and omitted therefrom exception clause permitting organization of banks with a capital of not less than $25,000 in places of not more than 3,000 inhabitants.

1927—Act Feb. 25, 1927, added exception clause in second sentence.

EFFECTIVE DATE OF 1933 AMENDMENT

Words ''After this section as amended takes effect'' are from amendment of June 16, 1933, which took effect on June 16, 1933.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1821 of this title.

§51a. Preferred stock; issuance authorized

Notwithstanding any other provision of law any national banking association may, with the approval of the Comptroller of the Currency and by vote of shareholders owning a majority of the stock of such association, upon not less than five days' notice given by registered mail or by certified mail pursuant to action taken by its board of directors, issue preferred stock of one or more classes, in such amount and with such par value as shall be approved by said Comptroller, and make such amendments to its articles of association as may be necessary for this purpose; but, in the case of any newly organized national banking association which has not yet issued common stock, the requirement of notice to and vote of shareholders shall not apply. No issue of preferred stock shall be valid until the par value of all stock so issued shall be paid in and notice thereof, duly acknowledged before a notary public by the president, vice president, or cashier of said association, has been transmitted to the Comptroller of the Currency and his certificate obtained specifying the amount of such issue of preferred stock and his approval thereof and that the amount has been duly paid in as a part of the capital of such association;

which certificate shall be deemed to be conclusive evidence that such preferred stock has been duly and validly issued.

(Mar. 9, 1933, ch. 1, title III, § 301, 48 Stat. 5; June 15, 1933, ch. 79, 48 Stat. 147; Aug. 23, 1935, ch. 614, title III, § 336, 49 Stat. 720; Pub. L. 86–507, § 1(9), June 11, 1960, 74 Stat. 200.)

AMENDMENTS

1960—Pub. L. 86–507 inserted ''or by certified mail'' after ''registered mail''.

1935—Act Aug. 23, 1935, amended last sentence generally.

1933—Act June 15, 1933, struck out all of former section and inserted a new section which incorporated all former provisions and inserted ''of one or more classes,'' in first sentence.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Right to amend, separability of provisions, see section 212 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 51c, 212, 213 of this title.

§ 51b. Dividends, voting, and retirement of preferred stock; individual liability

(a) Notwithstanding any other provision of law, whether relating to restriction upon the payment of dividends upon capital stock or otherwise, the holders of such preferred stock shall be entitled to receive such cumulative dividends and shall have such voting and conversion rights and such control of management, and such stock shall be subject to retirement in such manner and upon such conditions, as may be provided in the articles of association with the approval of the Comptroller of the Currency. The holders of such preferred stock shall not be held individually responsible as such holders for any debts, contracts, or engagements of such association, and shall not be liable for assessments to restore impairments in the capital of such association as now provided by law with reference to holders of common stock.

(b) No dividends shall be declared or paid on common stock until the cumulative dividends on the preferred stock shall have been paid in full; and, if the association is placed in voluntary liquidation or a conservator or a receiver is appointed therefor, no payments shall be made to the holders of the common stock until the holders of the preferred stock shall have been paid in full the par value of such stock plus all accumulated dividends.

(Mar. 9, 1933, ch. 1, title III, § 302, 48 Stat. 5; June 15, 1933, ch. 79, 48 Stat. 148; Pub. L. 96–221, title VII, § 702, Mar. 31, 1980, 94 Stat. 186.)

AMENDMENTS

1980—Subsec. (a). Pub. L. 96–221 struck out limitation on payment of cumulative dividends at a rate not exceeding 6 per centum per annum.

1933—Subsec. (a). Act June 15, 1933, struck out former subsec. (a) and inserted a new subsec. (a) which incorporated all former provisions and inserted ''Notwithstanding any other provision of law, whether relating to restriction upon the payment of dividends upon capital stock or otherwise'' and ''and conversion rights,'' in first sentence.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Right to amend, separability of provisions, see section 212 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 51c, 62, 212, 213 of this title.

§ 51b–1. Consideration of preferred stock in determining impairment of capital; dividends; retirement

If any part of the capital of a national bank, State member bank, or bank applying for membership in the Federal Reserve System consists of preferred stock, the determination of whether or not the capital of such bank is impaired and the amount of such impairment shall be based upon the par value of its stock even though the amount which the holders of such preferred stock shall be entitled to receive in the event of retirement or liquidation shall be in excess of the par value of such preferred stock. If any such bank or trust company shall have outstanding any capital notes or debentures of the type which the Reconstruction Finance Corporation is authorized to purchase pursuant to the provisions of section 51d of this title, the capital of such bank may be deemed to be unimpaired if the sound value of its assets is not less than its total liabilities, including capital stock, but excluding such capital notes or debentures and any obligations of the bank expressly subordinated thereto. Notwithstanding any other provision of law, the holders of preferred stock issued by a national banking association pursuant to the provisions of the Emergency Banking and Bank Conservation Act, approved March 9, 1933, as amended, shall be entitled to receive such cumulative dividends on the purchase price received by the association for such stock and, in the event of the retirement of such stock, to receive such retirement price, not in excess of such purchase price plus all accumulated dividends, as may be provided in the articles of association with the approval of the Comptroller of the Currency. If the association is placed in voluntary liquidation, or if a conservator or a receiver is appointed therefor, no payment shall be made to the holders of common stock until the holders of preferred stock shall have been paid in full such amount as may be provided in the articles of association with the approval of the Comptroller of the Currency, not in excess of such purchase price of such preferred stock plus all accumulated dividends.

(Aug. 23, 1935, ch. 614, title III, § 345, 49 Stat. 722; Pub. L. 96–221, title VII, § 703, Mar. 31, 1980, 94 Stat. 186.)

REFERENCES IN TEXT

Section 51d of this title, referred to in text, which was section 304 of the Emergency Banking and Bank

Conservation Act, approved March 9, 1933, ch. 1, 48 Stat. 6, as amended, and which authorized the Reconstruction Finance Corporation, upon the request of the Secretary of the Treasury approved by the President, to purchase, or to make loans upon, the capital stock of any bank or trust company requiring funds for capital purposes in connection with its organization or reorganization, and which made provision for the purchase of the capital notes of banks organized in States which subject holders of preferred stock to double liability and for the sale of any stock or notes purchased under such authority, was repealed by act June 30, 1947, ch. 166, title II, § 206(b), (*o*), 61 Stat. 208. However, according to the information received from the Department of the Treasury, the second sentence of this section is not obsolete even though it contains such obsolete reference to section 51d of this title, and even though, under 1957 Reorg. Plan No. 1, eff. June 30, 1957, 22 F.R. 4633, 71 Stat. 647, set out in the Appendix to Title 5, Government Organization and Employees, the Reconstruction Finance Corporation was abolished, for many banks have outstanding debentures which they obtained pursuant to the provisions of section 51d, and which they are not required to redeem; and their benefits or entitlements conferred by the second sentence of this section will remain until the debentures are redeemed.

The Emergency Banking and Bank Conservation Act, approved March 9, 1933, as amended, referred to in text, is act Mar. 9, 1933, ch. 1, 48 Stat. 1, as amended, which is classified to sections 51a, 51b, 51c, 51d, 95 to 95b, 201 to 212, 248, 347b, 347c, 347d, and 445 of this title and section 5 of Title 50, Appendix, War and National Defense.

AMENDMENTS

1980—Pub. L. 96–221 struck out limitation on payment of cumulative dividends at a rate not exceeding 6 per centum per annum.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 51c. "Common stock", "capital", and "capital stock" defined

The term ''common stock'' as used in sections 51a, 51b, 51c, and 51d[1] of this title means stock of national banking associations other than preferred stock issued under the provisions of said sections. The term ''capital'' as used in provisions of law relating to the capital of national banking associations shall mean the amount of unimpaired common stock plus the amount of preferred stock outstanding and unimpaired; and the term ''capital stock'', as used in sections 101, 177, and 178[1] of this title, shall mean only the amount of common stock outstanding.

(Mar. 9, 1933, ch. 1, title III, § 303, 48 Stat. 5.)

REFERENCES IN TEXT

Section 51d of this title, referred to in text, was repealed by act June 30, 1947, ch. 166, title II, § 206(b), (*o*), 61 Stat. 208. For effect of the repeal on outstanding debentures held by banks, see note under section 51b–1 of this title.

Sections 101, 177, and 178 of this title, referred to in text, were repealed by Pub. L. 103–325, title VI, § 602(f)(2), (5), Sept. 23, 1994, 108 Stat. 2292, 2293.

CROSS REFERENCES

Right to amend, separability of provisions, see section 212 of this title.

[1] See References in Text note below.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 212, 213 of this title.

§§ 51d to 51f. Repealed. June 30, 1947, ch. 166, title II, § 206(b), (*o*), 61 Stat. 208

Section 51d, acts Mar. 9, 1933, ch. 1, title III, § 304, 48 Stat. 6; Mar. 24, 1933, ch. 8, § 2, 48 Stat. 21; Mar. 20, 1936, ch. 160, § 1, 49 Stat. 1185; June 25, 1940, ch. 427, § 1, 54 Stat. 572, related to subscription for and sale of preferred stock in banks by the Reconstruction Finance Corporation.

Sections 51e and 51f, act Mar. 20, 1936, ch. 160, §§ 2, 3, 49 Stat. 1185, related to rate of interest on loans and separability provisions.

§ 52. Par value and incidents of stock; transfer of shares

The capital stock of each association shall be divided into shares of $100 each, or into shares of such less amount as may be provided in the articles of association, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Certificates issued after August 23, 1935, representing shares of stock of the association shall state (1) the name and location of the association, (2) the name of the holder of record of the stock represented thereby, (3) the number and class of shares which the certificate represents, and (4) if the association shall issue stock of more than one class, the respective rights, preferences, privileges, voting rights, powers, restrictions, limitations, and qualifications of each class of stock issued shall be stated in full or in summary upon the front or back of the certificates or shall be incorporated by a reference to the articles of association set forth on the front of the certificates. Every certificate shall be signed by the president and the cashier of the association, or by such other officers as the by-laws of the association shall provide, and shall be sealed with the seal of the association.

After August 23, 1935, no certificate evidencing the stock of any such association shall bear any statement purporting to represent the stock of any other corporation, except a member bank or a corporation engaged on June 16, 1934, in holding the bank premises of such association, nor shall the ownership, sale, or transfer of any certificate representing the stock of any such association be conditioned in any manner whatsoever upon the ownership, sale, or transfer of a certificate representing the stock of any other corporation, except a member bank or a corporation engaged on June 16, 1934 in holding the bank premises of such association: *Provided*, That this section shall not operate to prevent the ownership, sale, or transfer of stock of any other corporation being conditioned upon the ownership, sale, or transfer of a certificate representing stock of a national banking association.

(R.S. § 5139; Feb. 25, 1927, ch. 191, § 16, 44 Stat. 1233; June 16, 1933, ch. 89, § 18, 48 Stat. 186; Aug. 23, 1935, ch. 614, title III, §§ 310(a), 335, 49 Stat. 710, 720.)

CODIFICATION

R.S. § 5139 derived from act June 3, 1864, ch. 106, § 12, 13 Stat. 102, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1935—Act Aug. 23, 1935, § 335, added second par.

Act Aug. 23, 1935, § 310(a), among other changes in last par., inserted proviso.

1933—Act June 16, 1933, added last par.

1927—Act Feb. 25, 1927, inserted ''or into shares of such less amount as may be provided in the articles of association'' in first sentence.

§ 53. When capital stock paid in

All of the capital stock of every national banking association shall be paid in before it shall be authorized to commence business.

(R.S. § 5140; Pub. L. 86–230, § 4, Sept. 8, 1959, 73 Stat. 457.)

CODIFICATION

R.S. § 5140 derived from act June 3, 1864, ch. 106, § 14, 13 Stat. 103, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1959—Pub. L. 86–230 substituted requirement that all the capital stock of a national bank must be paid in before it commences business for permissive authority to be open for business upon payment of 50 per centum of the capital stock and installment payment of the remaining 50 per centum.

§ 54. Repealed. Pub. L. 86–230, § 5, Sept. 8, 1959, 73 Stat. 457

Section, R.S. § 5141, related to failure to pay installments, remedy and effect if reduction of capital resulted.

§ 55. Enforcing payment of deficiency in capital stock; assessments; liquidation; receivership

Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section 192 of this title. *And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

(R.S. § 5205; June 30, 1876, ch. 156, § 4, 19 Stat. 64.)

CODIFICATION

R.S. § 5205 derived from act Mar. 3, 1873, ch. 269, § 1, 17 Stat. 603.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 197 of this title.

§ 56. Prohibition on withdrawal of capital; unearned dividends

No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its undivided profits, subject to other applicable provisions of law. But nothing in this section shall prevent the reduction of the capital stock of the association under section 59 of this title.

(R.S. § 5204; Pub. L. 103–325, title VI, § 602(h)(1), Sept. 23, 1994, 108 Stat. 2294.)

CODIFICATION

R.S. § 5204 derived from act June 3, 1864, ch. 106, § 38, 13 Stat. 110, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1994—Pub. L. 103–325 substituted ''undivided profits, subject to other applicable provisions of law'' for ''net profits then on hand, deducting therefrom its losses and bad debts'' in second sentence and struck out after second sentence ''All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 324 of this title.

§ 57. Increase of capital by provision in articles of association

Any national banking association may, with the approval of the Comptroller of the Currency,

and by a vote of shareholders owning two-thirds of the stock of such associations, increase its capital stock to any sum approved by the said comptroller, but no increase in capital shall be valid until the whole amount of such increase is paid in and notice thereof, duly acknowledged before a notary public by the president, vice president, or cashier of said association, has been transmitted to the Comptroller of the Currency and his certificate obtained specifying the amount of such increase in capital stock and his approval thereof, and that it has been duly paid in as part of the capital of such association: *Provided, however*, That a national banking association may, with the approval of the Comptroller of the Currency, and by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock by the declaration of a stock dividend, provided that the surplus of said association, after the approval of the increase, shall be at least equal to 20 per centum of the capital stock as increased. Such increase shall not be effective until a certificate certifying to such declaration of dividend, signed by the president, vice president, or cashier of said association and duly acknowledged before a notary public, shall have been forwarded to the Comptroller of the Currency and his certificate obtained specifying the amount of such increase of capital stock by stock dividend, and his approval thereof.

(R.S. §5142; Feb. 25, 1927, ch. 191, §5, 44 Stat. 1227.)

CODIFICATION

R.S. §5142 derived from act June 3, 1864, ch. 106, §13, 13 Stat. 103, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1927—Act Feb. 25, 1927, among other changes, inserted proviso.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 58. Repealed. Pub. L. 86–230, § 6, Sept. 8, 1959, 73 Stat. 457

Section, act May 1, 1886, ch. 73, §1, 24 Stat. 18, related to increase of capital by vote of shareholders. See section 57 of this title.

§ 59. Reduction of capital by vote of shareholders

Any association formed under title 62 of the Revised Statutes may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by title 62 of the Revised Statutes to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such reduction has been approved by said Comptroller of the Currency and no shareholder shall be entitled to any distribution of cash or other assets by reason of any reduction of the common capital of any association unless such distribution shall have been approved by the Comptroller of the Currency and by the affirmative vote of at least two-thirds of the shares of each class of stock outstanding, voting as classes.

(R.S. §5143; Dec. 23, 1913, ch. 6, §28, 38 Stat. 274; Aug. 23, 1935, ch. 614, title III, §334, 49 Stat. 720.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in text, was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. §5143 derived from act June 3, 1864, ch. 106, §13, 13 Stat. 103, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1935—Act Aug. 23, 1935, substituted ''and no shareholder shall be entitled to any distribution of cash or other assets by reason of any reduction of the common capital of any association unless such distribution shall have been approved by the Comptroller of the Currency and by the affirmative vote of at least two-thirds of the shares of each class of stock outstanding, voting as classes'' for ''and by the Federal Reserve Board or by the organization committee pending the organization of the Federal Reserve Board''.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 56 of this title.

§ 60. Dividends

(a) Periodic declaration; surplus fund

The directors of any national banking association may, quarterly, semiannually or annually, declare a dividend of so much of the undivided profits of the association, subject to the limitations in subsection (b) of this section, as they shall judge expedient, except that until the surplus fund of such association shall equal its common capital, no dividends shall be declared unless there has been carried to the surplus fund not less than one-tenth part of the association's net income of the preceding half year in the case of quarterly or semiannual dividends, or not less than one-tenth part of its net income of the preceding two consecutive half-year periods in the case of annual dividends: *Provided*, That for the purposes of this section, any amounts paid into a fund for the retirement of any preferred stock of any such association out of its net income for such period or periods shall be deemed to be additions to its surplus fund if, upon the retirement of such preferred stock, the amounts so paid into such retirement fund may then prop-

erly be carried to surplus. In any such case the association shall be obligated to transfer to surplus the amounts so paid into such retirement fund on account of the preferred stock as such stock is retired.

(b) Approval of Comptroller

The approval of the Comptroller of the Currency shall be required if the total of all dividends declared by such association in any calendar year shall exceed the total of its net income of that year combined with its retained net income of the preceding two years, less any required transfers to surplus or a fund for the retirement of any preferred stock.

(R.S. § 5199; Aug. 23, 1935, ch. 614, title III, § 315, 49 Stat. 712; Pub. L. 86–230, § 21(a), Sept. 8, 1959, 73 Stat. 465; Pub. L. 103–325, title VI, § 602(h)(2), Sept. 23, 1994, 108 Stat. 2294.)

CODIFICATION

R.S. § 5199 derived from act June 3, 1864, ch. 106, § 33, 13 Stat. 109, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–325, § 602(h)(2)(A), (B), substituted ''undivided profits of the association, subject to the limitations in subsection (b) of this section,'' for ''net profits of the association'' in first sentence and ''net income'' for ''net profits'' wherever subsequently appearing.

Subsec. (b). Pub. L. 103–325, § 602(h)(2)(B), substituted ''net income'' for ''net profits'' in two places.

Subsec. (c). Pub. L. 103–325, § 602(h)(2)(C), struck out subsec. (c) which read as follows: ''For the purpose of this section the term 'net profits' shall mean the remainder of all earnings from current operations plus actual recoveries on loans and investments and other assets, after deducting from the total thereof all current operating expenses, actual losses, accrued dividends on preferred stock, if any, and all Federal and State taxes.''

1959—Pub. L. 86–230 designated existing provisions as subsec. (a), authorized the declaration of dividends, quarterly and annually, when at least one-tenth of the bank's net profits of the preceding half year or of the preceding two consecutive half-year periods has been carried to the surplus fund, respectively, and added subsecs. (b) and (c).

1935—Act Aug. 23, 1935, among other changes, inserted proviso.

CROSS REFERENCES

Dividends on preferred stock, see section 51b of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 324 of this title.

§ 61. Shareholders' voting rights; cumulative and distributive voting; preferred stock; trust shares; proxies, liability restrictions; percentage requirement exclusion of trust shares

In all elections of directors, each shareholder shall have the right to vote the number of shares owned by him for as many persons as there are directors to be elected, or to cumulate such shares and give one candidate as many votes as the number of directors multiplied by the number of his shares shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and in deciding all other questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him; except that (1) this shall not be construed as limiting the voting rights of holders of preferred stock under the terms and provisions of articles of association, or amendments thereto, adopted pursuant to the provisions of section 51b of this title; (2) in the election of directors, shares of its own stock held by a national bank as sole trustee, whether registered in its own name as such trustee or in the name of its nominee, shall not be voted by the registered owner unless under the terms of the trust the manner in which such shares shall be voted may be determined by a donor or beneficiary of the trust and unless such donor or beneficiary actually directs how such shares shall be voted; and (3) shares of its own stock held by a national bank and one or more persons as trustees may be voted by such other person or persons, as trustees, in the same manner as if he or they were the sole trustee. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such bank shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. Whenever shares of stock cannot be voted by reason of being held by the bank as sole trustee such shares shall be excluded in determining whether matters voted upon by the shareholders were adopted by the requisite percentage of shares.

(R.S. § 5144; June 16, 1933, ch. 89, § 19, 48 Stat. 186; Aug. 23, 1935, ch. 614, title III, § 311, 49 Stat. 710; Sept. 3, 1954, ch. 1263, § 21, 68 Stat. 1234; Pub. L. 86–114, § 4, July 28, 1959, 73 Stat. 264; Pub. L. 89–485, § 13(c), July 1, 1966, 80 Stat. 242.)

CODIFICATION

R.S. § 5144 derived from act June 3, 1864, ch. 106, § 11, 13 Stat. 102, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1966—Pub. L. 89–485 struck out: clause (4) requirement of a voting permit from the Board for voting shares controlled by a holding company affiliate of a national bank except when voting in favor of voluntary liquidation of an association; second par. definition of control of shares by a holding company affiliate; third par. prescribing procedure for obtaining a voting permit: application to Board, grant or denial of permit in the public interest, factors for consideration, and conditions described in subsecs. (a) to (e) for granting a permit; subsec. (a) requirement of agreement of the holding company affiliate to an examination of the affiliate by bank examiners, reports by such examiners, examination of affiliated banks, and publication of individual or consolidated statements of condition of such banks; subsec. (b) provisions for possession of readily marketable assets other than bank stock and reinvestment of a prescribed amount of net earnings in such assets; subsec. (c) provisions for reserve of assets, use of assets for capital replacement, and situations involving more than one holding company affiliate; subsec. (d) provisions for penalties for false entries; subsec. (e) requirements for disclosure in application of a absence of securities company status and for declaration of dividends out of net earnings; penultimate par. prescribing procedure for revocation of voting permit and prohibiting the use of the bank as a depositary for public moneys of the United States and payment of dividends to the affiliate; and last par. authorization for forfeiture of rights, privileges, and franchises of national banks.

1959—Subsec. (c). Pub. L. 86–114 authorized the Board to designate one of the chain of holding company affiliates which would have to maintain the 12 percent reserve and exempted the other holding company affiliates from the requirement.

1954—Subsec. (d). Act Sept. 3, 1954, substituted ''section 1005 of Title 18'' for ''section 592 of this title''.

1935—Act Aug. 23, 1935, amended first par., first sentence of third par., and inserted ''and the provisions of this subsection, instead of subsection (b), shall apply to all holding company affiliates with respect to any shares of bank stock owned or controlled by them as to which there is no statutory liability imposed upon the holders of such bank stock'' at end of subsec. (c).

1933—Act June 16, 1933, inserted provisions for cumulative voting of shares or distribution of votes on a cumulative voting principle, prohibited national banks holding their own shares as sole trustee from voting such shares but permitted such shares to be voted when held by another person or persons as trustees with the bank, denied voting rights to shares controlled by a holding company affiliate of a national bank unless a voting permit was first obtained, provided for application for a voting permit to the Federal Reserve Board, specified conditions for granting the voting permit and procedure for its revocation, and authorized the forfeiture of a National Bank's rights, privileges, and franchises upon such revocation.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 26 section 601.

§ 62. List of shareholders

The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency within ten days of any demand therefor made by him.

(R.S. § 5210; May 18, 1953, ch. 59, § 1, 67 Stat. 27.)

CODIFICATION

R.S. § 5210 derived from act June 3, 1864, ch. 106, § 40, 13 Stat. 111, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1953—Act May 18, 1953, changed the requirement for annual transmission of a copy of the shareholders list to the Comptroller of the Currency by authorizing the Comptroller to acquire such copy at any time on 10 days' notice.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

§§ 63, 64. Repealed. Pub. L. 86–230, § 7, Sept. 8, 1959, 73 Stat. 457

Section 63, R.S. § 5151, related to individual liability of shareholders.

Section 64, act Dec. 23, 1913, ch. 6, § 23, 38 Stat. 273, related to transfer of shares as affecting individual liability of shareholders. Limitation on liability of shareholders, see section 64a of this title.

The status of former section 63 of this title had been doubtful. At different times it had been held to have been repealed, superseded, and superseded only in part by former section 64 of this title which related to the same subject. See *American T. Co.* v. *Grut*, C.C.A. 1935, 80 F.2d 155; *Miller* v. *Hamner*, C.C.A. 1920, 269 F. 891; and *First Nat. Bank* v. *First Nat. Bank*, D.C. 1926, 14 F.2d 129.

§ 64a. Individual liability of shareholders; limitation on liability

The additional liability imposed upon shareholders in national banking associations by the provisions of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933. Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937: *Provided*, That not less than six months prior to such date, such association shall have caused notice of such prospective termination of liability to be published in a newspaper published in the city, town, or county in which such association is located, and if no newspaper is published in such city, town, or county, then in a newspaper of general circulation therein. If the association fail[1] to give such notice as and when above provided, a termination of such additional liability may thereafter be accomplished as of the date six month[2] subsequent to publication, in the manner above provided. In the case of each association which has not caused notice of such prospective termination of liability to be published prior to May 18, 1953, the Comptroller of the Currency shall cause such notice to be published in the manner provided in this section, and on the date six months subsequent to such publication by the Comptroller of the Currency such additional liability shall cease.

(June 16, 1933, ch. 89, § 22, 48 Stat. 189; Aug. 23, 1935, ch. 614, title III, § 304, 49 Stat. 708; May 18, 1953, ch. 59, § 2, 67 Stat. 27.)

REFERENCES IN TEXT

Sections 63 and 64 of this title, referred to in text, were repealed by Pub. L. 86–230, § 7, Sept. 8, 1959, 73 Stat. 457.

AMENDMENTS

1953—Act May 18, 1953, provided for termination of the additional liability, referred to in the section, by action of the Comptroller of the Currency with regard to those associations which had not, prior to May 18, 1953, caused notice of termination to be published.

1935—Act Aug. 23, 1935, added second and third sentences.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 65. Repealed. Pub. L. 86–230, § 8, Sept. 8, 1959, 73 Stat. 457

Section, acts June 30, 1876, ch. 156, § 2, 19 Stat. 63; Sept. 3, 1954, ch. 1263, § 22, 68 Stat. 1234, related to en-

[1] So in original. Probably should be ''fails''.

[2] So in original. Probably should be ''months''.

forcement of shareholders' individual liability by creditors on liquidation. Limitation on liability of shareholders, see section 64a of this title.

§ 66. Personal liability of representatives of stockholders

Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

(R.S. § 5152.)

CODIFICATION

R.S. § 5152 derived from act June 3, 1864, ch. 106, § 63, 13 Stat. 118, which was the National Bank Act. See section 38 of this title.

§ 67. Individual liability of shareholders; compromises; authority of receiver

Any receiver of a national banking association is authorized, with the approval of the Comptroller of the Currency and upon the order of a court of record of competent jurisdiction, to compromise, either before or after judgment, the individual liability of any shareholder of such association.

(Feb. 25, 1930, ch. 58, 46 Stat. 74.)

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer to Secretary of the Treasury, see note set out under section 1 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

SUBCHAPTER III—DIRECTORS

§ 71. Election

The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day of each year as is specified therefor in the bylaws. The directors shall hold office for one year, and until their successors are elected and have qualified.

(R.S. § 5145; Pub. L. 88–232, § 1, Dec. 23, 1963, 77 Stat. 472.)

CODIFICATION

R.S. § 5145 derived from act June 3, 1864, ch. 106, §§ 9, 10, 13 Stat. 102, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1963—Pub. L. 88–232 substituted ''on such day of each year as is specified therefor in the bylaws'' for ''on such day in January of each year as is specified therefor in the articles of association''.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1821 of this title.

§ 71a. Number of directors; penalties

After one year from June 16, 1933, notwithstanding any other provision of law, the board of directors, board of trustees, or other similar governing body of every national banking association and of every State bank or trust company which is a member of the Federal Reserve System shall consist of not less than five nor more than twenty-five members. If any national banking association violates the provisions of this section and continues such violation after thirty days' notice from the Comptroller of the Currency, the said Comptroller may appoint a receiver or conservator therefor, in accordance with the provisions of existing law. If any State bank or trust company which is a member of the Federal Reserve System violates the provisions of this section and continues such violation after thirty days' notice from the Board of Governors of the Federal Reserve System, it shall be subject to the forfeiture of its membership in the Federal Reserve System in accordance with the provisions of section 327 of this title.

(June 16, 1933, ch. 89, § 31, 48 Stat. 194; June 16, 1934, ch. 546, § 4, 48 Stat. 971; Aug. 23, 1935, ch. 614, title II, § 203(a), title III, § 306, 49 Stat. 704, 708.)

AMENDMENTS

1935—Act June 16, 1934, as amended by act Aug. 23, 1935, § 306, repealed a former provision of this section relating to stock ownership requirements of directors, trustees, or members of similar governing bodies of any national banking association, or of any State bank or trust company which is a member of the Federal Reserve System.

1934—Act June 16, 1934, repealed a former provision of this section relating to stock ownership requirements of directors, trustees, or members of similar governing bodies of member banks of the Federal Reserve System.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Interlocking directorates of banks, banking associations, and trust companies, see section 19 of Title 15, Commerce and Trade.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1821 of this title.

§ 72. Qualifications

Every director must, during his whole term of service, be a citizen of the United States, and at least a majority of the directors must have resided in the State, Territory, or District in which the association is located, or within one hundred miles of the location of the office of the association, for at least one year immediately

preceding their election, and must be residents of such State or within one-hundred-mile territory of the location of the association during their continuance in office, except that the Comptroller may, in the discretion of the Comptroller, waive the requirement of residency. Every director must own in his or her own right either shares of the capital stock of the association of which he or she is a director the aggregate par value of which is not less than $1,000, or an equivalent interest, as determined by the Comptroller of the Currency, in any company which has control over such association within the meaning of section 1841 of this title. If the capital of the bank does not exceed $25,000, every director must own in his or her own right either shares of such capital stock the aggregate par value of which is not less than $500, or an equivalent interest, as determined by the Comptroller of the Currency, in any company which has control over such association within the meaning of section 1841 of this title. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

(R.S. §5146; Feb. 28, 1905, ch. 1163, 33 Stat. 818; Mar. 1, 1921, ch. 100, 41 Stat. 1199; Feb. 25, 1927, ch. 191, §17, 44 Stat. 1233; Apr. 27, 1956, ch. 215, 70 Stat. 119; Pub. L. 95–369, §2, Sept. 17, 1978, 92 Stat. 608; Pub. L. 96–221, title VII, §710, Mar. 31, 1980, 94 Stat. 189; Pub. L. 103–325, title III, §313, Sept. 23, 1994, 108 Stat. 2221; Pub. L. 104–208, div. A, title II, §2241, Sept. 30, 1996, 110 Stat. 3009–418.)

CODIFICATION

R.S. §5146 derived from act June 3, 1864, ch. 106, §§9, 10, 13 Stat. 102, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1996—Pub. L. 104–208 substituted ''except that the Comptroller may, in the discretion of the Comptroller, waive the requirement of residency'' for ''except that in the case of an association which is a subsidiary or affiliate of a foreign bank, the Comptroller of the Currency may in his discretion waive the requirement of citizenship in the case of not more than a minority of the total number of directors'' before period at end of first sentence.

1994—Pub. L. 103–325, which directed the substitution of ''a majority'' for ''two thirds'', was executed by making the substitution for ''two-thirds'' in first sentence to reflect the probable intent of Congress.

1980—Pub. L. 96–221 inserted provisions setting forth additional ownership requirements with respect to equivalent interest determinations by the Comptroller of the Currency.

1978—Pub. L. 95–369 authorized the Comptroller of the Currency, in case of associations which are subsidiaries of affiliates of foreign banks, to waive citizenship requirements of not more than a minority of the total number of directors.

1956—Act Apr. 27, 1956, substituted ''two-thirds'', ''one hundred'', ''one-hundred-mile'', for ''three-fourths'', ''fifty'', and ''fifty-mile'', respectively.

1927—Act Feb. 25, 1927, substituted a minimum value of stock ownership for minimum number of shares in both instances.

CROSS REFERENCES

Interlocking directorates of banks, banking associations, and trust companies, see section 19 of Title 15, Commerce and Trade.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1821 of this title.

§ 73. Oath

Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of title 62 of the Revised Statutes, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by title 62 of the Revised Statutes, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. The oath shall be taken before a notary public, properly authorized and commissioned by the State in which he resides, or before any other officer having an official seal and authorized by the State to administer oaths, except that the oath shall not be taken before any such notary public or other officer who is an officer of the director's bank. The oath, subscribed by the director making it, and certified by the notary public or other officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency and shall be filed and preserved in his office for a period of ten years.

(R.S. §5147; Feb. 20, 1925, ch. 274, 43 Stat. 955.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in text, was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. §5147 derived from act June 3, 1864, ch. 106, §9, 13 Stat. 102, which was the National Bank Act. See section 38 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1821 of this title.

§ 74. Vacancies

Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

(R.S. §5148.)

CODIFICATION

R.S. §5148 derived from act June 3, 1864, ch. 106, §10, 13 Stat. 102, which was the National Bank Act. See section 38 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1821 of this title.

§ 75. Legal holiday, annual meeting on; proceedings where no election held on proper day

When the day fixed in the bylaws for the regular annual meeting of the shareholders falls on a legal holiday in the State in which the bank is located, the shareholders meeting shall be held, and the directors elected, on the next following banking day. If, from any cause, an election of directors is not made on the day fixed, or in the event of a legal holiday, on the next following banking day, an election may be held on any subsequent day within sixty days of the day fixed, to be designated by the board of directors, or, if the directors fail to fix the day, by shareholders representing two-thirds of the shares, at least ten days' notice thereof in all cases having been given by first-class mail to the shareholders.

(R.S. § 5149; Pub. L. 86–230, § 9, Sept. 8, 1959, 73 Stat. 457; Pub. L. 88–232, § 2, Dec. 23, 1963, 77 Stat. 472.)

CODIFICATION

R.S. § 5149 derived from act June 3, 1864, ch. 106, § 10, 13 Stat. 102, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1963—Pub. L. 88–232 substituted ''bylaws'' for ''articles of association''.

1959—Pub. L. 86–230 provided that when the day fixed for the regular annual meeting of the shareholders falls on a legal holiday, the meeting shall be held on the next following banking day and authorized election of directors to be held within sixty days of a fixed day upon ten days' notice to the shareholders by first-class mail instead of upon thirty days' notice in newspaper and at a date designated in the articles or bylaws or by the shareholders.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1821 of this title.

§ 76. President of bank as member of board; chairman of board

The president of the bank shall be a member of the board and shall be the chairman thereof, but the board may designate a director in lieu of the president to be chairman of the board, who shall perform such duties as may be designated by the board.

(R.S. § 5150; Feb. 25, 1927, ch. 191, § 6, 44 Stat. 1228.)

CODIFICATION

R.S. § 5150 derived from act June 3, 1864, ch. 106, § 9, 13 Stat. 102, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1927—Act Feb. 25, 1927, amended section generally. Prior to amendment, section read as follows: ''One of the directors, to be chosen by the board, shall be president of the board.''

§ 77. Repealed. Pub. L. 89–695, title II, § 207, Oct. 16, 1966, 80 Stat. 1055

Section, act June 16, 1933, ch. 89, § 30, 48 Stat. 193, provided authority for removal of directors or officers of national banks, District banks, or State member banks for continued violations of law or for continued unsafe or unsound practices in conducting the business of such banks.

CODIFICATION

Section 401 of Pub. L. 89–695, Oct. 16, 1966, 80 Stat. 1056, which provided for reenactment of this section effective upon expiration of the period ending at the close of June 30, 1972, was repealed by Pub. L. 91–609, title IX, § 908, Dec. 31, 1970, 84 Stat. 1811.

CONDITIONS GOVERNING EMPLOYMENT OF PERSONNEL NOT REPEALED, MODIFIED, OR AFFECTED

Nothing contained in section 207 of Pub. L. 89–695 repealing this section to be construed as repealing, modifying, or affecting section 1829 of this title, see section 206 of Pub. L. 89–695, set out as a note under section 1813 of this title.

§ 78. Certain persons excluded from serving as officers, directors or employees of member banks

No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.

(June 16, 1933, ch. 89, § 32, 48 Stat. 194; Aug. 23, 1935, ch. 614, § 307, 49 Stat. 709.)

AMENDMENTS

1935—Act Aug. 23, 1935, among other changes, substituted exception clause in place of provisions relating to issuance of permits in such cases and authorizing revocation of same where required in the public interest.

EFFECTIVE DATE OF 1935 AMENDMENT

Amendment by act Aug. 23, 1935, effective Jan. 1, 1936, see section 307 of act Aug. 23, 1935.

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

§ 81. Place of business

The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

(R.S. § 5190; Feb. 25, 1927, ch. 191, § 8, 44 Stat. 1229.)

CODIFICATION

R.S. § 5190 derived from act June 3, 1864, ch. 106, § 8, 13 Stat. 101, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1927—Act Feb. 25, 1927, among other changes, inserted ''and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title''.

CROSS REFERENCES

Change of location of business, see section 30 of this title.

Place of business, specification in organization certificate, see section 22 of this title.

§ 82. Repealed. Pub. L. 97–320, title IV, § 402, Oct. 15, 1982, 96 Stat. 1510

Section, R.S. § 5202; Dec. 23, 1913, ch. 6, § 13, 38 Stat. 264; Sept. 7, 1916, ch. 461, 39 Stat. 753; Apr. 5, 1918, ch. 45, § 20, 40 Stat. 512; Oct. 22, 1919, ch. 79, § 2, 41 Stat. 297; Mar. 4, 1923, ch. 252, title V, § 504, 42 Stat. 1481; Feb. 25, 1927, ch. 191, § 11, 44 Stat. 1231; Jan. 22, 1932, ch. 8, § 5, formerly § 6, 47 Stat. 8, renumbered and amended June 30, 1947, ch. 166, title I, § 1, 61 Stat. 202; May 20, 1933, ch. 35, § 2, 48 Stat. 73; June 19, 1934, ch. 653, § 2, 48 Stat. 1107; Sept. 8, 1959, Pub. L. 86–230, § 10, 73 Stat. 458; Sept. 9, 1959, Pub. L. 86–251, § 2, 73 Stat. 488; July 24, 1970, Pub. L. 91–351, title II, § 201(b), 84 Stat. 451; Jan. 4, 1975, Pub. L. 93–646, § 11, 88 Stat. 2337, provided that no national banking association could at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, plus 50 percent of the amount of its unimpaired surplus fund, except on account of demands of the nature following: notes of circulation; moneys deposited with or collected by the association; bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto; liabilities to the stockholders of the association for dividends and reserve profits; liabilities incurred under the provisions of the Federal Reserve Act; liabilities incurred under the provisions of the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.]; liabilities created by the indorsement of accepted bills of exchange payable abroad actually owned by the indorsing bank and discounted at home or abroad; liabilities incurred under the provisions of sections 1031 to 1033 of this title; liabilities incurred on account of loans made with the express approval of the Comptroller of the Currency under former section 84(9) of this title; liabilities incurred under the provisions of section 352a of this title; liabilities incurred in connection with sales of mortgages, or participations therein, to the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; and liabilities incurred in borrowing from the Export-Import Bank of the United States.

§ 83. Loans on or purchase by bank of own stock

No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 192 of this title.

(R.S. § 5201.)

CODIFICATION

R.S. § 5201 derived from act June 3, 1864, ch. 106, § 35, 13 Stat. 110, which was the National Bank Act. See section 38 of this title.

§ 84. Lending limits

(a) Total loans and extensions of credit

(1) The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured, as determined in a manner consistent with paragraph (2) of this subsection, by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

(2) The total loans and extensions of credit by a national banking association to a person outstanding at one time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the funds outstanding shall not exceed 10 per centum of the unimpaired capital and unimpaired surplus of the association. This limitation shall be separate from and in addition to the limitation contained in paragraph (1) of this subsection.

(b) Definitions

For the purposes of this section—

(1) the term ''loans and extensions of credit'' shall include all direct or indirect advances of funds to a person made on the basis of any obligation of that person to repay the funds or repayable from specific property pledged by or on behalf of the person and, to the extent specified by the Comptroller of the Currency, such term shall also include any liability of a national banking association to advance funds to or on behalf of a person pursuant to a contractual commitment; and

(2) the term ''person'' shall include an individual, sole proprietorship, partnership, joint venture, association, trust, estate, business trust, corporation, sovereign government or agency, instrumentality, or political subdivision thereof, or any similar entity or organization.

(c) Exceptions

The limitations contained in subsection (a) of this section shall be subject to the following exceptions:

(1) Loans or extensions of credit arising from the discount of commercial or business paper evidencing an obligation to the person negotiating it with recourse shall not be subject to any limitation based on capital and surplus.

(2) The purchase of bankers' acceptances of the kind described in section 372 of this title and issued by other banks shall not be subject to any limitation based on capital and surplus.

(3) Loans and extensions of credit secured by bills of lading, warehouse receipts, or similar documents transferring or securing title to readily marketable staples shall be subject to a limitation of 35 per centum of capital and surplus in addition to the general limitations if the market value of the staples securing each additional loan or extension of credit at all times equals or exceeds 115 per centum of the outstanding amount of such loan or extension of credit. The staples shall be fully covered by insurance whenever it is customary to insure such staples.

(4) Loans or extensions of credit secured by bonds, notes, certificates of indebtedness, or Treasury bills of the United States or by other such obligations fully guaranteed as to principal and interest by the United States shall not be subject to any limitation based on capital and surplus.

(5) Loans or extensions of credit to or secured by unconditional takeout commitments or guarantees of any department, agency, bureau, board, commission, or establishment of the United States or any corporation wholly owned directly or indirectly by the United States shall not be subject to any limitation based on capital and surplus.

(6) Loans or extensions of credit secured by a segregated deposit account in the lending bank shall not be subject to any limitation based on capital and surplus.

(7) Loans or extensions of credit to any financial institution or to any receiver, conservator, superintendent of banks, or other agent in charge of the business and property of such financial institution, when such loans or extensions of credit are approved by the Comptroller of the Currency, shall not be subject to any limitation based on capital and surplus.

(8)(A) Loans and extensions of credit arising from the discount of negotiable or nonnegotiable installment consumer paper which carries a full recourse endorsement or unconditional guarantee by the person transferring the paper shall be subject under this section to a maximum limitation equal to 25 per centum of such capital and surplus, notwithstanding the collateral requirements set forth in subsection (a)(2) of this section.

(B) If the bank's files or the knowledge of its officers of the financial condition of each maker of such consumer paper is reasonably adequate, and an officer of the bank designated for that purpose by the board of directors of the bank certifies in writing that the bank is relying primarily upon the responsibility of each maker for payment of such loans or extensions of credit and not upon any full or partial recourse endorsement or guarantee by the transferor, the limitations of this section as to the loans or extensions of credit of each such maker shall be the sole applicable loan limitations.

(9)(A) Loans and extensions of credit secured by shipping documents or instruments transferring or securing title covering livestock or giving a lien on livestock when the market value of the livestock securing the obligation is not at any time less than 115 per centum of the face amount of the note covered, shall be subject under this section, notwithstanding the collateral requirements set forth in subsection (a)(2) of this section, to a maximum limitation equal to 25 per centum of such capital and surplus.

(B) Loans and extensions of credit which arise from the discount by dealers in dairy cattle of paper given in payment for dairy cattle, which paper carries a full recourse endorsement or unconditional guarantee of the seller, and which are secured by the cattle being sold, shall be subject under this section, notwithstanding the collateral requirements set forth in subsection (a)(2) of this section, to a limitation of 25 per centum of such capital and surplus.

(10) Loans or extensions of credit to the Student Loan Marketing Association shall not be subject to any limitation based on capital and surplus.

(d) Authority of Comptroller of the Currency

(1) The Comptroller of the Currency may prescribe rules and regulations to administer and carry out the purposes of this section, including rules or regulations to define or further define terms used in this section and to establish limits or requirements other than those specified in this section for particular classes or categories of loans or extensions of credit.

(2) The Comptroller of the Currency also shall have authority to determine when a loan putatively made to a person shall for purposes of this section be attributed to another person.

(R.S. § 5200; June 22, 1906, ch. 3516, 34 Stat. 451; Sept. 24, 1918, ch. 176, § 6, 40 Stat. 967; Oct. 22, 1919, ch. 79, § 1, 41 Stat. 296; Feb. 25, 1927, ch. 191, § 10, 44 Stat. 1229; May 20, 1933, ch. 35, § 1, 48 Stat. 73; June 16, 1933, ch. 89, § 26(a), 48 Stat. 191; Aug. 23, 1935, ch. 614, title III, § 321(b), 49 Stat. 713; June 11, 1942, ch. 404, § 8, 56 Stat. 356; July 15, 1949, ch. 338, title VI, § 602(b), 63 Stat. 440; July 22, 1937, ch. 517, § 15(a), as added Aug. 14, 1946, ch. 964, § 5, 60 Stat. 1079; amended Pub. L. 85–748, § 1(c), Aug. 25, 1958, 72 Stat. 841; Pub. L. 86–251, § 3, Sept. 9, 1959, 73 Stat. 488; Pub. L. 87–723, § 4(c)(4), Sept. 28, 1962, 76 Stat. 672; Pub. L. 90–19, § 27(b), May 25, 1967, 81 Stat. 29; Pub. L. 92–318, title I, § 133(c)(2), June 23, 1972, 86 Stat. 270; Pub. L. 97–320, title IV, § 401(a), Oct. 15, 1982, 96 Stat. 1508; Pub. L. 97–457, § 17(a), Jan. 12, 1983, 96 Stat. 2509.)

REFERENCES IN TEXT

Section 372 of this title, referred to in subsec. (c)(2), was in the original a reference to ''section 13 of the Federal Reserve Act''. Provisions of section 13 describing bankers' acceptances are classified to section 372 of this title. Other provisions of section 13 are classified to sections 342 to 347, 347c, 347d of this title.

CODIFICATION

R.S. § 5200 derived from act June 3, 1864, ch. 106, § 29, 13 Stat. 108, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1983—Subsec. (b)(1). Pub. L. 97–457 inserted a comma before ''to the extent specified by the Comptroller of the Currency''.

1982—Pub. L. 97–320 amended section generally. Prior to amendment, section read as follows: ''The total obligations to any national banking association of any person, copartnership, association, or corporation shall at no time exceed 10 per centum of the amount of the capital stock of such association actually paid in and unimpaired and 10 per centum of its unimpaired surplus fund. The term 'obligations' shall mean the direct liability of the maker or acceptor of paper discounted with or sold to such association and the liability of the indorser, drawer, or guarantor who obtains a loan from or discounts paper with or sells paper under his guaranty to such association and shall include in the case of obligations of a copartnership or association the obligations of the several members thereof and shall include in the case of obligations of a corporation all obligations of all subsidiaries thereof in which such corporation owns or controls a majority interest. Such limitation of 10 per centum shall be subject to the following exceptions:

''(1) Obligations in the form of drafts or bills of exchange drawn in good faith against actually existing values shall not be subject under this section to any limitation based upon such capital and surplus.

''(2) Obligations arising out of the discount of commercial or business paper actually owned by the per-

son, copartnership, association, or corporation negotiating the same shall not be subject under this section to any limitation based upon such capital and surplus.

''(3) Obligations drawn in good faith against actually existing values and secured by goods or commodities in process of shipment shall not be subject under this section to any limitation based upon such capital and surplus.

''(4) Obligations as indorser or guarantor of notes, other than commercial or business paper excepted under paragraph (2) of this section, having a maturity of not more than six months, and owned by the person, corporation, association, or copartnership indorsing and negotiating the same, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

''(5) Obligations in the form of banker's acceptances of other banks of the kind described in section 372 of this title shall not be subject under this section to any limitation based upon such capital and surplus.

''(6) Obligations of any person, copartnership, association or corporation, in the form of notes or drafts secured by shipping documents, warehouse receipts or other such documents transferring or securing title covering readily marketable nonperishable staples when such property is fully covered by insurance, if it is customary to insure such staples, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus when the market value of such staples securing such obligation is not at any time less than 115 per centum of the face amount of such obligation, and to an additional increase of limitation of 5 per centum of such capital and surplus in addition to such 25 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 120 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 30 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 125 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 35 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 130 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 40 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 135 per centum of the face amount of such additional obligation, and to a further additional increase of limitation of 5 per centum of such capital and surplus in addition to such 45 per centum of such capital and surplus when the market value of such staples securing such additional obligation is not at any time less than 140 per centum of the face amount of such additional obligation, but this exception shall not apply to obligations of any one person, copartnership, association, or corporation arising from the same transactions and/or secured by the identical staples for more than ten months. Obligations of any person, copartnership, association, or corporation in the form of notes or drafts secured by shipping documents, warehouse receipts, or other such documents transferring or securing title covering refrigerated or frozen readily marketable staples when such property is fully covered by insurance, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus when the market value of such staples securing such obligation is not at any time less than 115 per centum of the face amount of such additional obligation, but this exception shall not apply to obligations of any one person, copartnership, association or corporation arising from the same transactions and/or secured by the identical staples for more than six months.

''(7) Obligations of any person, copartnership, association, or corporation in the form of notes or drafts secured by shipping documents or instruments transferring or securing title covering livestock or giving a lien on livestock when the market value of the livestock securing the obligation is not at any time less than 115 per centum of the face amount of the notes covered by such documents shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus. Obligations arising out of the discount by dealers in dairy cattle of paper given in payment for dairy cattle, which bear a full recourse endorsement or unconditional guarantee of the seller and are secured by the cattle being sold, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

''(8) Obligations of any person, copartnership, association, or corporation secured by not less than a like amount of bonds or notes of the United States issued since April 24, 1917, or certificates of indebtedness of the United States, Treasury bills of the United States, or obligations fully guaranteed both as to principal and interest by the United States, shall (except to the extent permitted by rules and regulations prescribed by the Comptroller of the Currency, with the approval of the Secretary of the Treasury) be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

''(9) Obligations representing loans to any national banking association or to any banking institution organized under the laws of any State, or to any receiver, conservator, or superintendent of banks, or to any other agent, in charge of the business and property of any such association or banking institution, when such loans are approved by the Comptroller of the Currency, shall not be subject under this section to any limitation based upon such capital and surplus.

''(10) Obligations shall not be subject under this section to any limitation based upon such capital and surplus to the extent that such obligations are secured or covered by guaranties, or by commitments or agreements to take over or to purchase, made by any Federal Reserve bank or by the United States or any department, bureau, board, commission, or establishment of the United States, including any corporation wholly owned directly or indirectly by the United States: *Provided*, That such guaranties, agreements, or commitments are unconditional and must be performed by payment of cash or its equivalent within sixty days after demand. The Comptroller of the Currency is authorized to define the terms herein used if and when he may deem it necessary.

''(11) Obligations of a local public agency (as defined in section 110(h) of the Housing Act of 1949 [42 U.S.C. 1460(h)]) or of a public housing agency (as defined in the United States Housing Act of 1937, as amended [42 U.S.C. 1437 et seq.]) which have a maturity of not more than eighteen months shall not be subject under this section to any limitation, if such obligations are secured by an agreement between the obligor agency and the Secretary of Housing and Urban Development in which the agency agrees to borrow from the Secretary, and the Secretary agrees to lend to the agency, prior to the maturity of such obligations, monies in an amount which (together with any other monies irrevocably committed to the payment of interest on such obligations) will suffice to pay the principal of such obligations with interest to maturity, which monies under the terms of said agreement are required to be used for that purpose.

''(12) Obligations insured by the Secretary of Agriculture pursuant to the Bankhead-Jones Farm Tenant Act, as amended [7 U.S.C. 1000 et seq.], or the Act of August 28, 1937, as amended (relating to the conservation of water resources), or title V of the Housing Act of 1949 [42 U.S.C. 1471 et seq.], shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus.

''(13) Obligations as endorser or guarantor of negotiable or nonnegotiable installment consumer paper which carries a full recourse endorsement or unconditional guarantee by the person, copartnership, association, or corporation transferring the same, shall be subject under this section to a limitation of 15 per centum of such capital and surplus in addition to such 10 per centum of such capital and surplus: *Provided, however*, That if the bank's files or the knowledge of its officers of the financial condition of each maker of such obligations is reasonably adequate, and upon certification by an officer of the bank designated for that purpose by the board of directors of the bank, that the responsibility of each maker of such obligations has been evaluated and the bank is relying primarily upon each such maker for the payment of such obligations, the limitations of this section as to the obligations of each such maker shall be the sole applicable loan limitation: *Provided further*, That such certification shall be in writing and shall be retained as part of the records of such bank.

''(14) Obligations of the Student Loan Marketing Association shall not be subject to any limitation based upon such capital and surplus.''

1972—Par. (14). Pub. L. 92–318 added par. (14).

1967—Par. (11). Pub. L. 90–19 substituted ''Secretary of Housing and Urban Development'' for ''Housing and Home Finance Administrator or the Public Housing Administration'' and ''Secretary'' for ''Administrator or Administration'' wherever appearing, respectively.

1962—Par. (12). Pub. L. 87–723 inserted ''or title V of the Housing Act of 1949'' before ''shall be subject under this section''.

1959—Par. (6). Pub. L. 86–251, § 3(a), substituted ''secured by'' for ''secured upon'' and inserted exception with respect to obligations secured by documents transferring or securing title covering refrigerated or frozen readily marketable staples.

Par. (7). Pub. L. 86–251, § 3(b), inserted exception with respect to obligations arising out of the discount by dealers in dairy cattle of paper given in payment for dairy cattle.

Par. (8). Pub. L. 86–251, § 3(c), struck out ''in the form of notes'' after ''corporation''.

Par. (13). Pub. L. 86–251, § 3(d), added par. (13).

1958—Par. (12). Pub. L. 85–748 amended section 15(a) of act July 22, 1937, as added by act Aug. 14, 1946, by inserting sentence amending R.S. § 5200 by adding par. (12).

1949—Par. (11). Act July 15, 1949, added par. (11).

1942—Par. (10). Act June 11, 1942, added par. (10).

1935—Par. (8). Act Aug. 23, 1935, inserted ''Treasury bills of the United States, or obligations fully guaranteed both as to principal and interest by the United States''.

1933—Par. (1). Act June 16, 1933, inserted provision relating to obligations of a corporation and its subsidiaries in second sentence.

Par. (9). Act May 20, 1933, added par. (9).

1927—Act Feb. 25, 1927, reenacted section, subdividing it into eight numbered exceptions.

EFFECTIVE DATE OF 1982 AMENDMENT

Section 401(b) of Pub. L. 97–320 provided that: ''This section [amending this section] shall take effect upon the expiration of one hundred and eighty days after the date of its enactment [Oct. 15, 1982].''

REPEALS

Repealing provisions of Consolidated Farmers Home Administration Act of 1961 as not having the effect of repealing the amendment to this section enacted by act July 22, 1937, § 15(a), as added Aug. 14, 1946, see section 341(a) of Pub. L. 87–128, title III, Aug. 8, 1961, 75 Stat. 318, set out as a note under section 1921 of Title 7, Agriculture.

SAVINGS PROVISION

Section 26(b) of act June 16, 1933, provided: ''The amendment made by this section [amending this section] shall not apply to such obligations of subsidiaries held by such association on the date this section takes effect.''

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 3, 47 Stat. 1567 (D.C. Code, § 26–102).

CROSS REFERENCES

Loans, State member banks as subject to limitations and conditions applicable to national banks under par. (8), see section 248 of this title.

Rediscount of notes, drafts, and bills for member banks; limitation of amount, see section 345 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 248, 345, 375b, 1464 of this title.

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place

than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

(R.S. § 5197; June 16, 1933, ch. 89, § 25, 48 Stat. 191; Aug. 23, 1935, ch. 614, title III, § 314, 49 Stat. 711; Pub. L. 93–501, title II, § 201, Oct. 29, 1974, 88 Stat. 1558; Pub. L. 96–104, title I, § 101, Nov. 5, 1979, 93 Stat. 789; Pub. L. 96–161, title II, § 201, Dec. 28, 1979, 93 Stat. 1235; Pub. L. 96–221, title V, § 529, Mar. 31, 1980, 94 Stat. 168.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in text, was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. § 5197 derived from act June 3, 1864, ch. 106, § 30, 13 Stat. 108, which was the National Bank Act. See section 38 of this title.

Section 201 of Pub. L. 96–161, cited as a credit to this section, was repealed by section 529 of Pub. L. 96–221, effective at the close of Mar. 31, 1980. The amendment of this section by that repealed provision, described in the 1979 Amendments note below, shall continue in effect for limited purposes pursuant to section 529. See Savings Provisions note, describing the provisions of section 529 of Pub. L. 96–221, set out below.

Section 101 of Pub. L. 96–104, cited as a credit to this section, was repealed by section 212 of Pub. L. 96–161, effective at the close of Dec. 27, 1979. The amendment of this section by that repealed provision, described in the 1979 Amendments note below, shall continue in effect for limited purposes pursuant to section 212 of Pub. L. 96–161. See Savings Provisions note, describing the provisions of section 212 of Pub. L. 96–161, set out below. The amendment by Pub. L. 96–104, § 101, was duplicated with identical language in the amendment made by Pub. L. 96–161, § 201. See 1979 Amendments note below.

Section 201 of Pub. L. 93–501, cited as a credit to this section, was repealed by Pub. L. 96–104, § 1, Nov. 5, 1979, 93 Stat. 789. The amendment of this section by that repealed provision, described in the 1974 Amendment note set out under this section, was duplicated in 1979 with identical language under section 101 of Pub. L. 96–104. See 1979 Amendments note below.

AMENDMENTS

1980—Pub. L. 96–221 repealed Pub. L. 96–104 and title II of Pub. L. 96–161, resulting in the striking out of ''or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located,'' before ''whichever may be the greater'' in two places. See Codification and 1979 Amendment notes under this section.

1979—Pub. L. 96–161 inserted provisions relating to a 5 per centum interest rate on business or agricultural loans in the amount of $25,000 or more that were identical to provisions inserted earlier by Pub. L. 96–104. See Codification note above.

Pub. L. 96–104 substituted ''or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater'' for ''whichever may be the greater'' in two places. See Codification note above.

1974—Pub. L. 93–501 substituted ''or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located, whichever may be the greater'' for ''whichever may be the greater'' in two places.

1935—Act Aug. 23, 1935, inserted third sentence.

1933—Act June 16, 1933, authorized interest at the alternative rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the federal reserve bank in the Federal Reserve district where the bank is located if greater.

EFFECTIVE DATE OF 1980 AMENDMENT

Section 529 of Pub. L. 96–221 provided that the amendment made by that section is effective at the close of Mar. 31, 1980.

EFFECTIVE DATE OF 1979 AMENDMENTS

Section 207 of Pub. L. 96–161, which provided that amendment by Pub. L. 96–161 was applicable to loans made in any State during the period beginning on Dec. 28, 1979, and ending on the earliest of (1) in the case of a State statute, July 1, 1980; (2) the date, after Dec. 28, 1979, on which such State adopts a law stating in substance that such State does not want the amendment of this section made by Pub. L. 96–161 to apply with respect to loans made in such State; or (3) the date on which such State certifies that the voters of such State, after Dec. 28, 1979, have voted in favor of, or to retain, any law, provision of the constitution of such State, or amendment to the constitution of such State which prohibits the charging of interest at the rates provided in the amendment of this section by Pub. L. 96–161, was repealed by Pub. L. 96–221, title V, § 529, Mar. 31, 1980, 94 Stat. 168.

Section 107 of Pub. L. 96–104, which provided that amendment by Pub. L. 96–104 was applicable to loans made by any State during the period beginning on Nov. 5, 1979, and ending on the earlier of July 1, 1981, or the date after Nov. 5, 1979, on which such State adopts a law stating in substance that such State does not want the amendment of this section to apply with respect to loans made in such State, or the date on which such State certifies that the voters of such State have voted in favor of, or to retain, any law, provision of the constitution of such State, or amendment of the constitution of such State, which prohibits the charging of interest at the rates provided in the amendment of this section, was repealed by Pub. L. 96–161, title II, § 212, Dec. 28, 1979, 93 Stat. 1239.

EFFECTIVE AND TERMINATION DATES OF 1974 AMENDMENT

Section 206 of Pub. L. 93–501, which provided that amendment by Pub. L. 93–501 applicable to loans made in any state after Oct. 29, 1974, but prior to the earlier of July 1, 1977, or the date (after Oct. 29, 1974) of enactment by the state of a law prohibiting the charging of interest at the rates provided in the amendment of this section, was repealed by Pub. L. 96–104, § 1, Nov. 5, 1979, 93 Stat. 789.

SAVINGS PROVISIONS

Section 529 of Pub. L. 96–221 provided in part that, notwithstanding the repeal of Pub. L. 96–104 and title II of Pub. L. 96–161, the provisions added to this section by those repealed laws shall continue to apply to any loan made, any deposit made, or any obligation issued in any State during any period when those provisions were in effect in such State.

Section 212 of Pub. L. 96–161 provided in part that, notwithstanding the repeal, effective at the close of

Dec. 27, 1979, of Pub. L. 96–104 [which had enacted sections 86a, 371b–1, 1730e, and 1831a of this title, amended sections 85, 1425b, and 1828 of this title and section 687 of Title 15, Commerce and Trade, repealed sections 371b–1, 1730e, and 1831a of this title and notes set out under sections 371b–1 and 1831a of this title, and enacted provisions set out as notes under this section and sections 86a, 371b–1, and 1831a of this title], the amendment which had been made by title I of Pub. L. 96–104 and the provisions of that title would continue to apply to any loan made in any State on or after Nov. 5, 1979, but prior to the repeal of Pub. L. 96–104, and that the amendments made by title II of Pub. L. 96–104 would continue to apply to any deposit made or obligation issued in any State on or after Nov. 5, 1979, but prior to the repeal of Pub. L. 96–104.

Section 1 of Pub. L. 96–104 provided in part that, notwithstanding the repeal of titles II and III of Pub. L. 93–501 [which had enacted sections 371b–1, 1730e, and 1831a of this title, amended sections 85, 1425b, and 1828 of this title, and section 687 of Title 15, Commerce and Trade, and enacted provisions set out as notes under sections 371b–1 and 1831a of this title], the amendments which had been made by title II of that Act and the provisions of such title would continue to apply to any loan made in any State during the period specified in section 206 of such Act [set out as a note under section 1831a of this title] and that the amendments which had been made by title III of such Act would continue to apply to any deposit made or obligation issued in any State during the period specified in section 304 of such Act [set out as a note under section 371b–1 of this title].

CHOICE OF HIGHEST APPLICABLE INTEREST RATE

In any case in which one or more provisions of, or amendments made by, title V of Pub. L. 96–221 [enacting sections 86a, 1730g, 1735f–7a, 1785(g), and 1831d of this title and section 687(i) of Title 15, Commerce and Trade, and enacting provisions set out as notes under sections 86a, 1730g, and 1735f–7 of this title], section 1735f–7 of this title, or any other provisions of law, including this section, apply with respect to the same loan, mortgage, credit sale, or advance, such loan, mortgage, credit sale, or advance may be made at the highest applicable rate, see section 528 of Pub. L. 96–221, set out as a note under section 1735f–7a of this title.

STATES HAVING CONSTITUTIONAL PROVISIONS REGARDING MAXIMUM INTEREST RATES

Section 213 of Pub. L. 96–161 provided that the provisions of title II of Pub. L. 96–161, which amended this section, repealed provisions which had formerly amended this section, and enacted provisions set out as notes under this section, to continue to apply until July 1, 1981, in the case of any State having a constitutional provision regarding maximum interest rates.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 86 of this title.

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: *Provided*, That such action is commenced within two years from the time the usurious transaction occurred.

(R.S. § 5198.)

CODIFICATION

R.S. § 5198 (less last sentence) derived from act June 3, 1864, ch. 106, § 30, 13 Stat. 108, which was the National Bank Act. See section 38 of this title.

Section is based on R.S. § 5198, less last sentence as added by act Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320, which is classified to section 94 of this title.

FEDERAL RULES OF CIVIL PROCEDURE

One form of action, see rule 2, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 86a. Omitted

CODIFICATION

Section, Pub. L. 96–221, title V, § 511, Mar. 31, 1980, 94 Stat. 164; Pub. L. 96–399, title III, § 324(b), (d), Oct. 8, 1980, 94 Stat. 1648, which authorized interest on business or agricultural loans of $1,000 or more at a rate of not more than 5 per centum in excess of the discount rate, was omitted pursuant to section 512 of Pub. L. 96–221 which made these provisions applicable only with respect to such loans made in any State during the period beginning on April 1, 1980, and ending on the earlier of (1) April 1, 1983, or (2) the date, on or after April 1, 1980, on which such State adopts a law or certifies that the voters of such State have voted in favor of any provision, constitutional or otherwise, which states explicitly that such State does not want these provisions to apply with respect to loans made in such State.

A prior section 86a, Pub. L. 96–161, title II, § 205, Dec. 28, 1979, 93 Stat. 1237, similar to this section as enacted by Pub. L. 96–221, was repealed by section 529 of Pub. L. 96–221, effective at the close of Mar. 31, 1980, except that its provisions would continue to apply to any loan made, any deposit made, or any obligation issued in any State during any period when that section was in effect in such State. For the effective date provisions relating to the prior section 86a, see section 207 of Pub. L. 96–161.

Another prior section 86a, Pub. L. 96–104, title I, § 105, Nov. 5, 1979, 93 Stat. 791, identical to this section as enacted by Pub. L. 96–161, was repealed by section 212 of Pub. L. 96–161, effective at the close of Dec. 27, 1979, except that its provisions would continue to apply to loans made in any State on or after Nov. 5, 1979, but prior to such repeal.

Section 301 of Pub. L. 96–104, which limited the applicability of Pub. L. 96–104 to those States having a constitutional provision that all contracts for a greater rate of interest than 10 per centum per annum are void as to both principal and interest, was repealed by section 212 of Pub. L. 96–161, effective at the close of Dec. 27, 1979.

§§ 87 to 89. Repealed. Pub. L. 103–325, title VI, § 602(e)(2)–(4), Sept. 23, 1994, 108 Stat. 2291

Section 87, R.S. § 5203, related to restriction on use by bank of its circulating notes.

Section 88, R.S. § 5206, related to restriction on use by bank of notes of other banks.

Section 89, R.S. § 5196, related to duty of bank to receive circulating notes of other banks in payment of debts.

§ 90. Depositaries of public moneys and financial agents of Government

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as de-

positaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided*, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided*, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any national banking association may, upon the deposit with it of any funds by any State or political subdivision thereof or any agency or other governmental instrumentality of one or more States or political subdivisions thereof, including any officer, employee, or agent thereof in his official capacity, give security for the safekeeping and prompt payment of the funds so deposited to the same extent and of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

Any national banking association may, upon the deposit with it of any funds by any federally recognized Indian tribe, or any officer, employee, or agent thereof in his or her official capacity, give security for the safekeeping and prompt payment of the funds so deposited by the deposit of United States bonds and otherwise as may be prescribed by the Secretary of the Treasury for public funds under the first paragraph of this section.

Notwithstanding the Federal Property and Administrative Services Act of 1949, as amended [40 U.S.C. 471 et seq.], the Secretary may select associations as financial agents in accordance with any process the Secretary deems appropriate and their reasonable duties may include the provision of electronic benefit transfer services (including State-administered benefits with the consent of the States), as defined by the Secretary.

(R.S. §5153; Mar. 3, 1901, ch. 871, 31 Stat. 1448; Mar. 4, 1907, ch. 2913, §3, 34 Stat. 1290; Dec. 23, 1913, ch. 6, §27, 38 Stat. 274; Aug. 4, 1914, ch. 225, 38 Stat. 682; June 25, 1930, ch. 604, 46 Stat. 809; Aug. 18, 1950, ch. 754, 64 Stat. 463; Pub. L. 96–153, title III, §323(f), Dec. 21, 1979, 93 Stat. 1120; Pub. L. 104–208, div. A, title I, §101(f) [§2(1)], Sept. 30, 1996, 110 Stat. 3009–314, 3009–386.)

REFERENCES IN TEXT

The Federal Property and Administrative Services Act of 1949, referred to in text, is act June 30, 1949, ch. 288, 63 Stat. 377, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 471 of Title 40, Public Buildings, Property, and Works, and Tables.

CODIFICATION

R.S. §5153 derived from act June 3, 1864, ch. 106, §45, 13 Stat. 113, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1996—Pub. L. 104–208 added fourth par.

1979—Pub. L. 96–153 added third par.

1950—Act Aug. 18, 1950, permitted national banks to accept and give security for deposits of funds made by agencies or governmental instrumentalities or States or political subdivisions thereof and by their officers, employees or agents.

1930—Act June 25, 1930, added second par.

§ 91. Transfers by bank and other acts in contemplation of insolvency

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by chapter 4 of title 62 of the Revised Statutes, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

(R.S. §5242.)

REFERENCES IN TEXT

Chapter 4 of title 62 of the Revised Statutes, referred to in text, was in the original ''this chapter'', meaning chapter 4 of title 62 of the Revised Statutes, consisting of R.S. §§5220 to 5244, which are classified to sections 43, 91, 93, 93a, 131 to 138, 181 to 186, 192 to 196, and 481 to 485 of this title. See, also, section 709 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§5220 to 5244 to the Code, see Tables.

CODIFICATION

R.S. §5242 derived from act June 3, 1864, ch. 106, §52, 13 Stat. 115, which was the National Bank Act, and act Mar. 3, 1873, ch. 269, §2, 17 Stat. 603. See section 38 of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Execution, see rule 69, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 92. Acting as insurance agent or broker

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank

is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however*, That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

(Dec. 23, 1913, ch. 6, § 13 (par.), as added Sept. 7, 1916, ch. 461, 39 Stat. 753; amended Pub. L. 97–320, title IV, § 403(b), Oct. 15, 1982, 96 Stat. 1511.)

CODIFICATION

Section is based on the eleventh par. of section 13 of act Dec. 23, 1913, as amended. The eleventh par. constituted the ninth par. of section 13 in 1916 (39 Stat. 752, 753), became the tenth par. in 1923 (42 Stat. 1478), and became the eleventh par. in 1932 (47 Stat. 715). For further details, see Codification notes under sections 342 to 344 of this title.

For decision by U.S. Supreme Court that, despite faulty placement of quotation marks, act Sept. 7, 1916, placed within section 13 of act Dec. 23, 1913, each of the ten pars. located between the phrases that introduced the amendments to sections 13 and 14 of said act, that only the seventh par. (rather than seventh to tenth pars.) comprised the amended R.S. § 5202, and that section 20 of act Apr. 5, 1918 (40 Stat. 512) (which amended R.S. § 5202 comprised of a single par.), did not amend section 13 of said act so as to repeal the eighth to tenth pars., see *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc., et al.*, 508 U.S. 439, 113 S.Ct. 2173, 124 L.Ed. 2d 402 (1993). As the result of subsequent amendments, such seventh to tenth pars. of section 13 now constitute the ninth to twelfth pars. The ninth par. amended former section 82 of this title, and the tenth to twelfth pars. are classified to sections 361, 92, and 373, respectively, of this title.

AMENDMENTS

1982—Pub. L. 97–320 struck out ''; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission'' after ''may act as agent'' and ''guarantee either the principal or interest of any such loans or'' after ''shall in any case''.

EFFECTIVE DATE OF 1982 AMENDMENT

Amendment by Pub. L. 97–320 effective upon the expiration of 180 days after Oct. 15, 1982, see section 403(c) of Pub. L. 97–320, set out as a note under section 371 of this title.

MORATORIUM

Pub. L. 100–86, title II, § 201(a), (b)(5), Aug. 10, 1987, 101 Stat. 581, 583, provided that, during period beginning Mar. 6, 1987, and ending Mar. 1, 1988, national banks and Federal branches or agencies of foreign banks could not expand their insurance agency activities pursuant to this section into places where they were not conducting such activities as of Mar. 5, 1987.

§ 92a. Trust powers

(a) Authority of Comptroller of the Currency

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Grant and exercise of powers deemed not in contravention of State or local law

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

(c) Segregation of fiduciary and general assets; separate books and records; access of State banking authorities to reports of examinations, books, records, and assets

National banks exercising any or all of the powers enumerating[1] in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this section shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

(d) Prohibited operations; separate investment account; collateral for certain funds used in conduct of business

No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

(e) Lien and claim upon bank failure

In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

(f) Deposits of securities for protection of private or court trusts; execution of and exemption from bond

Whenever the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make simi-

[1] So in original. Probably should be ''enumerated''.

lar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law. National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement. National banks shall have power to execute such bond when so required by the laws of the State.

(g) Officials' oath or affidavit

In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

(h) Loans of trust funds to officers and employees prohibited; penalties

It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

(i) Considerations determinative of grant or denial of applications; minimum capital and surplus for issuance of permit

In passing upon applications for permission to exercise the powers enumerated in this section, the Comptroller of the Currency may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to him proper, and may grant or refuse the application accordingly: *Provided*, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

(j) Surrender of authorization; board resolution; Comptroller certification; activities affected; regulations

Any national banking association desiring to surrender its right to exercise the powers granted under this section, in order to relieve itself of the necessity of complying with the requirements of this section, or to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, or for any other purpose, may file with the Comptroller of the Currency a certified copy of a resolution of its board of directors signifying such desire. Upon receipt of such resolution, the Comptroller of the Currency, after satisfying himself that such bank has been relieved in accordance with State law of all duties as trustee, executory,[2] administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or other fiduciary, under court, private, or other appointments previously accepted under authority of this section, may, in his discretion, issue to such bank a certificate certifying that such bank is no longer authorized to exercise the powers granted by this section. Upon the issuance of such a certificate by the Comptroller of the Currency, such bank (1) shall no longer be subject to the provisions of this section or the regulations of the Comptroller of the Currency made pursuant thereto, (2) shall be entitled to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, and (3) shall not exercise thereafter any of the powers granted by this section without first applying for and obtaining a new permit to exercise such powers pursuant to the provisions of this section. The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein.

(k) Revocation; procedures applicable

(1) In addition to the authority conferred by other law, if, in the opinion of the Comptroller of the Currency, a national banking association is unlawfully or unsoundly exercising, or has unlawfully or unsoundly exercised, or has failed for a period of five consecutive years to exercise, the powers granted by this section or otherwise fails or has failed to comply with the requirements of this section, the Comptroller may issue and serve upon the association a notice of intent to revoke the authority of the association to exercise the powers granted by this section. The notice shall contain a statement of the facts constituting the alleged unlawful or unsound exercise of powers, or failure to exercise powers, or failure to comply, and shall fix a time and place at which a hearing will be held to determine whether an order revoking authority to exercise such powers should issue against the association.

(2) Such hearing shall be conducted in accordance with the provisions of section 1818(h) of this title, and subject to judicial review as provided in such section, and shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or later date is set by the Comptroller at the request of any association so served.

(3) Unless the association so served shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the issuance of the revocation order. In the event of such consent, or if upon the record made at any such hearing, the Comptroller shall find that any allegation specified in the notice of charges has been established, the Comptroller may issue and serve upon the association an order prohibiting it from accepting any new or additional trust accounts and revoking authority to exercise any and all powers granted by this section, except that such order shall permit the association to continue to service all previously accepted trust accounts pending their expeditious divestiture or termination.

[2] So in original. Probably should be ''executor,''.

(4) A revocation order shall become effective not earlier than the expiration of thirty days after service of such order upon the association so served (except in the case of a revocation order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable, except to such extent as it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court.

(Pub. L. 87–722, § 1, Sept. 28, 1962, 76 Stat. 668; Pub. L. 96–221, title VII, § 704, Mar. 31, 1980, 94 Stat. 187.)

AMENDMENTS

1980—Subsec. (k). Pub. L. 96–221 added subsec. (k).

SAVINGS PROVISION

Section 2 of Pub. L. 87–722 provided that: ''Nothing contained in this Act [enacting this section, amending sections 581 and 584(a)(2) of Title 26, and repealing section 248(k) of this title] shall be deemed to affect or curtail the right of any national bank to act in fiduciary capacities under a permit granted before the date of enactment of this Act [Sept. 28, 1962] by the Board of Governors of the Federal Reserve System, nor to affect the validity of any transactions entered into at any time by any national bank pursuant to such permit. On and after the date of enactment of this Act the exercise of fiduciary powers by national banks shall be subject to the provisions of this Act and the requirements of regulations issued by the Comptroller of the Currency pursuant to the authority granted by this Act.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 93 of this title; title 15 sections 78c, 80a–2, 80b–2.

§ 93. Violation of provisions of chapter

(a) Forfeiture of franchise; personal liability of directors

If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of title 62 of the Revised Statutes, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

(b) Civil money penalty

(1) First tier

Any national banking association which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such association who, violates any provision of title 62 of the Revised Statutes or any of the provisions of section 92a of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(2) Second tier

Notwithstanding paragraph (1), any national banking association which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such association who, commits any violation described in paragraph (1) which—[1]

(A)(i) commits any violation described in any[2] paragraph (1);

(ii) recklessly engages in an unsafe or unsound practice in conducting the affairs of such association; or

(iii) breaches any fiduciary duty;

(B) which violation, practice, or breach—

(i) is part of a pattern of misconduct;

(ii) causes or is likely to cause more than a minimal loss to such association; or

(iii) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(3) Third tier

Notwithstanding paragraphs (1) and (2), any national banking association which, and any institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such association who—

(A) knowingly—

(i) commits any violation described in paragraph (1);

(ii) engages in any unsafe or unsound practice in conducting the affairs of such association; or

(iii) breaches any fiduciary duty; and

(B) knowingly or recklessly causes a substantial loss to such association or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under paragraph (4) for each day during which such violation, practice, or breach continues.

(4) Maximum amounts of penalties for any violation described in paragraph (3)

The maximum daily amount of any civil penalty which may be assessed pursuant to paragraph (3) for any violation, practice, or breach described in such paragraph is—

(A) in the case of any person other than a national banking association, an amount to not[3] exceed $1,000,000; and

(B) in the case of a national banking association, an amount not to exceed the lesser of—

(i) $1,000,000; or

(ii) 1 percent of the total assets of such association.

(5) Assessment; etc.

Any penalty imposed under paragraph (1), (2), or (3) shall be assessed and collected by the

[1] So in original. The words '', commits any violation described in paragraph (1) which'' probably should not appear.

[2] So in original. The word ''any'' probably should not appear.

[3] So in original. Probably should be ''not to''.

Comptroller of the Currency in the manner provided in subparagraphs (E), (F), (G), and (I) of section 1818(i)(2) of this title for penalties imposed (under such section) and any such assessment shall be subject to the provisions of such section.

(6) Hearing

The association or other person against whom any penalty is assessed under this subsection shall be afforded an agency hearing if such association or person submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section 1818(h) of this title shall apply to any proceeding under this subsection.

(7) Disbursement

All penalties collected under authority of this subsection shall be deposited into the Treasury.

(8) "Violate" defined

For purposes of this section, the term ''violate'' includes any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(12)[4] Regulations

The Comptroller shall prescribe regulations establishing such procedures as may be necessary to carry out this subsection.

(c) Notice under this section after separation from service

The resignation, termination of employment or participation, or separation of an institution-affiliated party (within the meaning of section 1813(u) of this title) with respect to such an association (including a separation caused by the closing of such an association) shall not affect the jurisdiction and authority of the Comptroller of the Currency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such association (whether such date occurs before, on, or after August 9, 1989).

(d) Forfeiture of franchise for money laundering or cash transaction reporting offenses

(1) In general

(A) Conviction of title 18 offenses

(i) Duty to notify

If a national bank, a Federal branch, or Federal agency has been convicted of any criminal offense under section 1956 or 1957 of title 18, the Attorney General shall provide to the Comptroller of the Currency a written notification of the conviction and shall include a certified copy of the order of conviction from the court rendering the decision.

(ii) Notice of termination; pretermination hearing

After receiving written notification from the Attorney General of such a conviction, the Comptroller of the Currency shall issue to the national bank, Federal branch, or Federal agency a notice of the Comptroller's intention to terminate all rights, privileges, and franchises of the bank, Federal branch, or Federal agency and schedule a pretermination hearing.

(B) Conviction of title 31 offenses

If a national bank, a Federal branch, or a Federal agency is convicted of any criminal offense under section 5322 or 5324 of title 31, after receiving written notification from the Attorney General, the Comptroller of the Currency may issue to the national bank, Federal branch, or Federal agency a notice of the Comptroller's intention to terminate all rights, privileges, and franchises of the bank, Federal branch, or Federal agency and schedule a pretermination hearing.

(C) Judicial review

Section 1818(h) of this title shall apply to any proceeding under this subsection.

(2) Factors to be considered

In determining whether a franchise shall be forfeited under paragraph (1), the Comptroller of the Currency shall take into account the following factors:

(A) The extent to which directors or senior executive officers of the national bank, Federal branch, or Federal agency knew of, or were involved in, the commission of the money laundering offense of which the bank, Federal branch, or Federal agency was found guilty.

(B) The extent to which the offense occurred despite the existence of policies and procedures within the national bank, Federal branch, or Federal agency which were designed to prevent the occurrence of any such offense.

(C) The extent to which the national bank, Federal branch, or Federal agency has fully cooperated with law enforcement authorities with respect to the investigation of the money laundering offense of which the bank, Federal branch, or Federal agency was found guilty.

(D) The extent to which the national bank, Federal branch, or Federal agency has implemented additional internal controls (since the commission of the offense of which the bank, Federal branch, or Federal agency was found guilty) to prevent the occurrence of any other money laundering offense.

(E) The extent to which the interest of the local community in having adequate deposit and credit services available would be threatened by the forfeiture of the franchise.

(3) Successor liability

This subsection shall not apply to a successor to the interests of, or a person who acquires, a bank, a Federal branch, or a Federal agency that violated a provision of law described in paragraph (1), if the successor succeeds to the interests of the violator, or the acquisition is made, in good faith and not for purposes of evading this subsection or regulations prescribed under this subsection.

[4] So in original. No pars. (9) to (11) have been enacted.

(4) "Senior executive officer" defined

The term ''senior executive officer'' has the same meaning as in regulations prescribed under section 1831i(f) of this title.

(d)[5] Authority

The Comptroller of the Currency may act in the Comptroller's own name and through the Comptroller's own attorneys in enforcing any provision of title 62 of the Revised Statutes, regulations thereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Comptroller of the Currency is a party.

(R.S. § 5239; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Pub. L. 95–630, title I, § 103, Nov. 10, 1978, 92 Stat. 3643; Pub. L. 97–320, title IV, § 424(d)(3), (f), (g), Oct. 15, 1982, 96 Stat. 1523; Pub. L. 97–457, § 24, Jan. 12, 1983, 96 Stat. 2510; Pub. L. 101–73, title IX, §§ 905(e), 907(e), Aug. 9, 1989, 103 Stat. 460, 469; Pub. L. 102–550, title XV, § 1502(a), Oct. 28, 1992, 106 Stat. 4045; Pub. L. 103–322, title XXXIII, § 330017(b)(2), Sept. 13, 1994, 108 Stat. 2149; Pub. L. 103–325, title III, § 331(b)(3), title IV, §§ 411(c)(2)(C), 413(b)(2), Sept. 23, 1994, 108 Stat. 2232, 2253, 2254.)

REFERENCES IN TEXT

Title 62 of the Revised Statutes, referred to in subsecs. (a), (b)(1), and (d), was in the original ''this Title'' meaning title 62 of the Revised Statutes, consisting of R.S. §§ 5133 to 5244, which are classified to sections 21, 22 to 24, 25a, 26 to 29, 35 to 37, 39, 43, 51, 52, 53, 56, 57, 59 to 62, 66, 71, 72 to 76, 81, 83 to 86, 90, 91, 93, 93a, 94, 101a, 102, 104, 107 to 110, 123, 124, 131 to 138, 141 to 144, 151, 152, 161, 164, 168 to 175, 181 to 186, 192 to 196, 215c, 481 to 485, 501, 541, 548, and 582 of this title. See, also, sections 8, 333, 334, 475, 656, 709, 1004, and 1005 of Title 18, Crimes and Criminal Procedure. For complete classification of R.S. §§ 5133 to 5244 to the Code, see Tables.

CODIFICATION

R.S. § 5239 derived from act June 3, 1864, ch. 106, § 53, 13 Stat. 116, which was the National Bank Act. See section 38 of this title.

Act Mar. 3, 1911, conferred the powers and duties of the former circuit courts upon the district courts.

AMENDMENTS

1994—Subsec. (c). Pub. L. 103–322, § 330017(b)(2), and Pub. L. 103–325, § 413(b)(2), amended section identically, redesignating subsec. (c), relating to forfeiture of franchise for money laundering, as (d).

Subsec. (d). Pub. L. 103–322, § 330017(b)(2), and Pub. L. 103–325, § 413(b)(2), amended section identically, redesignating subsec. (c), relating to forfeiture of franchise for money laundering, as (d).

Pub. L. 103–325, § 331(b)(3), added subsec. (d) relating to authority.

Subsec. (d)(1)(B). Pub. L. 103–325, § 411(c)(2)(C), substituted ''section 5322 or 5324 of title 31'' for ''section 5322 of title 31''.

1992—Subsec. (c). Pub. L. 102–550 added subsec. (c) relating to forfeiture of franchise for money laundering.

1989—Subsec. (b). Pub. L. 101–73, § 907(e), amended subsec. (b) generally, revising and restating as pars. (1) to (8) and (12) provisions of former pars. (1) to (8).

Subsec. (c). Pub. L. 101–73, § 905(e), added subsec. (c) relating to notice after separation from service.

1982—Subsec. (b)(1). Pub. L. 97–320, as amended by Pub. L. 97–457, inserted ''or any of the provisions of section 92a of this title'', and substituted ''may be assessed'' for ''shall be assessed'' and ''title'' for ''chapter''.

1978—Pub. L. 95–630 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1989 AMENDMENT

Section 907(*l*) of Pub. L. 101–73 provided that: ''The amendments made by this section [amending this section and sections 481, 504, 505, 1467a, 1786, 1817, 1818, 1828, 1847, and 1972 of this title] shall apply with respect to conduct engaged in by any person after the date of the enactment of this Act [Aug. 9, 1989], except that the increased maximum civil penalties of $5,000 and $25,000 per violation or per day may apply to such conduct engaged in before such date if such conduct—

''(1) is not already subject to a notice (initiating an administrative proceeding) issued by the appropriate Federal banking agency (as defined in section 3(q) of the Federal Deposit Insurance Act [12 U.S.C. 1813(q)]) or the National Credit Union Administration Board; and

''(2) occurred after the completion of the last report of examination of the institution involved by the appropriate Federal banking agency (as so defined) occurring before the date of the enactment of this Act.''

EFFECTIVE DATE OF 1978 AMENDMENT

Section 109 of title I of Pub. L. 95–630 provided that: ''Any amendment made by this title which provides for the imposition of civil penalties [enacting sections 504 and 505 of this title and amending this section and sections 1464, 1730, 1730a, 1786, 1818, 1828, and 1847 of this title] shall apply only to violations occurring or continuing after the date of its enactment [Nov. 10, 1978].''

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Appointment of receiver, see section 191 et seq. of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1831k of this title; title 31 sections 3121, 9110.

§ 93a. Authority to prescribe rules and regulations

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the ''Glass-Steagall Act''.

(R.S. § 5239A, as added Pub. L. 96–221, title VII, § 708, Mar. 31, 1980, 94 Stat. 188.)

REFERENCES IN TEXT

The Glass-Steagall Act, referred to in text, probably refers to act June 16, 1933, ch. 89, 48 Stat. 162, as amended, also known as the Banking Act of 1933 or the Glass-Steagall Act, 1933, rather than to act Feb. 27, 1932, ch. 58, 47 Stat. 56, known as the Glass-Steagall Act, 1932. Section 16 of the 1933 act, which amended section 24 (Seventh) of this title, related in part to securities activities of national banks. For complete classification of these Acts to the Code, see Tables.

§ 94. Venue of suits

Any action or proceeding against a national banking association for which the Federal De-

[5] So in original. Probably should be ''(e)''.

posit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located, or, in the event any State, county, or municipal court has jurisdiction over such an action or proceeding, in such court in the county or city in which that association's principal place of business is located.

(R.S. § 5198; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Pub. L. 97–320, title IV, § 406, Oct. 15, 1982, 96 Stat. 1512; Pub. L. 97–457, § 20(a), Jan. 12, 1983, 96 Stat. 2509.)

CODIFICATION

The last sentence of R.S. § 5198, as added by act Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320, appears to have been derived from act June 3, 1864, ch. 106, § 57, 13 Stat. 116, which was the National Bank Act. See section 38 of this title.

Section is comprised of last sentence of R.S. § 5198 as added by act Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320. The remaining sentences of R.S. § 5198 are classified to section 86 of this title.

Act Mar. 3, 1911, conferred powers and duties of former circuit courts on district courts.

AMENDMENTS

1982—Pub. L. 97–320, as amended by Pub. L. 97–457, amended section generally. Prior to amendment section read as follows: ''Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.''

EFFECTIVE DATE OF 1983 AMENDMENT

Section 20(b) of Pub. L. 97–457 provided that: ''The amendment made by subsection (a) [amending this section] shall be deemed to have taken effect upon the enactment of Public Law 97–320 [Oct. 15, 1982].''

CROSS REFERENCES

Jurisdiction and venue in suits against national banks, see sections 1348 and 1394 of Title 28, Judiciary and Judicial Procedure.

§ 94a. Repealed. June 25, 1948, ch. 646, § 39, 62 Stat. 992, eff. Sept. 1, 1948

Section, act July 12, 1882, ch. 290, § 4, 22 Stat. 163, related to jurisdiction and venue. See sections 1348 and 1394 of Title 28, Judiciary and Judicial Procedure.

§ 95. Emergency limitations and restrictions on business of members of Federal reserve system; designation of legal holiday for national banking associations; exceptions; "State" defined

(a) In order to provide for the safer and more effective operation of the national Banking System and the Federal Reserve System, to preserve for the people the full benefits of the currency provided for by the Congress through the national banking system and the Federal reserve system, and to relieve interstate commerce of the burdens and obstructions resulting from the receipt on an unsound or unsafe basis of deposits subject to withdrawal by check, during such emergency period as the President of the United States by proclamation may prescribe, no member bank of the Federal reserve system shall transact any banking business except to such extent and subject to such regulations, limitations and restrictions as may be prescribed by the Secretary of the Treasury, with the approval of the President. Any individual, partnership, corporation, or association, or any director, officer or employee thereof, violating any of the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or, if a natural person, may, in addition to such fine, be imprisoned for a term not exceeding ten years. Each day that any such violation continues shall be deemed a separate offense.

(b)(1) In the event of natural calamity, riot, insurrection, war, or other emergency conditions occurring in any State whether caused by acts of nature or of man, the Comptroller of the Currency may designate by proclamation any day a legal holiday for the national banking associations located in that State. In the event that the emergency conditions affect only part of a State, the Comptroller of the Currency may designate the part so affected and may proclaim a legal holiday for the national banking associations located in that affected part. In the event that a State or a State official authorized by law designates any day as a legal holiday for ceremonial or emergency reasons, for the State or any part thereof, that same day shall be a legal holiday for all national banking associations or their offices located in that State or the part so affected. A national banking association or its affected offices may close or remain open on such a State-designated holiday unless the Comptroller of the Currency by written order directs otherwise.

(2) For the purpose of this subsection, the term ''State'' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, or any other territory or possession of the United States.

(Mar. 9, 1933, ch. 1, title I, § 4, 48 Stat. 2; Pub. L. 96–221, title VII, § 705, Mar. 31, 1980, 94 Stat. 187; Pub. L. 97–320, title IV, § 407, Oct. 15, 1982, 96 Stat. 1513; Pub. L. 97–457, § 21, Jan. 12, 1983, 96 Stat. 2509.)

AMENDMENTS

1983—Subsec. (b)(1). Pub. L. 97–457 inserted ''a State or'' before ''a State official''.

1982—Subsec. (b)(1). Pub. L. 97–320 substituted ''In the event that a State official authorized by law designates any day as a legal holiday for ceremonial or emergency reasons, for the State or any part thereof, that same day shall be a legal holiday for all national banking associations or their offices located in that State or the part so affected. A national banking association or its affected offices may close or remain open on such a State-designated holiday unless the Comptroller of the Currency by written order directs otherwise'' for ''In the event that a State or a State official authorized by law designates any day as a legal holiday for either emergency or ceremonial reasons for all banks chartered by that State to do business within that State, that same day shall be a legal holiday for all national

banking associations chartered to do business within that State unless the Comptroller of the Currency shall by written order permit all national banking associations located in that State to remain open''.

1980—Pub. L. 96–221 designated existing provisions as subsec. (a) and added subsec. (b).

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

BANK HOLIDAY OF 1933

Proclamations Nos. 2039, 2040, and 2070, dated Mar. 6, 1933, Mar. 9, 1933, and Dec. 30, 1933, respectively, related to the temporary suspension of banking transactions beginning Mar. 6, 1933, by all member banks of the Federal Reserve System.

Pursuant to Ex. Ord. No. 6073, dated March 10, 1933, formerly set out as a note under this section, the Secretary of the Treasury by order of March 11, 1933, authorized all Federal reserve banks and nonmember banks and other banking institutions to resume their normal and usual banking functions on March 13, 1933, subject to certain restrictions. See 31 C.F.R. 121.20–121.22. The fifth and sixth paragraphs of Ex. Ord. No. 6073, relating to the removal of gold coin, gold bullion, or gold certificates from the United States by corporations, etc., including banking institutions and authorization of banking institutions to pay out gold coin, gold bullion or gold certificates, were revoked by Ex. Ord. No. 11825, Dec. 31, 1974, 40 F.R. 1003, set out as a note under section 95a of this title.

PROC. NO. 2725. EXEMPTION OF MEMBER BANKS OF FEDERAL RESERVE SYSTEM

Proc. No. 2725, Apr. 7, 1947, 12 F.R. 2343, 61 Stat. 1062, provided:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 5(b) of the Trading with the Enemy Act of October 6, 1917, 40 Stat. 415, as amended [section 5(b) of Appendix to Title 50], and section 4 of the act of March 9, 1933, 48 Stat. 2 [this section] and by virtue of all other authority vested in me, do hereby, in the interest of the internal management of the Government, proclaim, order, direct, and declare that the said proclamations of March 6 and March 9, 1933, and Executive order of March 10, 1933, as amended, are further amended to exclude from their scope banking institutions which are members of the Federal Reserve System: *Provided*, *however*, That no banking institution shall pay out any gold coin, gold bullion, or gold certificates, except as authorized by the Secretary of the Treasury, or allow the withdrawal of any currency for hoarding.

This proclamation shall become effective as of March 15, 1947.

CROSS REFERENCES

Right to amend, separability of provisions, see section 212 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 212, 213 of this title.

§ 95a. Regulation of transactions in foreign exchange of gold and silver; property transfers; vested interests, enforcement and penalties

(1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this section or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this section, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term ''United States'' means the United States and any place subject to the jurisdiction thereof; *Provided*, *however*, That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. As used in this subdivision the term ''person''

means an individual, partnership, association, or corporation.

(4) The authority granted to the President by this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds. The exports exempted from regulation or prohibition by this paragraph do not include those which are otherwise controlled for export under section 2404 of title 50, Appendix, or under section 2405 of title 50, Appendix to the extent that such controls promote the nonproliferation or antiterrorism policies of the United States, or with respect to which acts are prohibited by chapter 37 of title 18.

(Oct. 6, 1917, ch. 106, §5(b), 40 Stat. 415; Sept. 24, 1918, ch. 176, §5, 40 Stat. 966; Mar. 9, 1933, ch. 1, title I, §2, 48 Stat. 1; May 7, 1940, ch. 185, §1, 54 Stat. 179; Dec. 18, 1941, ch. 593, title III, §301, 55 Stat. 839; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 69 Stat. 1352; Pub. L. 95–223, title I, §§101(a), 102, 103(b), Dec. 28, 1977, 91 Stat. 1625, 1626; Pub. L. 100–418, title II, §2502(a)(1), Aug. 23, 1988, 102 Stat. 1371; Pub. L. 103–236, title V, §525(b)(1), Apr. 30, 1994, 108 Stat. 474.)

CODIFICATION

Section 5(b) of act Oct. 6, 1917, is part of the Trading with the Enemy Act and is also classified to section 5(b) of the Appendix to Title 50, War and National Defense.

Words '', including the Philippine Islands, and the several courts of first instance of the Commonwealth of the Philippine Islands shall have jurisdiction in all cases, civil or criminal, arising under this section in the Philippine Islands and concurrent jurisdiction with the district courts of the United States of all cases, civil or criminal, arising upon the high seas'' following ''to the jurisdiction thereof:'' in subsec. (3) were omitted on authority of 1946 Proc. No. 2695, which granted the Philippine Islands independence, and which was issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse. Proc. No. 2695 is set out as a note under section 1394 of Title 22.

AMENDMENTS

1994—Par. (4). Pub. L. 103–236 amended par. (4) generally. Prior to amendment, par. (4) read as follows: ''The authority granted to the President in this section does not include the authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials, which are not otherwise controlled for export under section 2404 of title 50, Appendix, or with respect to which no acts are prohibited by chapter 37 of title 18.''

1988—Par. (4). Pub. L. 100–418 added par. (4).

1977—Par. (1). Pub. L. 95–223, §§101(a), 102, substituted ''During the time of war, the President may, through any agency that he may designate, and under such rules and regulations'' for ''During the time of war or during any other period of national emergency declared by the President, the President may, through any agency, that he may designate, or otherwise, and under such rules and regulations'' in the provisions preceding subpar. (A), and, in the provisions following subpar. (B), struck out ''; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of the subdivision'' after ''control of such person''.

Par. (3). Pub. L. 95–223, §103(b), struck out provisions that whoever willfully violated any of the provisions of this subdivision or of any license, order, rule, or regulation issued thereunder, could be fined not more than $10,000, or, if a natural person, could be imprisoned for not more than ten years, or both; and that any officer, director, or agent of any corporation who knowingly participated in that violation could be punished by a like fine, imprisonment, or both.

1941—Act Dec. 18, 1941, broadened the powers of the President to take, administer, control, use and liquidate foreign-owned property and added a flexibility of control which enabled the President and the agencies designated by him to cope with the problems surrounding alien property, its ownership or control, on the basis of the particular facts in each case.

1940—Act May 7, 1940, included dealings in evidences of indebtedness or ownership of property in which foreign states, nationals or political subdivisions thereof have an interest.

1933—Act Mar. 9, 1933, amended section generally by, among other things, extending the President's power to any time of war or national emergency, by permitting regulations to be issued by any agency designated by the President, by providing for the furnishing under oath of complete information relative to transactions under this section and by placing sanctions on violations to the extent of a $10,000 fine or ten years imprisonment.

1918—Act Sept. 24, 1918, inserted provisions relating to the hoarding or melting of gold or silver coin or bullion or currency and to the regulation of transactions in bonds or certificates of indebtedness.

DELEGATION OF POWERS

Delegation of President's powers under this section to Secretary of the Treasury and Alien Property Custodian; and transfer of Alien Property Custodian's powers to Attorney General, see Ex. Ord. Nos. 9095 and 9788, set out as notes under section 6 of the Appendix to Title 50, War and National Defense.

All powers conferred upon President by this section delegated to Secretary of the Treasury by Memorandum of the President dated Feb. 12, 1942, 7 F.R. 1409.

ADMINISTRATION OF EXPORT ADMINISTRATION ACT

For provisions relating to the administration of the Export Administration Act, see Executive Orders set out as notes under section 2403 of Title 50, Appendix, War and National Defense.

LIMITATION ON EXERCISE OF EMERGENCY AUTHORITIES

Section 525(b)(2) of Pub. L. 103–236 provided that: ''The authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act [this section], which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, and are being exercised on the date of the enactment of this Act [Apr. 30, 1994], do not include the authority to regulate or prohibit, directly or indirectly, any activity which, under section 5(b)(4) of the Trading With the Enemy Act, as amended by paragraph (1) of this subsection, may not be regulated or prohibited.''

Section 2502(a)(2) of Pub. L. 100–418 provided that: ''The authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act [this section], which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, and are being exercised on the date of the enactment of this Act [Aug. 23, 1988], do not include the authority to regulate or prohibit, directly or indirectly, any activity which, under section 5(b)(4) of the Trading With the Enemy Act, as added by paragraph (1) of this subsection, may not be regulated or prohibited.''

EXTENSION AND TERMINATION OF NATIONAL EMERGENCY POWERS UNDER THE TRADING WITH THE ENEMY ACT

Section 101(b), (c) of Pub. L. 95–223 provided that:

''(b) Notwithstanding the amendment made by subsection (a) [amending par. (1) of this section], the authorities conferred upon the President by section 5(b) of the Trading With the Enemy Act [this section], which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised with respect to such country, except that, unless extended, the exercise of such authorities shall terminate (subject to the savings provisions of the second sentence of section 101(a) of the National Emergencies Act [section 1601(a) of Title 50, War and National Defense]) at the end of the two-year period beginning on the date of enactment of the National Emergencies Act [Sept 14, 1976]. The President may extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States.

''(c) The termination and extension provisions of subsection (b) of this section supersede the provisions of section 101(a) [section 1601(a) of Title 50, War and National Defense] and of title II [section 1621 et seq. of Title 50] of the National Emergencies Act to the extent that the provisions of subsection (b) of this section are inconsistent with those provisions.''

REMOVAL OF LIMITATIONS AND RESTRAINTS IN FINANCING EXPORTS

Pub. L. 92–126, § 2, Aug. 17, 1971, 85 Stat. 346, provided that: ''In connection with section 2 of Executive Order Number 11387, dated January 1, 1968 [formerly set out below] and any rule, regulation, or guideline established by the Board of Governors of the Federal Reserve System in connection with a voluntary foreign credit restraint program, there shall be no limitation or restraint, or suggestion that there be a limitation or restraint, on the part of any bank or financial institution in connection with the extension of credit for the purpose of financing exports of the United States.''

WORLD WAR II ALIEN PROPERTY CUSTODIAN

Reestablishment and termination of Office of Alien Property Custodian during World War II, see notes under section 6 of the Appendix to Title 50, War and National Defense.

DIPLOMATIC PROPERTY OF GERMANY AND JAPAN

Ex. Ord. No. 9760, July 24, 1946, 11 F.R. 7999, set out in notes to section 6 of Title 50, Appendix, War and National Defense, supersedes conflicting provisions of Ex. Ord. No. 8389, set out below.

EXECUTIVE ORDER NO. 6260

Ex. Ord. No. 6260, Aug. 28, 1933, as amended by Ex. Ord. No. 6359, Oct. 25, 1933; Ex. Ord. No. 6556, Jan. 12, 1934; Ex. Ord. No. 6560, Jan. 15, 1934; Ex. Ord. No. 10896, Nov. 29, 1960, 25 F.R. 12281; Ex. Ord. No. 10905, Jan. 14, 1961, 26 F.R. 321; Ex. Ord. No. 11037, July 20, 1962, 27 F.R. 6967, formerly set out as a note under this section, which related to the hoarding, export, and earmarking of gold coin, bullion, or currency, and transactions in foreign exchange, was revoked by Ex. Ord. No. 11825, Dec. 31, 1974, 40 F.R. 1003, set out below.

EXECUTIVE ORDER NO. 6560

Ex. Ord. No. 6560, Jan. 15, 1934, as amended by Ex. Ord. No. 8389. April 10, 1940, 6 p.m. E. S. T., 5 F.R. 1400; Ex. Ord. No. 8405, May 10, 1940, 7:55 a.m. E. S. T., 5 F.R. 1677; Ex. Ord. No. 8493, July 25, 1940, 5 F.R. 2667, formerly set out as a note under this section, which declared the existence of a national emergency and prescribed regulations for the investigation, regulation, and prohibition of transactions in foreign exchange, transfers of credit between or payments by banking institutions, and export of currency or silver coin by persons within the United States or subject to its jurisdiction, was based on authority of section 95a of this title (act Oct. 6, 1917, ch. 106, § 5(b), 40 Stat. 415, comprising part of the Trading With the Enemy Act) which was amended in 1977 to remove the powers of the President to regulate transactions during a period of national emergency other than a war.

EX. ORD. NO. 8389. REGULATING TRANSACTIONS IN FOREIGN EXCHANGE AND FOREIGN-OWNED PROPERTY, PROVIDING FOR THE REPORTING OF ALL FOREIGN-OWNED PROPERTY

Ex. Ord. No. 8389, Apr. 10, 1940, 5 F.R. 1400, as amended by Ex. Ord. No. 8405, May 10, 1940, 5 F.R. 1677; Ex. Ord. No. 8446, June 17, 1940, 5 F.R. 2279; Ex. Ord. No. 8484, July 15, 1940, 5 F.R. 2586; Ex. Ord. No. 8493, July 25, 1940, 5 F.R. 2667; Ex. Ord. No. 8565, Oct. 10, 1940, 5 F.R. 4062; Ex. Ord. No. 8701, Mar. 4, 1941, 6 F.R. 1285; Ex. Ord. No. 8711, Mar. 13, 1941, 6 F.R. 1443; Ex. Ord. No. 8721, Mar. 24, 1941, 6 F.R. 1622; Ex. Ord. No. 8746, Apr. 28, 1941, 6 F.R. 2187; Ex. Ord. No. 8785, June 14, 1941, 6 F.R. 2897; Ex. Ord. No. 8832, July 26, 1941, 6 F.R. 3715; Ex. Ord. No. 8963, Dec. 9, 1941, 6 F.R. 6348; Ex. Ord. No. 8998, Dec. 26, 1941, 6 F.R. 6787, provided:

SECTION 1. CERTAIN FOREIGN BANKING TRANSACTIONS PROHIBITED

All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

SECTION 2. DEALINGS IN FOREIGN SECURITIES; REGULATIONS

A. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise:

(1) The acquisition, disposition or transfer of, or other dealing in, or with respect to, any security or evidence thereof on which there is stamped or imprinted, or to which there is affixed or otherwise attached, a tax stamp or other stamp of a foreign country designated in this Order or a notarial or similar seal which by its contents indicates that it was stamped, imprinted, affixed or attached within such foreign country, or where the attendant circumstances disclose or indicate that such stamp or seal may, at any time, have been stamped, imprinted, affixed or attached thereto; and

(2) The acquisition by, or transfer to, any person within the United States of any interest in any security or evidence thereof if the attendant circumstances disclose or indicate that the security or evidence thereof is not physically situated within the United States.

B. The Secretary of the Treasury may investigate, regulate, or prohibit under such regulations, rulings, or instructions as he may prescribe, by means of licenses or otherwise, the sending, mailing, importing or otherwise bringing, directly or indirectly, into the United States, from any foreign country, of any securities or evidences thereof or the receiving or holding in the United States of any securities or evidences thereof so brought into the United States.

SECTION 3. FOREIGN COUNTRIES AFFECTED; EFFECTIVE DATE OF PROHIBITIONS

The term ''foreign country designated in this Order'' means a foreign country included in the following schedule, and the term ''effective date of this Order'' means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

(a) April 8, 1940—
Norway and
Denmark;
(b) May 10, 1940—
The Netherlands,
Belgium and
Luxembourg;
(c) June 17, 1940—
France (including Monaco);
(d) July 10, 1940—
Latvia, Estonia and
Lithuania;
(e) October 9, 1940—
Rumania;
(f) March 4, 1941—
Bulgaria;
(g) March 13, 1941—
Hungary;
(h) March 24, 1941—
Yugoslavia;
(i) April 28, 1941—
Greece; and
(j) June 14, 1941—
Albania,
Andorra,
Austria,
Czechoslovakia,
Danzig,
Finland,
Germany,
Italy,
Liechtenstein,
Poland,
Portugal,
San Marino,
Spain,
Sweden,
Switzerland, and
Union of Soviet Socialist Republics;
(k) June 14, 1941—
China and
Japan;
(*l*) June 14, 1941—
Thailand;
(m) June 14, 1941—
Hong Kong.

The ''effective date of this Order'' with respect to any foreign country not designated in this Order shall be deemed to be June 14, 1941.

SECTION 4. RECORDS OF FOREIGN BANKING AND SECURITY TRANSACTIONS; INVESTIGATIONS

A. The Secretary of the Treasury and/or the Attorney General may require, by means of regulations, rulings, instructions, or otherwise, any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, from time to time and at any time or times, complete information relative to, any transaction referred to in section 5(b) of the Act of October 6, 1917 (40 Stat. 415) [this section], as amended, or relative to any property in which any foreign country or any national thereof has any interest of any nature whatsoever, direct or indirect, including the production of any books of account, contracts, letters, or other papers, in connection therewith, in the custody or control of such person, either before or after such transaction is completed; and the Secretary of the Treasury and/or the Attorney General may, through any agency, investigate any such transaction or act, or any violation of the provisions of this Order.

B. Every person engaging in any of the transactions referred to in sections 1 and 2 of this Order shall keep a full record of each such transaction engaged in by him, regardless of whether such transaction is effected pursuant to license or otherwise, and such record shall be available for examination for at least one year after the date of such transaction.

SECTION 5. DEFINITIONS

A. As used in the first paragraph of section 1 of this Order ''transactions (which) involve property in which any foreign country designated in this Order, or any national thereof, has * * * any interest of any nature whatsoever, direct or indirect,'' shall include but not by way of limitation (i) any payment or transfer to any such foreign country or national thereof, (ii) any export or withdrawal from the United States to such foreign country, and (iii) any transfer of credit, or payment of an obligation, expressed in terms of the currency of such foreign country.

B. The term ''United States'' means the United States and any place subject to the jurisdiction thereof, and the term ''continental United States'' means the States of the United States, the District of Columbia, and the Territory of Alaska: *Provided, however*, That for the purposes of this Order the term ''United States'' shall not be deemed to include any territory included within the term ''foreign country'' as defined in paragraph D of this section.

C. The term ''person'' means an individual, partnership, association, corporation, or other organization.

D. The term ''foreign country'' shall include, but not by way of limitation,

(i) The state and the government thereof on the effective date of this Order as well as any political subdivision, agency, or instrumentality thereof or any territory, dependency, colony, protectorate, mandate, dominion, possession or place subject to the jurisdiction thereof.

(ii) Any other government (including any political subdivision, agency, or instrumentality thereof) to the extent and only to the extent that such government exercises or claims to exercise *de jure* or *de facto* sovereignty over the area which on such effective date constituted such foreign country, and

(iii) Any territory which on or since the effective date of this Order is controlled or occupied by the military, naval or police forces or other authority of such foreign country;

(iv) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any of the foregoing. Hong Kong shall be deemed to be a foreign country within the meaning of this subdivision.

E. The term ''national'' shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order,

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of

the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined.

(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a ''national'' as herein defined.

In any case in which by virtue of the foregoing definition a person is a national of more than one foreign country, such person shall be deemed to be a national of each such foreign country. In any case in which the combined interests of two or more foreign countries designated in this Order and/or nationals thereof are sufficient in the aggregate to constitute, within the meaning of the foregoing, control of 25 per centum or more of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of a partnership, association, corporation or other organization, but such control or a substantial part of such stock, shares, bonds, debentures, notes, drafts, or other securities or obligations is not held by any one such foreign country and/or national thereof, such partnership, association, corporation or other organization shall be deemed to be a national of each of such foreign countries. The Secretary of the Treasury shall have full power to determine that any person is or shall be deemed to be a ''national'' within the meaning of this definition, and the foreign country of which such person is or shall be deemed to be a national. Without limitation of the foregoing, the term ''national'' shall also include any other person who is determined by the Secretary of the Treasury to be, or to have been, since such effective date, acting or purporting to act directly or indirectly for the benefit or under the direction of a foreign country designated in this Order or national thereof, as herein defined.

F. The term ''banking institution'' as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any person holding credits for others as a direct or incidental part of his business, or brokers, and each principal, agent, home office, branch or correspondent of any person so engaged shall be regarded as a separate ''banking institution''.

G. The term ''this Order'', as used herein, shall mean Executive Order No. 8389 of April 10, 1940, as amended.

SECTION 6. CONSTRUCTION WITH EX. ORD. NO. 6560; SAVING CLAUSE

Executive Order No. 8389 of April 10, 1940, as amended, shall no longer be deemed to be an amendment to or a part of Executive Order No. 6560 of January 15, 1934. Executive Order No. 6560 of January 15, 1934, and the Regulations of November 12, 1934, are hereby modified in so far as they are inconsistent with the provisions of this Order, and except as so modified, continue in full force and effect. Nothing herein shall be deemed to revoke any license, ruling, or instruction now in effect and issued pursuant to Executive Order No. 6560 of January 15, 1934, as amended, or pursuant to this Order; provided, however, that all such licenses, rulings, or instructions shall be subject to the provisions hereof. Any amendment, modification or revocation by or pursuant to the provisions of this Order of any orders, regulations, rulings, instructions or licenses shall not affect any act done, or any suit or proceeding had or commenced in any civil or criminal case prior to such amendment, modification or revocation, and all penalties, forfeitures and liabilities under any such orders, regulations, rulings, instructions or licenses shall continue and may be enforced as if such amendment, modification or revocation had not been made.

SECTION 7. REGULATIONS BY SECRETARY OF THE TREASURY

Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application or license shall be final.

SECTION 8. OFFENSES AND PENALTIES UNDER ACT OCT. 6, 1917

Section 5(b) of the Act of October 6, 1917, as amended, provides in part:

''* * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.''

SECTION 9. AMENDMENTS OF ORDER AND REGULATIONS PRESCRIBED THEREUNDER

This Order and any regulations, rulings, licenses or instructions issued hereunder may be amended, modified or revoked at any time.

[Ex. Ord. No. 8389 and the regulations and general rulings issued thereunder by the Secretary of the Treasury were approved and confirmed by Res. May 7, 1940, ch. 185, § 2, 54 Stat. 179.]

[Ex. Ord. No. 9760, July 24, 1946, 11 F.R. 7999, 50 U.S.C. App., § 6 note, relating to diplomatic property of Germany and Japan in the United States, supersedes conflicting provisions of Ex. Ord. No. 8389, set out above.]

EXECUTIVE ORDERS NOS. 8446, 8484, 8565, 8701, 8711, 8721, 8746

The application of Ex. Ord. No. 6560, §§ 9 to 14, to French property by Ex. Ord. No. 8446, 5 F.R. 2279; to Latvian, Estonian and Lithuanian property by Ex. Ord. No. 8484, 5 F.R. 2586; to Rumanian property by Ex. Ord. No. 8565, 5 F.R. 4062; to Bulgarian property by Ex. Ord. No. 8701, 6 F.R. 1285; to Hungarian property by Ex. Ord. No. 8711, 6 F.R. 1443; to Yugoslav property by Ex. Ord. No. 8721, 6 F.R. 1622; to Greek property by Ex. Ord. No. 8746, 6 F.R. 2187, was incorporated in the provisions of Ex. Ord. No. 8389 as amended by Ex. Ord. No. 8785, set out above.

EX. ORD. NO. 9747. FUNCTIONS OF ALIEN PROPERTY CUSTODIAN AND TREASURY DEPARTMENT CONTINUED IN PHILIPPINES

Ex. Ord. No. 9747, July 3, 1946, 11 F.R. 7518, provided: The terms and provisions of Executive Order 9095 of March 11, 1942, as amended [formerly set out as a note under section 6 of the Appendix to Title 50, War and National Defense], and Executive Order No. 8389 of April 10, 1940, as amended [set out above], shall continue in force in the Philippines after July 4, 1946, and all powers and authority delegated by the said Executive Orders to the Alien Property Custodian and to the Secretary of the Treasury, respectively, shall after July 4, 1946, continue to be exercised in the Philippines by the said officers, respectively, as therein provided.

EXECUTIVE ORDER NO. 10348

Ex. Ord. No. 10348, Apr. 26, 1952, 17 F.R. 3769, which provided that Ex. Ord. No. 8389, Apr. 10, 1940, 5 F.R. 1400, as amended, set out above, and all delegations, designations, regulations, rulings, instructions, and licenses issued under such order, should be continued in force according to their terms for the duration of the period of

the national emergency proclaimed by Proclamation No. 2914 of December 16, 1950, set out as a note preceding section 1 of the Appendix to Title 50, War and National Defense, was superseded by Ex. Ord. No. 11281, May 13, 1966, 31 F.R. 7215, set out as a note under section 6 of the Appendix to Title 50.

EXECUTIVE ORDER NO. 11387

Ex. Ord. No. 11387, Jan. 1, 1968, 33 F.R. 47, which prohibited transfers of capital to or within a foreign country or to any national thereof outside the United States by a person subject to the jurisdiction of the United States who owns a 10 percent interest in a foreign business venture, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

EX. ORD. NO. 11825. REVOCATION OF EXECUTIVE ORDERS PERTAINING TO REGULATION OF ACQUISITION OF, HOLDING OF, OR OTHER TRANSACTIONS IN GOLD

Ex. Ord. No. 11825, Dec. 31, 1974, 40 F.R. 1003, provided:

By virtue of the authority vested in me by section 1 of the Act of August 8, 1950, 64 Stat. 419, and section 5(b) of the Act of October 6, 1917, as amended (12 U.S.C. 95a) [this section], and as President of the United States, and in view of the provisions of section 3 of Public Law 93–110, 87 Stat. 352, as amended by section 2 of Public Law 93–373, 88 Stat. 445, [set out as notes under section 442 of former Title 31, Money and Finance], it is ordered as follows:

SECTION 1. Executive Order No. 6260 of August 28, 1933, as amended by Executive Order No. 6359 of October 25, 1933, Executive Order No. 6556 of January 12, 1934, Executive Order No. 6560 of January 15, 1934, Executive Order No. 10896 of November 29, 1960, Executive Order No. 10905 of January 14, 1961, and Executive Order No. 11037 of July 20, 1962; the fifth and sixth paragraphs of Executive Order No. 6073, March 10, 1933 [formerly set out as a note under section 95 of this title]; sections 3 and 4 of Executive Order No. 6359 of October 25, 1933 [formerly set out as a note under section 248 of this title]; and paragraph 2(d) of Executive Order No. 10289 of September 17, 1951 [set out as a note under section 301 of Title 3, The President], are hereby revoked.

SECTION 2. The revocation, in whole or in part, of such prior Executive orders relating to regulation on the acquisition of, holding of, or other transactions in gold shall not affect any act completed, or any right accruing or accrued, or any suit or proceeding finished or started in any civil or criminal cause prior to the revocation, but all such liabilities, penalties, and forfeitures under the Executive orders shall continue and may be enforced in the same manner as if the revocation had not been made.

This order shall become effective on December 31, 1974.

GERALD R. FORD.

CROSS REFERENCES

Jurisdiction of courts of Philippine Islands terminated, see section 1382 of Title 22, Foreign Relations and Intercourse.

Provisions governing checks and warrants withheld pursuant to Ex. Ord. No. 8389, adding sections 9 to 12 to Ex. Ord. No. 6560, which was formerly set out under this section, see section 3329 of Title 31, Money and Finance.

Right to amend, separability of provisions, see section 212 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 95b, 212, 3409, 3413 of this title; title 22 sections 6004, 6005; title 31 section 5315.

§ 95b. Ratification of acts of President and Secretary of the Treasury under section 95a

The actions, regulations, rules, licenses, orders and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury since March 4, 1933, pursuant to the authority conferred by section 95a of this title, are approved and confirmed.

(Mar. 9, 1933, ch. 1, title I, §1, 48 Stat. 1.)

CODIFICATION

This section is also set out as a note under section 5 of Title 50, Appendix, War and National Defense.

CROSS REFERENCES

Right to amend, separability of provisions, see section 212 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 212 of this title.

SUBCHAPTER V—OBTAINING AND ISSUING CIRCULATING NOTES

§§ 101 to 110. Repealed. Pub. L. 103–325, title VI, § 602(e)(5)–(11), (f)(2)–(4)(A), (g)(9), Sept. 23, 1994, 108 Stat. 2292, 2294

Section 101, acts Mar. 14, 1900, ch. 41, §12, 31 Stat. 49; Oct. 5, 1917, ch. 74, §2, 40 Stat. 342, provided for delivery of circulating notes in blank to national banking associations depositing bonds with Treasurer of United States.

Section 101a, R.S. §5159; Dec. 23, 1913, ch. 6, §17, 38 Stat. 268; June 21, 1917, ch. 32, §9, 40 Stat. 239, related to deposit of bonds to secure circulating notes.

Section 102, R.S. §5158, construed term ''United States bonds'' as including registered bonds.

Section 103, act Oct. 5, 1917, ch. 74, §3, 40 Stat. 342, related to denominations of notes and limitation on amount of $1 and $2 notes.

Section 104, R.S. §5172; May 30, 1908, ch. 229, §11, 35 Stat. 551; Dec. 23, 1913, ch. 6, §27, 38 Stat. 274; Aug. 4, 1914, ch. 225, 38 Stat. 682; Mar. 3, 1919, ch. 101, §4, 40 Stat. 1315, related to printing and form of circulating notes.

Section 105, act June 20, 1874, ch. 343, §5, 18 Stat. 124, provided that Comptroller of Currency was to print charter numbers of association on national bank notes.

Section 106, act Mar. 3, 1875, ch. 130, §1, 18 Stat. 372, provided for printing national-bank notes on distinctive paper adopted by Secretary of the Treasury.

Section 107, R.S. §5173, related to custody of plates and dies procured for printing notes and payment of expenses.

Section 108, R.S. §5174; Feb. 27, 1877, ch. 69, §1, 19 Stat. 252, related to examination of plates, dies, and other material from which national-bank circulation was printed, and destruction of obsolete material.

Section 109, R.S. §5182; Jan. 13, 1920, ch. 38, 41 Stat. 387, provided that banks could issue and circulate notes the same as money if signed by officers in manner of obligatory promissory notes payable on demand at place of business, and specified demands for which such notes were to be received.

Section 110, R.S. §5183; Feb. 18, 1875, ch. 80, §1, 18 Stat. 320, prohibited banks from issuing unauthorized notes.

SUBCHAPTER VI—REDEMPTION AND REPLACEMENT OF CIRCULATING NOTES

§ 121. Repealed. Pub. L. 103–325, title VI, § 602(f)(4)(B), Sept. 23, 1994, 108 Stat. 2292

Section, acts June 20, 1874, ch. 343, §3, 18 Stat. 123; Dec. 23, 1913, ch. 6, §20, 38 Stat. 271; May 29, 1920, ch. 214, §1, 41 Stat. 654, provided that every national banking association was to establish reserve in Treasury for redemption of notes by Treasurer of United States, forward notes unfit for use to Treasurer for disposition, and reimburse expenses of Treasury.

§ 121a. Redemption of notes unidentifiable as to bank of issue

Whenever any Federal Reserve bank notes or Federal Reserve notes are presented to the Treasurer of the United States for redemption and such notes cannot be identified as to the bank of issue or the bank through which issued, the Treasurer of the United States may redeem such notes under such rules and regulations as the Secretary of the Treasury may prescribe.

(June 13, 1933, ch. 62, §1, 48 Stat. 127; Pub. L. 89–427, §4(a), May 20, 1966, 80 Stat. 161; Pub. L. 103–325, title VI, §602(g)(8)(A), Sept. 23, 1994, 108 Stat. 2294.)

AMENDMENTS

1994—Pub. L. 103–325, §602(g)(8)(A)(ii), which directed the amendment of this section by striking out '', and the notes, other than Federal Reserves notes, so redeemed shall be forwarded to the Comptroller of the Currency for cancellation and destruction'' after ''Treasury may prescribe'', was executed by striking out text which contained the word ''Reserves'' rather than ''Reserve'', to reflect the probable intent of Congress.

Pub. L. 103–325, §602(g)(8)(A)(i), substituted ''Whenever any Federal Reserve bank notes,'' for ''Whenever any national-bank notes, Federal Reserve bank notes,''.

1966—Pub. L. 89–427 excepted Federal Reserve notes from the category of notes which, upon redemption by the Treasurer of the United States, must be forwarded to the Comptroller of the Currency for cancellation and destruction.

TRANSFER OF FUNCTIONS

For transfer of functions to Secretary of the Treasury, see note set out under section 121 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 122a of this title.

§ 122. Repealed. Pub. L. 97–258, § 5(b), Sept. 13, 1982, 96 Stat. 1068

Section, act July 14, 1890, ch. 708, §6, 26 Stat. 289, related to deposits received by the Treasurer from national banks made to redeem circulating notes of such banks and disposition of those deposits.

§ 122a. Redeemed notes of unidentifiable issue; funds charged against

Federal Reserve bank notes redeemed by the Treasurer of the United States under section 121a of this title shall be charged against the balance of deposits for the retirement of Federal Reserve bank notes under the provisions of sections 122 and 445[1] of this title; and charges for Federal Reserve notes redeemed by the Treasurer of the United States under section 121a of this title shall be apportioned among the twelve Federal Reserve banks as determined by the Board of Governors of the Federal Reserve System.

(June 13, 1933, ch. 62, §2, 48 Stat. 128; Pub. L. 89–427, §4(b), May 20, 1966, 80 Stat. 161; Pub. L. 103–325, title VI, §602(g)(8)(B), Sept. 23, 1994, 108 Stat. 2294.)

REFERENCES IN TEXT

Section 122 of this title, referred to in text, was repealed by Pub. L. 97–258, §5(b), Sept. 13, 1982, 96 Stat. 1068.

Section 445 of this title, referred to in text, was repealed by act June 12, 1945, ch. 186, §3, 59 Stat. 238.

AMENDMENTS

1994—Pub. L. 103–325 struck out ''National-bank notes and'' before ''Federal Reserve bank notes redeemed'' and ''national-bank notes and'' after ''deposits for the retirement of''.

1966—Pub. L. 89–427 substituted provisions allowing the Board of Governors of the Federal Reserve System to determine the proper apportioning between the Federal Reserve banks of the charges for the redemption by the Treasurer of the United States of Federal Reserve notes that are unidentifiable as to bank of issue for provisions that set out the exact formula for determining the proper apportioning of charges using a proportion based upon the amount of Federal Reserve notes of each Federal Reserve bank in circulation in the 31st day of December of the year preceding the date of redemption, with the amount apportioned under the formula charged by the Treasurer of the United States against deposit in the gold-redemption fund made by the bank or its Federal Reserve agent.

TRANSFER OF FUNCTIONS

For transfer of functions to Secretary of the Treasury, see note set out under section 121 of this title.

§§ 123 to 126. Repealed. Pub. L. 103–325, title VI, § 602(e)(12), (13), (f)(4)(C), (6), Sept. 23, 1994, 108 Stat. 2292, 2293

Section 123, R.S. §5195; June 20, 1874, ch. 343, §3, 18 Stat. 123, related to redemption of notes by bank at own counter.

Section 124, R.S. §5184; June 23, 1874, ch. 455, §1, 18 Stat. 206, related to destroying and replacing notes unfit for use.

Section 125, act July 28, 1892, ch. 317, 27 Stat. 322, related to redemption of lost or stolen notes.

Section 126, act June 20, 1874, ch. 343, §8, 18 Stat. 125, related to duty of Treasurer, designated depositaries, and national-bank depositaries of United States to return notes of failed or liquidated banks to Treasury for redemption.

§ 127. Repealed. Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 633

Section, act Mar. 3, 1875, ch. 130, §3, 18 Stat. 399, provided for a clerical force for redemption of circulating notes.

SUBCHAPTER VII—PROCEEDINGS ON FAILURE OF BANK TO REDEEM CIRCULATING NOTES

§§ 131 to 138. Repealed. Pub. L. 103–325, title VI, § 602(e)(14)–(21), Sept. 23, 1994, 108 Stat. 2292

Section 131, R.S. §5226; June 20, 1874, ch. 343, §3, 18 Stat. 123, related to protest of notes and waiver of demand and notice of protest.

Section 132, R.S. §5227, related to appointment by Comptroller of the Currency of special agent to examine failure of national banking association to redeem its circulating notes and provided for forfeiture of association's bonds to United States based on findings of agent.

Section 133, R.S. §5228; Feb. 18, 1875, ch. 80, §1, 18 Stat. 320, prohibited banking associations from continuing in business after default.

Section 134, R.S. §5229, provided that, upon declaration of forfeiture of association's bonds, Comptroller of the Currency was to notify holders of circulating notes to present notes for payment and was authorized to cancel bonds pledged by association.

Section 135, R.S. §5232, related to disposition of redeemed notes and perpetuation of evidence of payment of such notes.

[1] See References in Text note below.

Section 136, R.S. § 5233, related to cancellation of redeemed notes.

Section 137, R.S. § 5230, provided Comptroller of the Currency with option of selling defaulting association's bonds at auction, rather than cancelling them, and granted United States paramount lien on all association assets in case of deficiencies from such sale.

Section 138, R.S. § 5231, related to private sale of defaulting association's bonds by Comptroller of the Currency.

SUBCHAPTER VIII—RESERVE CITIES; LAWFUL RESERVES

§ 141. Central reserve and reserve cities; designation

The cities of New York and Chicago are designated as central reserve cities, and the following cities are designated as reserve cities:

Boston	Indianapolis
Albany	Chicago
Brooklyn and Bronx	Peoria
Buffalo	Detroit
Philadelphia	Grand Rapids
Pittsburgh	Milwaukee
Baltimore	Minneapolis
Washington	St. Paul
Richmond	Cedar Rapids
Atlanta	Des Moines
Little Rock	Dubuque
Louisville	Sioux City
Memphis	Kansas City, Mo.
Nashville	St. Joseph
Cincinnati	Jacksonville
Cleveland	Birmingham
Columbus	New Orleans
Toledo	Dallas
El Paso	Pueblo
Fort Worth	Muskogee
Galveston	Oklahoma City
Houston	Tulsa
San Antonio	Savannah
Waco	Seattle
St. Louis	Spokane
Lincoln	Portland
Omaha	Los Angeles
Kansas City, Kans.	Oakland
Topeka	San Francisco
Wichita	Ogden
Helena	Salt Lake City
Denver	

The Board of Governors of the Federal Reserve System may at any time reclassify cities so designated as reserve and central reserve cities, may add to the number so classified, or terminate the designation of any cities as such.

(R.S. § 5191; Dec. 23, 1913, ch. 6, § 2, 38 Stat. 251; Aug. 23, 1935, ch. 614, title II, § 203(a), 49 Stat. 704.)

CENTRAL RESERVE CITIES

Section 3(b)(1), (2), of Pub. L. 86–114, July 28, 1959, 73 Stat. 263, reclassified New York and Chicago as reserve cities and terminated the classification of central reserve city and the authority of the Board of Governors of the Federal Reserve System to classify or reclassify cities as central reserve cities, effective 3 years after July 28, 1959. See Central Reserve and Reserve Cities note, set out under this section.

CODIFICATION

R.S. § 5191 derived from act June 3, 1864, ch. 106, § 31, 13 Stat. 108, which was the National Bank Act, and act Mar. 1, 1872, ch. 22, 17 Stat. 32. See section 38 of this title.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

CENTRAL RESERVE AND RESERVE CITIES

Section 3(b) of Pub. L. 86–114, July 28, 1959, 73 Stat. 263, provided that: ''Effective three years after the date of the enactment of this Act [July 28, 1959]—

''(1) New York and Chicago are reclassified as reserve cities under the Federal Reserve Act;

''(2) the classification 'central reserve city' under the Federal Reserve Act, and the authority of the Board of Governors of the Federal Reserve System to classify or reclassify cities as 'central reserve cities' under such Act, are terminated;

''(3) section 5192 of the Revised Statutes of the United States (12 U.S.C., sec. 144) is amended by striking out 'central reserve or';

''(4) section 2 of the Act of March 3, 1887 (ch. 378; 24 Stat. 560) is repealed;

''(5) the last paragraph of section 2 of the Federal Reserve act (12 U.S.C., sec. 224) is amended by striking out 'and central reserve cities';

''(6) section 11(e) of the Federal Reserve Act (12 U.S.C., sec. 248e) is amended by striking out 'and central reserve' each place it appears;

''(7) the third paragraph (lettered (a)) of section 19 of the Federal Reserve Act (12 U.S.C., sec. 462) is amended by striking out 'or central reserve';

''(8) the fifth paragraph (lettered (c)) of such section 19 is repealed;

''(9) subparagraph (2) of the sixth paragraph of such section 19 (as added by the first section of this Act) is amended by striking out 'and a member bank in a central reserve city may hold and maintain the reserve balances which are in effect under this section for member banks described in paragraph (a) or (b),';

''(10) the seventh paragraph of such section 19 is amended by striking out clauses (1), (2), (3), and (4) and inserting in lieu thereof the following: '(1) by member banks in reserve cities, (2) by member banks not in reserve cities, or (3) by all member banks'; and

''(11) the seventh paragraph of such section is further amended by striking out 'and central reserve cities'.''

CROSS REFERENCES

List of Federal Reserve Banks and Branches, see note under section 222 of this title.

Power of Board of Governors of the Federal Reserve System to add to and reclassify reserve cities, see section 248 of this title.

Reserve cities unaffected by organization of reserve districts and Federal reserve cities, see section 224 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 377, 481 of this title.

§ 142. Banks in reserve cities; reserves

National banking associations located in reserve cities or central reserve cities shall maintain reserves provided for in section 462 of this title for banks so located.

(R.S. § 5191; Dec. 23, 1913, ch. 6, §§ 19, 27, 38 Stat. 270, 274; Aug. 4, 1914, ch. 225, 38 Stat. 682; Aug. 15, 1914, ch. 252, 38 Stat. 691; June 21, 1917, ch. 32, § 10, 40 Stat. 239.)

REFERENCES IN TEXT

Section 462 of this title, referred to in text, was omitted from the Code. See section 461 of this title.

CODIFICATION

R.S. § 5191 derived from act June 3, 1864, ch. 106, § 31, 13 Stat. 108, which was the National Bank Act, and act Mar. 1, 1872, ch. 22, 17 Stat. 32. See section 38 of this title.

TERMINATION OF CENTRAL RESERVE CITIES

Central reserve cities terminated, see section 3(b) of Pub. L. 86–114, July 28, 1959, 73 Stat. 263 set out as a note under section 141 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 248, 1424, 1828 of this title.

§ 143. Banks in Alaska and insular possessions; lawful money reserves

Every national banking association located in Alaska or in a dependency or insular possession or any part of the United States outside of the continental United States, and not a member of the Federal reserve system, shall at all times have on hand in lawful money of the United States an amount equal to at least 15 percent of the aggregate amount of its deposits in all respects. Whenever the lawful money of any such association shall fall below 15 percent of its deposits such association shall not increase its liabilities by making any new loans or discounts other than by discounting or purchasing bills of exchange payable at sight nor make any dividends of its profits until the required proportion between the aggregate amount of its deposits and its lawful money of the United States has been restored. And the Comptroller of the Currency shall notify any such association whose lawful money reserve shall be below the amount required to be kept on hand to make good such reserve, and if such association shall fail for thirty days thereafter so to make good its lawful money the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association as provided in section 192 of this title.

(R.S. § 5191.)

CODIFICATION

R.S. § 5191 derived from act June 3, 1864, ch. 106, § 31, 13 Stat. 108, which was the National Bank Act, and act Mar. 1, 1872, ch. 22, 17 Stat. 32. See section 38 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Banks in dependencies or insular possessions as members of the Federal Reserve System, see section 466 of this title.

§ 144. Certain balances counted toward reserves in dependencies and insular possessions

Four-fifths of the reserve of 15 per centum which a national bank located in a dependency or insular possession or any part of the United States outside of the continental United States, and not a member of the Federal Reserve System, is required to keep, may consist of balances due such bank from associations approved by the Comptroller of the Currency and located in any one of the reserve cities as now or hereafter defined by law or designated by the Board of Governors of the Federal Reserve System.

(R.S. § 5192; July 1, 1952, ch. 536, 66 Stat. 314; Pub. L. 86–70, § 7, June 25, 1959, 73 Stat. 142; Pub. L. 86–114, § 3(b)(3), July 28, 1959, 73 Stat. 263.)

CODIFICATION

R.S. § 5192 derived from act June 3, 1864, ch. 106, § 31, 13 Stat. 108, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1959—Pub. L. 86–114 struck out ''central reserve or'' before ''reserve cities''.

Pub. L. 86–70 struck out ''in Alaska or'' before ''in a dependency''.

1952—Act July 1, 1952, reduced the required amount of cash on hand from two-fifths to one-fifth of the required reserve of 15 per centum.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86–114 effective three years after July 28, 1959, see section 3(b) of Pub. L. 86–114, set out as a Central Reserve and Reserve Cities note under section 141 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Banks in dependencies or insular possessions as members of Federal Reserve System, see section 466 of this title.

§§ 145, 146. Repealed. Pub. L. 97–258, § 5(b), Sept. 13, 1982, 96 Stat. 1068

Section 145, act July 14, 1890, ch. 708, § 2, 26 Stat. 289, authorized counting of treasury notes held by national banking associations as part of their lawful reserve.

Section 146, act July 12, 1882, ch. 290, § 12, 22 Stat. 165, related to holding of gold and silver certificates by national banking associations.

SUBCHAPTER IX—FORMATION OF ASSOCIATIONS TO ISSUE GOLD NOTES

§§ 151 to 153. Repealed. Pub. L. 103–325, title VI, § 602(e)(22), (23), (f)(7), Sept. 23, 1994, 108 Stat. 2292, 2293

Section 151, R.S. § 5185; Jan. 19, 1875, ch. 19, 18 Stat. 302, related to organization of associations to issue gold notes.

Section 152, R.S. § 5186, related to mandatory establishment of lawful money reserves by associations issuing gold notes and reception by such associations of gold notes of other associations in payment of debts.

Section 153, act Feb. 14, 1880, ch. 25, 21 Stat. 66, related to conversion of gold banks into currency banks.

SUBCHAPTER X—BANK EXAMINATIONS; REPORTS

§ 161. Reports to Comptroller of the Currency

(a) Reports of condition; form; contents; date of making; publication

Every association shall make reports of condition to the Comptroller of the Currency in ac-

cordance with the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.]. The Comptroller of the Currency may call for additional reports of condition, in such form and containing such information as he may prescribe, on dates to be fixed by him, and may call for special reports from any particular association whenever in his judgment the same are necessary for his use in the performance of his supervisory duties. Each report of condition shall contain a declaration by the president, a vice president, the cashier, or by any other officer designated by the board of directors of the bank to make such declaration, that the report is true and correct to the best of his knowledge and belief. The correctness of the report of condition shall be attested by the signatures of at least three of the directors of the bank other than the officer making such declaration, with the declaration that the report has been examined by them and to the best of their knowledge and belief is true and correct. Each report shall exhibit in detail and under appropriate heads the resources and liabilities of the association at the close of business on any past day specified by the Comptroller, and shall be transmitted to the Comptroller within the period of time specified by the Comptroller. Special reports called for by the Comptroller need contain only such information as is specified by the Comptroller in his request therefor, and publication of such reports need be made only if directed by the Comptroller.

(b) Payment of dividends

Every association shall make to the Comptroller reports of the payment of dividends, including advance reports of dividends proposed to be declared or paid in such cases and under such conditions as the Comptroller deems necessary to carry out the purposes of the laws relating to national banking associations in such form and at such times as he may require.

(c) Reports of affiliates; form; contents; date of making; publication; penalties

Each national banking association shall obtain from each of its affiliates other than member banks and furnish to the Comptroller of the Currency not less than four reports during each year, in such form as the Comptroller may prescribe, verified by the oath or affirmation of the president or such other officer as may be designated by the board of directors of such affiliate to verify such reports, disclosing the information hereinafter provided for as of dates identical with those for which the Comptroller shall during such year require the reports of the condition of the association. Each such report of an affiliate shall be transmitted to the Comptroller at the same time as the corresponding report of the association, except that the Comptroller may, in his discretion, extend such time for good cause shown. Each such report shall contain such information as in the judgment of the Comptroller of the Currency shall be necessary to disclose fully the relations between such affiliate and such bank and to enable the Comptroller to inform himself as to the effect of such relations upon the affairs of such bank. The Comptroller shall also have power to call for additional reports with respect to any such affiliate whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of the conditions of the association with which it is affiliated. Such additional reports shall be transmitted to the Comptroller of the Currency in such form as he may prescribe.

(R.S. §5211; Feb. 27, 1877, ch. 69, §1, 19 Stat. 252; Dec. 28, 1922, ch. 18, 42 Stat. 1067; Feb. 25, 1927, ch. 191, §13, 44 Stat. 1232; June 16, 1933, ch. 89, §27, 48 Stat. 191; Pub. L. 86–230, §§11, 22(b), Sept. 8, 1959, 73 Stat. 458, 466; Pub. L. 86–671, §5, July 14, 1960, 74 Stat. 551; Pub. L. 89–485, §13(d), July 1, 1966, 80 Stat. 243; Pub. L. 101–73, title IX, §911(b)(1), Aug. 9, 1989, 103 Stat. 478; Pub. L. 103–325, title III, §308(a), Sept. 23, 1994, 108 Stat. 2218.)

REFERENCES IN TEXT

The Federal Deposit Insurance Act, referred to in subsec. (a), is act Sept. 21, 1950, ch. 967, §2, 64 Stat. 873, as amended, which is classified generally to chapter 16 (§1811 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1811 of this title and Tables.

CODIFICATION

R.S. §5211 derived from act June 3, 1864, ch. 106, §34, 13 Stat. 109, which was the National Bank Act, and act Mar. 3, 1869, ch. 130, §1, 15 Stat. 326. See section 38 of this title.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–325, §308(a)(1), struck out before period at end of fifth sentence ''; and the statement of resources and liabilities in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association, and such proof of publication shall be furnished as may be required by the Comptroller''.

Subsec. (c). Pub. L. 103–325, §308(a)(2), struck out after third sentence ''The reports of such affiliates shall be published by the association under the same conditions as govern its own condition reports.''

1989—Subsec. (a). Pub. L. 101–73, §911(b)(1)(A), in fifth sentence substituted ''within the period of time specified by the Comptroller'' for ''within ten days after the receipt of a request therefor from him''.

Subsec. (c). Pub. L. 101–73, §911(b)(1)(B), struck out at end ''Any such affiliated bank which fails to obtain and furnish any report required under this section shall be subject to a penalty of $100 for each day during which such failure continues.''

1966—Subsec. (c). Pub. L. 89–485 struck out second sentence stating that the term ''affiliate'' shall include holding company affiliates as well as other affiliates.

1960—Subsec. (a). Pub. L. 86–671, §5(a), designated existing provisions of former first par. as subsec. (a), substituted provisions relating to the making of reports of condition in accordance with the Federal Deposit Insurance Act and additional reports of condition containing declaration of officer for former provisions requiring minimum of three reports annually verified by an officer, inserted provisions respecting contents and publication of special reports and deleted requirement for making reports of payment of dividends, which is incorporated in subsec. (b) of this section.

Subsec. (b). Pub. L. 86–671, §5(a), designated existing provisions of former first par. as subsec. (b).

Subsec. (c). Pub. L. 86–671, §5(b), designated existing provisions of former second par. as subsec. (c) and substituted ''four'' for ''three'' in first sentence.

1959—Pub. L. 86–230 required transmission of reports to the Comptroller within ten instead of five days and the making of reports of the payment of dividends including advance reports of dividends proposed to be declared or paid, respectively.

1933—Act June 16, 1933, added second par.

1927—Act Feb. 25, 1927, inserted ''or of a vice-president, or of an assistant cashier of the association designated by its board of directors to verify such reports in the absence of the president and cashier, taken before a notary public properly authorized and commissioned by the State in which such notary resides and the association is located, or any other officer having an official seal, authorized in such State to administer oaths'' in first sentence, and ''and the statement of resources and liabilities together with acknowledgment and attestation'', in second sentence.

EFFECTIVE DATE OF 1989 AMENDMENT

Section 911(i)[(g)] of Pub. L. 101–73 provided that: ''The amendments made by this section [amending this section and sections 164, 324, 1782, 1817, 1847, and 1882 of this title] shall apply with respect to reports filed or required to be filed after the date of the enactment of this Act [Aug. 9, 1989].''

EFFECTIVE DATE OF 1960 AMENDMENT

Amendment by Pub. L. 86–671 effective Jan. 1, 1961, see section 7 of Pub. L. 86–671, set out as a note under section 1817 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

Comptroller not subject to provisions relating to coordination of Federal reports, see section 3507 of Title 44, Public Printing and Documents.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 164 of this title; title 7 section 6f; title 15 sections 78*o*–5, 78q.

§ 162. Repealed. Pub. L. 86–671, § 6, July 14, 1960, 74 Stat. 552.

Section, act Feb. 26, 1881, ch. 82, 21 Stat. 352, prescribed the manner of verification of reports of condition of national banks. See section 1817 of this title.

EFFECTIVE DATE OF REPEAL

Repeal effective Jan. 1, 1961, see section 7 of Pub. L. 86–671, set out as an Effective Date of 1960 Amendment note under section 1817 of this title.

§ 163. Repealed. Pub. L. 86–230, § 22(a), Sept. 8, 1959, 73 Stat. 466

Section, R.S. § 5212, related to report of dividends and net earnings. See section 161 of this title.

§ 164. Penalty for failure to make reports

(a) First tier

Any association which—

(1) maintains procedures reasonably adapted to avoid any inadvertent error and, unintentionally and as a result of such an error—

(A) fails to make, obtain, transmit, or publish any report or information required by the Comptroller of the Currency under section 161 of this title, within the period of time specified by the Comptroller; or

(B) submits or publishes any false or misleading report or information; or

(2) inadvertently transmits or publishes any report which is minimally late,

shall be subject to a penalty of not more than $2,000 for each day during which such failure continues or such false or misleading information is not corrected. The association shall have the burden of proving that an error was inadvertent and that a report was inadvertently transmitted or published late.

(b) Second tier

Any association which—

(1) fails to make, obtain, transmit, or publish any report or information required by the Comptroller of the Currency under section 161 of this title, within the period of time specified by the Comptroller; or

(2) submits or publishes any false or misleading report or information,

in a manner not described in subsection (a) of this section shall be subject to a penalty of not more than $20,000 for each day during which such failure continues or such false or misleading information is not corrected.

(c) Third tier

Notwithstanding subsections (a) and (b) of this section, if any association knowingly or with reckless disregard for the accuracy of any information or report described in subsection (b) of this section submits or publishes any false or misleading report or information, the Comptroller may assess a penalty of not more than $1,000,000 or 1 percent of total assets of the association, whichever is less, per day for each day during which such failure continues or such false or misleading information is not corrected.

(d) Assessment; etc.

Any penalty imposed under subsection (a), (b), or (c) of this section shall be assessed and collected by the Comptroller of the Currency in the manner provided in subparagraphs (E), (F), (G), and (I) of section 1818(i)(2) of this title (for penalties imposed under such section) and any such assessment (including the determination of the amount of the penalty) shall be subject to the provisions of such section.

(e) Hearing

Any association against which any penalty is assessed under this subsection[1] shall be afforded an agency hearing if such association submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section 1818(h) of this title shall apply to any proceeding under this section.

(R.S. § 5213; Pub. L. 86–230, § 12, Sept. 8, 1959, 73 Stat. 458; Pub. L. 101–73, title IX, § 911(b)(2), Aug. 9, 1989, 103 Stat. 478.)

CODIFICATION

R.S. § 5213 derived from act Mar. 3, 1869, ch. 130, §§ 1, 2, 15 Stat. 326, 327.

AMENDMENTS

1989—Pub. L. 101–73 amended section generally. Prior to amendment, section read as follows: ''Every association which fails to make and transmit any report required under section 161 of this title shall be subject to a penalty of $100 for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after it has

[1] So in original. Probably should be ''section''.

been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States.''

1959—Pub. L. 86–230 substituted ''section 161 of this title'' for ''either section 161 or 163 of this title''.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–73 applicable with respect to reports filed or required to be filed after Aug. 9, 1989, see section 911(i) of Pub. L. 101–73, set out as a note under section 161 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1831k of this title.

§ 165. Omitted

CODIFICATION

Section, R.S. § 5241, related to limitation of visitorial powers. See section 484 of this title.

SUBCHAPTER XI—MISCELLANEOUS PROVISIONS REGARDING UNITED STATES BONDS IN RELATION TO NATIONAL BANKS

§§ 168 to 177. Repealed. Pub. L. 103–325, title VI, § 602(e)(24)–(31), (f)(4)(D), (5)(A), Sept. 23, 1994, 108 Stat. 2292, 2293

Section 168, R.S. § 5160, authorized associations to take up bonds upon returning circulating notes to Comptroller of the Currency.

Section 169, R.S. § 5161, related to exchange of United States coupon bonds for registered bonds.

Section 170, R.S. § 5162; Aug. 23, 1935, ch. 614, § 313, 49 Stat. 711, related to manner of making transfers of bonds.

Section 171, R.S. § 5163, related to establishment of registry of transferred bonds by Comptroller of the Currency.

Section 172, R.S. § 5164, required Comptroller of the Currency to notify national banking associations of transfers from its accounts.

Section 173, R.S. § 5165, related to examination of registry and bonds by Comptroller of the Currency and Treasurer of United States.

Section 174, R.S. § 5166, related to annual examination of bonds by national banking associations.

Section 175, R.S. § 5167, related to custody of bonds and collection of interest.

Section 176, acts June 20, 1874, ch. 343, § 4, 18 Stat. 124; June 21, 1917, ch. 32, § 9, 40 Stat. 239, provided that associations desiring to withdraw circulating notes could, upon deposit of money with Treasurer of United States, withdraw bonds on deposit with Treasurer for security of such notes.

Section 177, acts July 12, 1882, ch. 290, § 8, 22 Stat. 164; Mar. 14, 1900, ch. 41, § 12, 31 Stat. 49; June 21, 1917, ch. 32, § 9, 40 Stat. 239, related to amount of bonds banks were required to keep on deposit with Treasurer of United States, as security for circulating notes, and authorized banks having deposits in excess of such amount to reduce, or retire in full, their circulation by depositing lawful money.

§ 177a. Funds available for cost of transporting and redeeming national and Federal Reserve bank notes

The cost of transporting and redeeming outstanding national bank notes and Federal Reserve bank notes as may be presented to the Treasurer of the United States for redemption shall be paid from the regular annual appropriation for the Department of the Treasury.

(Oct. 10, 1940, ch. 841, 54 Stat. 1093; Pub. L. 103–325, title VI, § 602(g)(10), Sept. 23, 1994, 108 Stat. 2294.)

AMENDMENTS

1994—Pub. L. 103–325 amended section generally. Prior to amendment, section read as follows: ''After the reimbursement to the Treasury from funds derived from assessments made pursuant to section 177 of this title, of all costs lawfully charged thereto for the fiscal year ending June 30, 1941, the balance of such funds shall be covered into the Treasury as miscellaneous receipts; and thereafter the cost of transporting and redeeming such outstanding national bank notes and Federal Reserve bank notes as may be presented to the Treasurer of the United States for redemption shall be paid from the regular annual appropriations for the Treasury Department.''

§ 178. Repealed. Pub. L. 103–325, title VI, § 602(f)(5)(B), Sept. 23, 1994, 108 Stat. 2293

Section, acts July 12, 1882, ch. 290, § 9, 22 Stat. 164; Mar. 14, 1900, ch. 41, § 12, 31 Stat. 49; Mar. 4, 1907, ch. 2913, § 4, 34 Stat. 1290, authorized national banking associations desiring to withdraw circulating notes to deposit money with Treasurer of United States and withdraw bonds or other securities securing such notes.

SUBCHAPTER XII—VOLUNTARY DISSOLUTION

§ 181. Voluntary dissolution; appointment and removal of liquidating agent or committee; examination

Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval.

The shareholders shall designate one or more persons to act as liquidating agent or committee, who shall conduct the liquidation in accordance with law and under the supervision of the board of directors, who shall require a suitable bond to be given by said agent or committee. The liquidating agent or committee shall render annual reports to the Comptroller of the Currency on the 31st day of December of each year showing the progress of said liquidation until the same is completed. The liquidating agent or committee shall also make an annual report to a meeting of the shareholders to be held on the date fixed in the articles of association for the annual meeting, at which meeting the shareholders may, if they see fit, by a vote representing a majority of the entire stock of the bank, remove the liquidating agent or committee and

appoint one or more others in place thereof. A special meeting of the shareholders may be called at any time in the same manner as if the bank continued an active bank and at said meeting the shareholders may, by vote of the majority of the stock, remove the liquidating agent or committee. The Comptroller of the Currency is authorized to have an examination made at any time into the affairs of the liquidating bank until the claims of all creditors have been satisfied, and the expense of making such examinations shall be assessed against such bank in the same manner as in the case of examinations made pursuant to subchapter XV of chapter 3 of this title.

(R.S. § 5220; Aug. 23, 1935, ch. 614, title III, § 317, 49 Stat. 712; Pub. L. 86–230, § 15, Sept. 8, 1959, 73 Stat. 458.)

REFERENCES IN TEXT

Subchapter XV [§ 481 et seq.] of chapter 3 of this title, referred to in second par., was in the original a reference to section 5240 of the Revised Statutes.

CODIFICATION

R.S. § 5220 derived from act June 3, 1864, ch. 106, § 42, 13 Stat. 112, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1959—Pub. L. 86–230 required shareholder approval of purchase and sale agreement where there is liquidation of a bank effected through sale of its assets and assumption of deposit liabilities and authorized waiver of such requirement in an emergency.

1935—Act Aug. 23, 1935, added second par.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

New banks organized by Federal Deposit Insurance Corporation after closing of old bank, non-application of this section to, see section 1821 of this title.

Notice of intent to dissolve, see section 182 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 186, 202, 288, 1821 of this title.

§ 182. Notice of intent to dissolve

Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and publication thereof to be made for a period of two months in every issue of a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying its creditors to present their claims against the association for payment.

(R.S. § 5221; Aug. 9, 1955, ch. 626, 69 Stat. 546.)

CODIFICATION

R.S. § 5221 derived from act June 3, 1864, ch. 106, § 42, 13 Stat. 112, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1955—Act Aug. 9, 1955, struck out provisions relating to publication in a newspaper published in the City of New York, and notification to holders of national bank notes to present them for payment.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CROSS REFERENCES

New banks organized by Federal Deposit Insurance Corporation after closing of old bank, non-application of this section to, see section 1821 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 186, 1821 of this title.

§§ 183 to 186. Repealed. Pub. L. 103–325, title VI, § 602(e)(32)–(35), Sept. 23, 1994, 108 Stat. 2292

Section 183, R.S. § 5222, provided that, within six months of voting to liquidate, an association was to deposit with Treasurer of United States money sufficient to redeem all outstanding circulation.

Section 184, R.S. § 5223, exempted associations which wound up business for purpose of consolidating with another association from requirement to deposit money to redeem all outstanding circulation.

Section 185, R.S. § 5224; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 320, related to reassignment of bonds to association and redemption of notes.

Section 186, R.S. § 5225; Feb. 27, 1877, ch. 69, § 1, 19 Stat. 252, related to destruction of redeemed notes by Treasurer.

SUBCHAPTER XIII—RECEIVERSHIP

§ 191. Appointment of Federal Deposit Insurance Corporation as receiver

The Comptroller of the Currency may, without prior notice or hearings, appoint a receiver for any national bank (and such receiver shall be the Federal Deposit Insurance Corporation if the national bank is an insured bank (as defined in section 1813(h) of this title)) if the Comptroller determines, in the Comptroller's discretion, that—

(1) 1 or more of the grounds specified in section 1821(c)(5) of this title exist; or

(2) the association's board of directors consists of fewer than 5 members.

(June 30, 1876, ch. 156, § 2, formerly § 1, 19 Stat. 63; Pub. L. 86–230, § 16, Sept. 8, 1959, 73 Stat. 458; Pub. L. 102–242, title I, § 133(b), Dec. 19, 1991, 105 Stat. 2271; renumbered § 2 and amended Pub. L. 102–550, title XVI, § 1603(d)(6), (7), Oct. 28, 1992, 106 Stat. 4080.)

PRIOR PROVISIONS

A prior section 2 of act June 30, 1876, was classified to section 65 of this title, prior to repeal by Pub. L. 86–230, § 8, Sept. 8, 1959, 73 Stat. 457.

AMENDMENTS

1992—Pub. L. 102–550, § 1603(d)(7)(B), substituted ''appoint a receiver for any national bank (and such receiver shall be the Federal Deposit Insurance Corporation if the national bank is an insured bank (as defined in section 1813(h) of this title))'' for ''appoint the Federal Deposit Insurance Corporation as receiver for any national banking association'' in introductory provisions.

Pub. L. 102–550, §1603(d)(6), amended directory language of Pub. L. 102–242, §133(b). See 1991 Amendment note below.

1991—Pub. L. 102–242, §133(b), as amended by Pub. L. 102–550, §1603(d)(6), amended section generally. Prior to amendment, section read as follows: ''Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association.''

1959—Pub. L. 86–230 struck out provisions which required receiver to enforce the personal liability of shareholders.

EFFECTIVE DATE OF 1992 AMENDMENT

Section 1609 of Pub. L. 102–550 provided that:

''(a) IN GENERAL.—Except as provided in subsection (b) or any other provision of this subtitle [subtitle A (§§1601–1609) of title XVI of Pub. L. 102–550, see Tables for classification], the amendments made by this subtitle to the Federal Deposit Insurance Corporation Improvement Act of 1991, the Federal Deposit Insurance Act, and any other law shall take effect as if such amendments had been included in the Federal Deposit Insurance Corporation Improvement Act of 1991 [Pub. L. 102–242] as of the date of the enactment of such Act [Dec. 19, 1991].

''(b) EFFECTIVE DATE OF CERTAIN AMENDMENTS.—In the case of any amendment made by this subtitle to any provision of law added or amended by the Federal Deposit Insurance Corporation Improvement Act of 1991 [see Tables for classification] effective after December 19, 1992, the amendment made by this subtitle shall take effect on the effective date of the amendment made by the Federal Deposit Insurance Corporation Improvement Act of 1991.''

EFFECTIVE DATE OF 1991 AMENDMENT

Section 133(g) of Pub. L. 102–242 provided that: ''The amendments made by this section [amending this section and sections 203, 248, 1464, and 1821 of this title] shall become effective 1 year after the date of enactment of this Act [Dec. 19, 1991].''

SHORT TITLE

Section 1 of act June 30, 1876, as added by act Oct. 28, 1992, Pub. L. 102–550, title XVI, §1603(d)(7)(A), 106 Stat. 4080, provided that: ''This Act [enacting this section, sections 65 and 197 of this title, and section 424 of former Title 31, Money and Finance, and amending section 55 of this title] may be cited as the 'National Bank Receivership Act'.''

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, §4, 47 Stat. 1567 (D.C. Code, §26–104).

TERMINATION OF NATIONAL BANK CLOSED RECEIVERSHIP FUND

Pub. L. 96–221, title VII, §§721–723, Mar. 31, 1980, 94 Stat. 190, 191, as amended Pub. L. 97–320, title IV, §409, Oct. 15, 1982, 96 Stat. 1515, provided that:

''SEC. 721. The purpose of this part [enacting this provision] is to terminate the closed receivership fund by—

''(1) providing final notice of availability of liquidating dividends to creditors of national banks which have been closed and for which the Comptroller has appointed a receiver other than the Federal Deposit Insurance Corporation;

''(2) barring rights of creditors to collect liquidating dividends from the Comptroller of the Currency after a reasonable period of time following such final notice; and

''(3) refunding to the Comptroller the principal amount of such fund and any income earned thereon.

''SEC. 722. For purposes of this part—

''(1) the term 'closed receivership fund' means the aggregation of undisbursed liquidating dividends from national banks which have been closed and for which the Comptroller has appointed a receiver other than the Federal Deposit Insurance Corporation, held by the Comptroller in his capacity as successor to receivers of those banks;

''(2) the term 'Comptroller' means the Comptroller of the Currency;

''(3) the term 'claimant' means a depositor or other creditor who asserts a claim against a closed national bank for a liquidating dividend; and

''(4) the term 'liquidating dividend' means an amount of money in the closed receivership fund determined by a receiver of a closed national bank or by the Comptroller to be owed by that bank to a depositor or other creditor.

''SEC. 723. (a) The Comptroller shall publish notice once a week for four weeks in the Federal Register that all rights of depositors and other creditors of closed national banks to collect liquidating dividends from the closed receivership fund shall be barred after twelve months following the last date of publication of such notice.

''(b) The Comptroller shall pay the principal amount of a liquidating dividend, exclusive of any income earned thereon, to a claimant presenting a valid claim, if the claimant applies to collect within twelve months following the last date notice is published.

''(c) If a creditor shall fail to apply to collect a liquidating dividend within twelve months after the last date notice is published, all rights of the claimant against the closed receivership fund with respect to the liquidating dividend shall be barred.

''(d) The principal amount of any liquidating dividends (1) for which claims have not been asserted within twelve months following the last date notice is published or (2) for which the Comptroller has determined a valid claim has not been submitted shall, together with any income earned on liquidating dividends and other moneys, if any, remaining in the closed receivership fund, be covered into the general funds of the Comptroller.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 197, 205 of this title.

§ 192. Default in payment of circulating notes

On becoming satisfied, as specified in sections 131 and 132[1] of this title, that any association is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound

[1] See References in Text note below.

all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

Provided, That the Comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited: *Provided*, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 12B of the Federal Reserve Act, as amended. Such depositary shall pay upon such money interest at such rate as the Comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits.

(R.S. § 5234; May 15, 1916, ch. 121, 39 Stat. 121; Aug. 23, 1935, ch. 614, title III, § 339, 49 Stat. 721; Pub. L. 86–230, § 17, Sept. 8, 1959, 73 Stat. 458; Pub. L. 103–325, title VI, § 602(g)(11), Sept. 23, 1994, 108 Stat. 2294.)

REFERENCES IN TEXT

Sections 131 and 132 of this title, referred to in text, were repealed by Pub. L. 103–325, title VI, § 602(e)(14), (15), Sept. 23, 1994, 108 Stat. 2292.

Section 12B of the Federal Reserve Act, as amended, referred to in text, formerly classified to section 264 of this title, has been withdrawn from the Federal Reserve Act and incorporated in the Federal Deposit Insurance Act which is classified generally to chapter 16 (§ 1811 et seq.) of this title.

CODIFICATION

R.S. § 5234 derived from act June 3, 1864, ch. 106, § 50, 13 Stat. 114, which was part of the National Bank Act. See section 38 of this title.

AMENDMENTS

1994—Pub. L. 103–325 struck out ''has refused to pay its circulating notes as therein mentioned, and'' before ''is in default''.

1959—Pub. L. 86–230 struck out provisions which required receiver to enforce the personal liability of shareholders.

1935—Act Aug. 23, 1935, inserted second proviso in second par.

TRANSFER OF FUNCTIONS

For transfer of functions to Secretary of the Treasury, see note set out under section 121 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

INTEREST ON DEPOSITS

So much of existing law requiring the payment of interest with respect to any funds deposited by the United States or by any public instrumentality, agency, or officer thereof, as is inconsistent with sections 371a, 371b, 374, 374a, 461, former sections 462 to 465, and section 466 of this title, repealed, see section 371a of this title.

CROSS REFERENCES

Certifying check when amount of deposit was inadequate, proceedings under this section, see section 501 of this title.

Failure to pay up capital stock, appointment of receiver under this section, see section 55 of this title.

Failure to sell or dispose of own capital stock acquired as security or by purchase, appointment of receiver under this section, see section 83 of this title.

Individual liability of shareholders, limitation on liability, see section 64a of this title.

Money reserve falling below required amount in banks in Alaska and insular possessions, appointment of receiver under this section, see section 143 of this title.

Payment of interest on demand deposits, see section 371a of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 55, 83, 143, 197, 481, 501, 1467 of this title.

§ 193. Notice to present claims

The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

(R.S. § 5235.)

CODIFICATION

R.S. § 5235 derived from act June 3, 1864, ch. 106, § 50, 13 Stat. 114, which was part of the National Bank Act. See section 38 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

§ 194. Dividends on adjusted claims; distribution of assets

From time to time, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

(R.S. § 5236; Pub. L. 103–325, title VI, § 602(g)(12), Sept. 23, 1994, 108 Stat. 2294.)

CODIFICATION

R.S. § 5236 derived from act June 3, 1864, ch. 106, § 50, 13 Stat. 114, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1994—Pub. L. 103–325 struck out '', after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association'' after ''From time to time''.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc. in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

CROSS REFERENCES

Preferential rights of preferred stock on liquidation, see section 51b of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 197 of this title.

§ 195. Repealed. Pub. L. 103–325, title VI, § 602(e)(36), Sept. 23, 1994, 108 Stat. 2292

Section, R.S. § 5237; Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1167, related to injunction by bank denying failure to redeem notes.

§ 196. Expenses

All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

(R.S. § 5238; Pub. L. 103–325, title VI, § 602(g)(13), Sept. 23, 1994, 108 Stat. 2294.)

CODIFICATION

R.S. § 5238 derived from act June 3, 1864, ch. 106, § 51, 13 Stat. 115, which was the National Bank Act. See section 38 of this title.

AMENDMENTS

1994—Pub. L. 103–325 struck out at beginning ''All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees.''

§ 197. Shareholders' meeting; continuance of receivership; appointment of agent; winding up business; distribution of assets

(a) Whenever any national banking association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four [12 U.S.C. 192] and other sections of the Revised Statutes of the United States and section 1821(c) of this title, and when, as provided in section 194 of this title, there has been paid to each and every creditor of such association whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership, the Comptroller of the Currency or the Federal Deposit Insurance Corporation, where that Corporation has been appointed receiver of the bank, shall call a meeting of the shareholders of the association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of the association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of the association, or whether an agent shall be elected for that purpose, and in so determining the shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in number of shares shall be necessary to determine whether the receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the receiver shall be continued, the receiver shall thereupon proceed with the execution of the trust, and shall sell, dispose of, or otherwise collect the assets of the association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon such receiver so far as they remain applicable. In case such meeting shall, by the vote of a majority of the stock in number of shares, determine that an agent shall be elected, the meeting shall thereupon proceed to elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority of stock in number of shares shall be declared the agent for the purposes hereinafter provided; and when such agent shall have executed a bond to the shareholders conditioned for the payment and discharge in full or, to the extent possible from the remaining assets of the association, of each and every claim that may thereafter be proved and allowed by and before a competent court and for the faithful performance of his duties, in the penalty fixed by the shareholders at such meeting, with a surety or sureties to be approved by the district court of the United States for the district where the business of the association was carried on, and shall have filed such bond in the office of the clerk of such court, the Comptroller and the receiver, or the Federal Deposit Insurance Corporation, where that Corporation has been appointed receiver of the bank, shall thereupon transfer and deliver to such agent all the uncollected or other assets of the association then remaining in the hands or subject to the order and control of the Comptroller and such receiver, or either of them, or the Federal Deposit Insurance Corporation; and for this purpose the Comptroller and such receiver, or the Federal Deposit Insurance Corporation, as the case may be, are severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; and upon the execution and delivery of such instrument to such agent the Comptroller and such receiver or the Federal Deposit Insurance Corporation shall by virtue of this Act be discharged from any and all liabilities to the association and to each and all the creditors and shareholders thereof.

(b) Upon receiving such deed, assignment, transfer, or other instrument the person elected such agent shall hold, control, and dispose of the

assets and property of the association which he may receive under the terms hereof for the benefit of the shareholders of the association, and he may in his own name, or in the name of the association, sue and be sued and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to the association, with the consent and approval of the district court of the United States for the district where the business of the association was carried on, and shall at the conclusion of his trust render to such district court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge such agent and sureties upon such bond. In case any such agent so elected shall die, resign, or be removed, any shareholder may call a meeting of the shareholders of the association in the town, city, or village where the business of the association was carried on, by giving notice thereof for thirty days in a newspaper published in such town, city, or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in number of shares, and shall have executed a bond to the shareholders conditioned for the payment and discharge in full or, to the extent possible from the remaining assets of the association, of each and every claim that may thereafter be proved and allowed by and before a competent court and for the faithful performance of his duties, in the penalty fixed by the shareholders at such meeting, with a surety or sureties, to be approved by such court, and file such bond in the office of the clerk of that court, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or cestui que trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows:

First. To pay the expenses of the execution of the trust to the date of such payment.

Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of the association upon and by reason of any and all assessments made upon the stock of the association by order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States.

Third. To pay the balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the Comptroller of the Currency, or the Federal Deposit Insurance Corporation if continued as receiver of the bank under subsection (a) of this section, or such agent, as the case may be.

(June 30, 1876, ch. 156, § 3, 19 Stat. 63; Aug. 3, 1892, ch. 360, 27 Stat. 345; Mar. 2, 1897, ch. 354, 29 Stat. 600; Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; Pub. L. 86–230, § 18, Sept. 8, 1959, 73 Stat. 458.)

REFERENCES IN TEXT

Section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, referred to in subsec. (a), are classified to section 192 of this title and other sections of the Code. See Tables.

This Act, referred to in subsec. (a), is act June 30, 1876, ch. 156, 19 Stat. 63, as amended, sections 1, 3, and 4 of which are classified to this section and sections 55 and 191 of this title, respectively. Section 2 of the Act, which was classified to section 65 of this title, was repealed by Pub. L. 86–230, § 8, Sept. 8, 1959, 73 Stat. 457. Section 5 of the Act, which was classified to section 424 of former Title 31, was repealed and reenacted as section 5153 of Title 31, Money and Finance, by Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 877.

AMENDMENTS

1959—Subsec. (a). Pub. L. 86–230 designated former first par., less last sentence, as subsec. (a), and incorporated references to Federal Deposit Insurance Corporation respecting receiverships under section 1821(c) of this title, convocation of shareholders, transfer of assets, execution of instruments and discharge from liability, omitted provision for deposit of money with the Treasurer of the United States for the redemption of the circulating notes of the association, and for the value of shares as a test to determine whether a majority vote has been cast in a stockholders' meeting, required the windup agent to file a bond to the shareholders in an amount satisfactory to them with sureties approved by appropriate district court instead of a bond from the shareholders satisfactory to the Comptroller and to condition the bond to payment of proved claims to the extent possible from the remaining instead of payment of the claims in full, only.

Subsec. (b). Pub. L. 86–230 designated former last sentence of first par. and second par., as subsec. (b), and omitted provisions which related to refusal of agent to serve as a ground for the calling of an election of another agent, to the value of shares as a test to determine whether a majority vote has been cast in a stockholders' meeting, required the bond of the windup agent to be conditioned for payment of proved claims to the extent possible from the remaining assets instead of payment of the claims in full, only, and provided for the distribution of the balance as shall be deemed advisable by the Federal Deposit Insurance Corporation.

TRANSFER OF FUNCTIONS

For transfer of functions to Secretary of the Treasury, see note set out under section 121 of this title.

Act Mar. 3, 1911, conferred upon the district courts all powers formerly vested in the former circuit courts.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

§ 197a. Resumption of business by closed bank on consent of depositors

In any case in which, in the opinion of the Comptroller of the Currency, it would be to the advantage of the depositors and unsecured creditors of any national banking association whose business has been closed, for such association to

resume business upon the retention by the association, for a reasonable period to be prescribed by the Comptroller, of all or any part of its deposits, the Comptroller is authorized, in his discretion, to permit the association to resume business if depositors and unsecured creditors of the association representing at least 75 per centum of its total deposit and unsecured credit liabilities consent in writing to such retention of deposits. Nothing in this section shall be construed to affect in any manner any powers of the Comptroller under the provisions of law in force on June 16, 1933, with respect to the reorganization of national banking associations.

(June 16, 1933, ch. 89, § 29, 48 Stat. 193.)

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 198. Purchase by receiver of property of bank; request to Comptroller

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

(Mar. 29, 1886, ch. 28, § 1, 24 Stat. 8.)

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

§ 199. Approval of request

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States.

(Mar. 29, 1886, ch. 28, § 2, 24 Stat. 8.)

TRANSFER OF FUNCTIONS

For transfer of functions to Secretary of the Treasury, see note set out under section 121 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

§ 200. Payment

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: *Provided, however*, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order.

(Mar. 29, 1886, ch. 28, § 3, 24 Stat. 8.)

TRANSFER OF FUNCTIONS

For transfer of functions to Secretary of the Treasury, see note set out under section 121 of this title.

APPLICATION TO DISTRICT OF COLUMBIA

Provisions of this section were made applicable to banks, etc., in the District of Columbia by act Mar. 4, 1933, ch. 274, § 4, 47 Stat. 1567 (D.C. Code, § 26–104).

SUBCHAPTER XIV—BANK CONSERVATION ACT

§ 201. Short title

This subchapter may be cited as the ''Bank Conservation Act.''

(Mar. 9, 1933, ch. 1, title II, § 201, 48 Stat. 2.)

CROSS REFERENCES

Right to amend, separability of provisions, see section 212 of this title.

§ 202. Definitions

As used in this subchapter, the term ''bank'' means (1) any national banking association or any other financial institution chartered or licensed under Federal law and subject to the supervision of the Comptroller of the Currency, and (2) any bank or trust company located in the District of Columbia and operating under the supervision of the Comptroller of the Currency; the term ''voluntary dissolution and liquidation'' means a transaction pursuant to section 181 of this title that involves the assumption of the bank's insured deposit liabilities and the sale of the bank, or of control of the bank, as a going concern; and the term ''State'' means any State, Territory, or possession of the United States, and the Canal Zone.

(Mar. 9, 1933, ch. 1, title II, § 202, 48 Stat. 2; Pub. L. 101–73, title VIII, § 801, Aug. 9, 1989, 103 Stat. 441.)

REFERENCES IN TEXT

For definition of Canal Zone, referred to in text, see section 3602(b) of Title 22, Foreign Relations and Intercourse.

AMENDMENTS

1989—Pub. L. 101–73, § 801(1), in cl. (1), extended term ''bank'' to include any financial institution chartered or licensed under Federal law and subject to supervision of Comptroller of the Currency.

Pub. L. 101–73, § 801(2), in cl. (2), inserted definition of term ''voluntary dissolution and liquidation''.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 203. Appointment of conservator

(a) Appointment

The Comptroller of the Currency may, without prior notice or hearings, appoint a conservator (which may be the Federal Deposit Insurance Corporation) to the possession and control of a bank whenever the Comptroller of the Currency determines that 1 or more of the grounds specified in section 11(c)(5) of the Federal Deposit Insurance Act [12 U.S.C. 1821(c)(5)] exist.

(b) Judicial review

(1) In general

Not later than 20 days after the initial appointment of a conservator pursuant to this section, the bank may bring an action in the United States district court for the judicial district in which the home office of such bank is located, or in the United States District Court for the District of Columbia, for an order requiring the Comptroller to terminate the appointment of the conservator, and the court, upon the merits, shall dismiss such action or shall direct the Comptroller to terminate the appointment of such conservator. The Comptroller's decision to appoint a conservator pursuant to this section shall be set aside only if the court finds that such decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(2) Stay

The conservator may request that any judicial action or proceeding to which the conservator or the bank is or may become a party be stayed for a period of up to 45 days after the appointment of the conservator. Upon petition, the court shall grant such stay as to all parties.

(3) Actions and orders

Except as otherwise provided in this subsection, no court may take any action regarding the removal of a conservator, or restrain, or affect the exercise of powers or functions of a conservator. A court, upon application by the Comptroller, shall have jurisdiction to enforce an order of the Comptroller relating to—

(A) the conservatorship and the bank in conservatorship, or

(B) restraining or affecting the exercise of powers or functions of a conservator.

(c) Additional grounds for appointment

In addition to the foregoing provisions, the Comptroller may appoint a conservator for a bank if—

(1) the bank, by an affirmative vote of a majority of its board of directors or by an affirmative vote of a majority of its shareholders, consents to such appointment, or

(2) the Federal Deposit Insurance Corporation terminates the bank's status as an insured bank.

The appointment of a conservator pursuant to this subsection shall not be subject to review.

(d) Exclusive authority

The Comptroller shall have exclusive power and jurisdiction to appoint a conservator for a bank. Whenever the Comptroller appoints a conservator for any bank, the Comptroller may appoint the Federal Deposit Insurance Corporation conservator for such bank. The Federal Deposit Insurance Corporation, as such conservator, shall have all the powers granted under the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.], and (when not inconsistent therewith) any other rights, powers, and privileges possessed by conservators of banks under this Act and any other provision of law. The Comptroller may also appoint another person as conservator, who shall be subject to the provisions of this Act.

(e) Replacement of conservator

The Comptroller may, without notice or hearing, replace a conservator with another conservator. Such replacement shall not affect the bank's right under subsection (b) of this section to obtain judicial review of the Comptroller's original decision to appoint a conservator.

(Mar. 9, 1933, ch. 1, title II, § 203, 48 Stat. 2; Pub. L. 101–73, title VIII, § 802, Aug. 9, 1989, 103 Stat. 442; Pub. L. 102–242, title I, § 133(c), Dec. 19, 1991, 105 Stat. 2271.)

REFERENCES IN TEXT

The Federal Deposit Insurance Act, referred to in subsec. (d), is act Sept. 21, 1950, ch. 967, § 2, 64 Stat. 873, as amended, which is classified generally to chapter 16 (§ 1811 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1811 of this title and Tables.

This Act, referred to in subsec. (d), is act Mar. 9, 1933, ch. 1, 48 Stat. 1, as amended, popularly known as the Emergency Banking and Bank Conservation Act, which is classified to sections 51a, 51b, 51c, 51d, 95 to 95b, 201 to 212, 248, 347b, 347c, 347d, 445 of this title and to section 5 of Title 50, Appendix, War and National Defense.

Section 51d of this title was repealed by act June 30, 1947, ch. 166, title II, § 206(b), (*o*), 61 Stat. 208. For effect of the repeal on outstanding debentures held by banks, see References in Text note set out under section 51b–1 of this title.

AMENDMENTS

1991—Subsec. (a). Pub. L. 102–242 amended subsec. (a) generally, substituting present provisions for provisions which specified circumstances under which Comptroller could appoint conservator.

1989—Pub. L. 101–73 amended section generally, changing structure of section from a single unlettered paragraph to one consisting of subsections (a) to (e).

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102–242 effective 1 year after Dec. 19, 1991, see section 133(g) of Pub. L. 102–242, set out as a note under section 191 of this title.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

CONSERVATORS OF STATE BANKS

Ex. Ord. No. 6080, Mar. 18, 1933, provided for appointment of conservators of State banks under certain regulations.

§ 204. Examinations

The Comptroller of the Currency (in consultation with the Board of Directors of the Federal Deposit Insurance Corporation when the Corporation is appointed conservator) is authorized to examine and supervise the bank in conservatorship as long as the bank continues to operate as a going concern. The Comptroller may use reports and other information provided by the Federal Deposit Insurance Corporation for this purpose.

(Mar. 9, 1933, ch. 1, title II, § 204, 48 Stat. 3; Pub. L. 101–73, title VIII, § 803, Aug. 9, 1989, 103 Stat. 443.)

AMENDMENTS

1989—Pub. L. 101–73 amended section generally. Prior to amendment, section read as follows: ''The Comptroller of the Currency shall cause to be made such examinations of the affairs of such bank as shall be necessary to inform him as to the financial condition of such bank, and the examiner shall make a report thereon to the Comptroller of the Currency at the earliest practicable date.''

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 205. Termination of conservatorship

(a) General rule

At any time the Comptroller[1] becomes satisfied that it may safely be done and that it would be in the public interest, the Comptroller (with the agreement of the Board of Directors of the Federal Deposit Insurance Corporation when the Corporation has been appointed conservator) may—

(1) terminate the conservatorship and permit the involved bank to resume the transaction of its business subject to such terms, conditions, and limitations as the Comptroller may prescribe; or

(2) terminate the conservatorship upon a sale, merger, consolidation, purchase and assumption, change in control, or voluntary dissolution and liquidation of the involved bank.

(b) Other grounds for termination

The Comptroller also may terminate the conservatorship upon the appointment of a receiver pursuant to section 191 of this title.

(c) Enforcement under Federal Deposit Insurance Act

Such terms, conditions, and limitations as may be prescribed under subsection (a)(1) of this section shall be enforceable under the provisions of section 8(i) of the Federal Deposit Insurance Act [12 U.S.C. 1818(i)], to the same extent as an order issued pursuant to section 8(b) of the Federal Deposit Insurance Act [12 U.S.C. 1818(b)] which has become final. The bank may bring an action in the United States district court for the judicial district in which the home office of such bank is located or in the United States District Court for the District of Columbia for an order requiring the Comptroller to terminate the order. An action for judicial review of the terms, conditions, and limitations may not be commenced later than 20 days from the date of the termination of the conservatorship or the imposition of the order, whichever is later.

(d) Action upon termination

(1) In general

Upon termination of the conservatorship under subsection (a)(2) of this section, the Federal Deposit Insurance Corporation, as conservator, or when another person is appointed conservator, such other person, shall conclude the affairs of the conservatorship in accordance with paragraph (2).

(2) Deposit and distribution of proceeds

(A) Within 180 days of the sale, merger, consolidation, purchase and assumption, change in control, or voluntary dissolution and liquidation, the conservator shall deposit all net proceeds received from the transaction, less any outstanding expenses of the conservatorship, with the United States district court for the judicial district in which the home office of such bank is located and shall cause notice to be published for three consecutive months and notify by mail all known and remaining creditors and shareholders. Within 60 days thereafter, any depositor, creditor, or other claimant of the bank, or any shareholder of the bank may bring an action in interpleader in that court for distribution of the proceeds. The district court shall distribute such funds equitably. If no such action is instituted within one year after the date the funds are deposited with the district court, title to such net proceeds shall revert to the United States and the district court shall remit the funds to the Treasury of the United States.

(B) The conservator shall be deemed to have discharged all responsibility of the conservatorship upon the deposit of the proceeds with the district court and giving the required notifications.

(Mar. 9, 1933, ch. 1, title II, § 205, 48 Stat. 3; Pub. L. 101–73, title VIII, § 804, Aug. 9, 1989, 103 Stat. 443.)

REFERENCES IN TEXT

The Federal Deposit Insurance Act, referred to in subsec. (c), is act Sept. 21, 1950, ch. 967, § 2, 64 Stat. 873, as amended, which is classified generally to chapter 16 (§ 1811 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1811 of this title and Tables.

AMENDMENTS

1989—Pub. L. 101–73 amended section generally. Prior to amendment, section read as follows: ''If the Comptroller of the Currency becomes satisfied that it may

[1] So in original. Probably should be ''Comptroller of the Currency''.

safely be done and that it would be in the public interest, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business subject to such terms, conditions, restrictions and limitations as he may prescribe.''

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 206. Conservator; powers and duties

(a) General powers

A conservator shall have all the powers of the shareholders, directors, and officers of the bank and may operate the bank in its own name unless the Comptroller[1] in the order of appointment limits the conservator's authority.

(b) Subject to rules of Comptroller

The conservator shall be subject to such rules, regulations, and orders as the Comptroller from time to time deems appropriate; and, except as otherwise specifically provided in such rules, regulations, or orders or in section 209 of this title, shall have the same rights and privileges and be subject to the same duties, restrictions, penalties, conditions, and limitations as apply to directors, officers, or employees of a national bank.

(c) Payment of depositors and creditors

The Comptroller may require the conservator to set aside and make available for withdrawal by depositors and payment to other creditors such amounts as in the opinion of the Comptroller may safely be used for that purpose. All depositors and creditors who are similarly situated shall be treated in the same manner.

(d) Compensation of conservator and employees

The conservator and professional employees appointed to represent or assist the conservator shall not be paid amounts greater than are payable to employees of the Federal Government for similar services, except that the Comptroller of the Currency may authorize payment at higher rates (but not in excess of rates prevailing in the private sector), if the Comptroller determines that paying such higher rates is necessary in order to recruit and retain competent personnel.

(e) Expenses

All expenses of any such conservatorship shall be paid by the bank and shall be a lien upon the bank which shall be prior to any other lien.

(Mar. 9, 1933, ch. 1, title II, § 206, 48 Stat. 3; Pub. L. 101–73, title VIII, § 805, Aug. 9, 1989, 103 Stat. 445.)

AMENDMENTS

1989—Pub. L. 101–73 amended section generally. Prior to amendment, section read as follows: ''While such bank is in the hands of the conservator appointed by the Comptroller of the Currency, the Comptroller may require the conservator to set aside and make available for withdrawal by depositors and payment to other creditors, on a ratable basis, such amounts as in the opinion of the Comptroller may safely be used for this purpose; and the Comptroller may, in his discretion, permit the conservator to receive deposits, but deposits received while the bank is in the hands of the conservator shall not be subject to any limitation as to payment or withdrawal, and such deposits shall be segregated and shall not be used to liquidate any indebtedness of such bank existing at the time that a conservator was appointed for it, or any subsequent indebtedness incurred for the purpose of liquidating any indebtedness of such bank existing at the time such conservator was appointed. Such deposits received while the bank is in the hands of the conservator shall be kept on hand in cash, invested in the direct obligations of the United States, or deposited with a Federal reserve bank. The Federal reserve banks are authorized to open and maintain separate deposit accounts for such purpose, or for the purpose of receiving deposits from State officials in charge of State banks under similar circumstances.''

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 5373.

§§ 207, 208. Repealed. Pub. L. 101–73, title VIII, § 808, Aug. 9, 1989, 103 Stat. 446

Section 207, acts Mar. 9, 1933, ch. 1, title II, § 207, 48 Stat. 3; May 20, 1933, ch. 34, 48 Stat. 72, prescribed conditions for reorganization of banks, requiring consent of depositors and other creditors, of stockholders, or of both depositors and other creditors and stockholders, namely that the reorganization plan be fair and equitable to depositors, other creditors, and stockholders and be in the public interest; that the plan be consented to in writing; and that the approved plan be binding on all consenting or nonconsenting depositors, creditors, and stockholders.

Section 208, act Mar. 9, 1933, ch. 1, title II, § 208, 48 Stat. 4, made the provisions for segregation of deposits inapplicable after termination of conservatorship, and provided for termination of conservatorship after publication of notice of termination and mailing of a copy of such notice by registered mail to depositors of record.

§ 209. Liability protection

(a) Federal agency and employees

In any case in which the conservator is a Federal agency or an employee of the Government, the provisions of chapters 161 and 171 of title 28 shall apply with respect to such conservator's liability for acts or omissions performed pursuant to and in the course of the duties and responsibilities of the conservatorship.

(b) Other conservators

In any case where the conservator is not a conservator described in subsection (a) of this section, the conservator shall not be liable for damages in tort or otherwise for acts or omissions performed pursuant to and in the course of the duties and responsibilities of the conservatorship, unless such acts or omissions constitute gross negligence, including any similar conduct or any form of intentional tortious conduct, as determined by a court.

[1] So in original. Probably should be ''Comptroller of the Currency''.

(c) Indemnification

The Comptroller[1] shall have authority to indemnify the conservator on such terms as the Comptroller deems proper.

(Mar. 9, 1933, ch. 1, title II, § 209, 48 Stat. 5; Sept. 3, 1954, ch. 1263, § 23, 68 Stat. 1234; Pub. L. 101–73, title VIII, § 806, Aug. 9, 1989, 103 Stat. 445.)

AMENDMENTS

1989—Pub. L. 101–73 amended section generally. Prior to amendment, section read as follows: ''Conservators appointed pursuant to the provisions of this subchapter shall be subject to the provisions of and to the penalties prescribed by sections 334, 656, and 1005 of title 18; and sections 202, 216, 281, 431, 432, and 433 of title 18, in so far as applicable, are extended to apply to contracts, agreements, proceedings, dealings, claims and controversies by or with any such conservator or the Comptroller of the Currency under the provisions of this subchapter.''

1954—Act Sept. 3, 1954, corrected references to title 18.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 206 of this title.

§ 210. Governmental powers unimpaired

Nothing in this subchapter shall be construed to impair in any manner any powers of the President, the Secretary of the Treasury, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System.

(Mar. 9, 1933, ch. 1, title II, § 210, 48 Stat. 5; Aug. 23, 1935, ch. 614, title II, § 203(a), 49 Stat. 704.)

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed the name of the Federal Reserve Board to Board of Governors of the Federal Reserve System.

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 211. Rules and regulations

(a) In general

The Comptroller of the Currency may prescribe such rules and regulations as the Comptroller may deem necessary to carry out the provisions of this Act.

(b) F.D.I.C. as conservator

In any case in which the Federal Deposit Insurance Corporation is the conservator, any rules or regulations prescribed by the Comptroller shall be consistent with any rules and regulations prescribed by the Federal Deposit Insurance Corporation pursuant to the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.].

(Mar. 9, 1933, ch. 1, title II, § 211, 48 Stat. 5; Pub. L. 101–73, title VIII, § 807, Aug. 9, 1989, 103 Stat. 446.)

[1] So in original. Probably should be ''Comptroller of the Currency''.

REFERENCES IN TEXT

This Act, referred to in subsec. (a), is act Mar. 9, 1933, ch. 1, 48 Stat. 1, as amended, popularly known as the Emergency Banking and Bank Conservation Act, which is classified to sections 51a, 51b, 51c, 51d, 95 to 95b, 201 to 212, 248, 347b, 347c, 347d, and 445 of this title and section 5 of Title 50, Appendix, War and National Defense.

Section 51d of this title was repealed by act June 30, 1947, ch. 166, title II, § 206(b), (*o*), 61 Stat. 208. For effect of the repeal on outstanding debentures held by banks, see References in Text note set out under section 51b–1 of this title.

The Federal Deposit Insurance Act, referred to in subsec. (b), is act Sept. 21, 1950, ch. 967, § 2, 64 Stat. 873, as amended, which is classified generally to chapter 16 (§ 1811 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1811 of this title and Tables.

AMENDMENTS

1989—Pub. L. 101–73 amended section generally. Prior to amendment, section read as follows: ''The Comptroller of the Currency is authorized and empowered, with the approval of the Secretary of the Treasury, to prescribe such rules and regulations as he may deem necessary in order to carry out the provisions of this subchapter. Whoever violates any rule or regulation made pursuant to this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than one year, or both.''

EXCEPTION AS TO TRANSFER OF FUNCTIONS

Functions vested by any provision of law in Comptroller of the Currency, referred to in this section, not included in transfer of functions to Secretary of the Treasury, see note set out under section 1 of this title.

§ 212. Right to amend; separability

The right to alter, amend, or repeal this Act is expressly reserved. If any provision of this Act, or the application there of to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

(Mar. 9, 1933, ch. 1, title V, § 502, 48 Stat. 7.)

REFERENCES IN TEXT

This Act, referred to in text, is act Mar. 9, 1933, ch. 1, 48 Stat. 1, as amended, popularly known as the Emergency Banking and Bank Conservation Act, which is classified to sections 51a, 51b, 51c, 51d, 95 to 95b, 201 to 212, 248, 347b, 347c, 347d, and 445 of this title and section 5 of Title 50, Appendix, War and National Defense.

Section 51d of this title was repealed by act June 30, 1947, ch. 166, title II, § 206(b), (*o*), 61 Stat. 208. For effect of the repeal on outstanding debentures held by banks, see References in Text note set out under section 51b–1 of this title.

CODIFICATION

This section was not enacted as part of title II of act Mar. 9, 1933, ch. 1, 48 Stat. 2, which comprises this subchapter.

§ 213. Transferred

CODIFICATION

Section, act Jan. 30, 1934, ch. 6, § 13, 48 Stat. 343, relating to ratification of acts of the President and Secretary of the Treasury, was transferred to section 824 of former Title 31, and subsequently repealed by Pub. L. 97–258, Sept. 13, 1982, 96 Stat. 1068, the first section of which enacted Title 31, Money and Finance.

SUBCHAPTER XV—CONVERSION OF NATIONAL BANKS INTO STATE BANKS

§ 214. Definitions

(a) As used in this subchapter and section 321 of this title the term ''State bank'' means any bank, banking association, trust company, savings bank (other than a mutual savings bank), or other banking institution which is engaged in the business of receiving deposits and which is incorporated under the laws of any State, any Territory of the United States, Puerto Rico, or the Virgin Islands, or which is operating under the Code of Law for the District of Columbia (except a national banking association).

(b) For purposes of merger or consolidation under this subchapter and section 321 of this title the term ''national banking association'' means one or more national banking associations, and the term ''State bank'' means one or more State banks.

(Aug. 17, 1950, ch. 729, ch. 729, §1, 64 Stat. 455; Sept. 3, 1954, ch. 1263, §24, 68 Stat. 1234.)

AMENDMENTS

1954—Act Sept. 3, 1954, substituted ''this subchapter and section 321 of this title'' for ''sections 214 to 214c, 264(e)(2), (i)(2), (v)(4), and 321 of this title'' wherever appearing.

SEPARABILITY

Section 9 of act Aug. 17, 1950, provided that: ''If any provision of this Act [enacting this subchapter and amending of sections 264 and 321 of this title], or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.''

CROSS REFERENCES

Consolidation of State bank with national bank under charter of such national bank, see section 215 of this title.

Conversation of State bank into national bank, see sections 215 to 215b of this title.

§ 214a. Procedure for conversion, merger, or consolidation; vote of stockholders

A national banking association may, by vote of the holders of at least two-thirds of each class of its capital stock, convert into, or merge or consolidate with, a State bank in the same State in which the national banking association is located, under a State charter, in the following manner:

(a) Approval of board of directors; publication of notice of stockholders' meeting; waiver of publication; notice by registered or certified mail

The plan of conversion, merger, or consolidation must be approved by a majority of the entire board of directors of the national banking association. The bank shall publish notice of the time, place, and object of the shareholders' meeting to act upon the plan, in some newspaper with general circulation in the place where the principal office of the national banking association is located, at least once a week for four consecutive weeks: *Provided*, That newspaper publication may be dispensed with entirely if waived by all the shareholders and in the case of a merger or consolidation one publication at least ten days before the meeting shall be sufficient if publication for four weeks is waived by holders of at least two-thirds of each class of capital stock and prior written consent of the Comptroller of the Currency is obtained. The national banking association shall send such notice to each shareholder of record by registered mail or by certified mail at least ten days prior to the meeting, which notice may be waived specifically by any shareholder.

(b) Rights of dissenting stockholders

A shareholder of a national banking association who votes against the conversion, merger, or consolidation, or who has given notice in writing to the bank at or prior to such meeting that he dissents from the plan, shall be entitled to receive in cash the value of the shares held by him, if and when the conversion, merger, or consolidation is consummated, upon written request made to the resulting State bank at any time before thirty days after the date of consummation of such conversion, merger, or consolidation, accompanied by the surrender of his stock certificates. The value of such shares shall be determined as of the date on which the shareholders' meeting was held authorizing the conversion, merger, or consolidation, by a committee of three persons, one to be selected by majority vote of the dissenting shareholders entitled to receive the value of their shares, one by the directors of the resulting State bank, and the third by the two so chosen. The valuation agreed upon by any two of three appraisers thus chosen shall govern; but, if the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment as provided herein, such shareholder may within five days after being notified of the appraised value of his shares appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding as to the value of the shares of the appellant. If, within ninety days from the date of consummation of the conversion, merger, or consolidation, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party, cause an appraisal to be made, which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal, or the appraisal as the case may be, shall be paid by the resulting State bank. The plan of conversion, merger, or consolidation shall provide the manner of disposing of the shares of the resulting State bank not taken by the dissenting shareholders of the national banking association.

(Aug. 17, 1950, ch. 729, §2, 64 Stat. 455; Pub. L. 86–507, §1(10), June 11, 1960, 74 Stat. 200; Pub. L. 96–221, title VII, §706, Mar. 31, 1980, 94 Stat. 188.)

AMENDMENTS

1980—Subsec. (b). Pub. L. 96–221 substituted ''majority'' for ''unanimous''.

1960—Subsec. (a). Pub. L. 86–507 inserted ''or by certified mail'' after ''registered mail''.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 214c of this title.

§ 214b. Continuation of business and corporate entity

The franchise of a national banking association as a national banking association shall automatically terminate when its conversion into or its merger or consolidation with a State bank under a State charter is consummated and the resulting State bank shall be considered the same business and corporate entity as the national banking association, although as to rights, powers, and duties the resulting bank is a State bank. Any references to such national banking association in any contract, will, or document shall be considered a reference to the State bank if not inconsistent with the provisions of the contract, will, or document or applicable law.

(Aug. 17, 1950, ch. 729, § 3, 64 Stat. 456.)

§ 214c. Conversions in contravention of State law

No conversion of a national banking association into a State bank or its merger or consolidation with a State bank shall take place under this subchapter and section 321 of this title in contravention of the law of the State in which the national banking association is located; and no such conversion, merger, or consolidation shall take place under said sections unless under the law of the State in which such national banking association is located State banks may without approval by any State authority convert into and merge or consolidate with national banking associations under limitations or conditions no more restrictive than those contained in section 214a of this title with respect to the conversion of a national bank into, or merger or consolidation of a national bank with, a State bank under State charter.

(Aug. 17, 1950, ch. 729, § 4, 64 Stat. 456; July 12, 1952, ch. 696, 66 Stat. 590; Sept. 3, 1954, ch. 1263, § 25, 68 Stat. 1235.)

AMENDMENTS

1954—Act Sept. 3, 1954, substituted ''this subchapter and section 321 of this title'' for ''sections 214 to 214c, 264(e)(2), (i)(2), (v)(4), and 321 of this title''.

1952—Act July 12, 1952, amended section so that the limitation of this section beyond which State law cannot go will be measured by the standard set out in section 214a of this title for National-to-State conversions.

SUBCHAPTER XVI—CONSOLIDATION AND MERGER

§ 215. Consolidation of banks within same State

(a) In general

Any national bank or any bank incorporated under the laws of any State may, with the approval of the Comptroller, be consolidated with one or more national banking associations located in the same State under the charter of a national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such State bank if the laws of the State where it is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation published in the place where the association or bank is located, or, if there is no such newspaper, then in the paper of general circulation published nearest thereto, and after sending such notice to each shareholder of record by certified or registered mail at least ten days prior to the meeting, except to those shareholders who specifically waive notice, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where it is organized. Publication of notice may be waived, in cases where the Comptroller determines that an emergency exists justifying such waiver, by unanimous action of the shareholders of the association or State bank.

(b) Liability of consolidated association; capital stock; dissenting shareholders

The consolidated association shall be liable for all liabilities of the respective consolidating banks or associations. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national bank in the place in which it is located: *Provided*, That if such consolidation shall be voted for at such meetings by the necessary majorities of the shareholders of each association and State bank proposing to consolidate, and thereafter the consolidation shall be approved by the Comptroller, any shareholder of any of the associations or State banks so consolidated who has voted against such consolidation at the meeting of the association or bank of which he is a stockholder, or who has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, shall be entitled to receive the value of the shares so held by him when such consolidation is approved by the Comptroller upon written request made to the consolidated association at any time before thirty days after the date of consummation of the consolidation, accompanied by the surrender of his stock certificates.

(c) Valuation of shares

The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the consolidation, by an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the consolidated banking association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant.

(d) Appraisal by Comptroller; expenses of consolidated association; sale and resale of shares; State appraisal and consolidation law

If, within ninety days from the date of consummation of the consolidation, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal or the appraisal, as the case may be, shall be paid by the consolidated banking association. The value of the shares ascertained shall be promptly paid to the dissenting shareholders by the consolidated banking association. Within thirty days after payment has been made to all dissenting shareholders as provided for in this section the shares of stock of the consolidated banking association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the consolidated banking association at an advertised public auction, unless some other method of sale is approved by the Comptroller, and the consolidated banking association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders the excess in such sale price shall be paid to such shareholders. The appraisal of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases, rather than as provided in this section, if such provision is made in the State law; and no such consolidation shall be in contravention of the law of the State under which such bank is incorporated.

(e) Status of consolidated association; property rights and interests vested and held as fiduciary

The corporate existence of each of the consolidating banks or banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation. All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation without any deed or other transfer. The consolidated national banking association, upon the consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the consolidating banks or banking associations at the time of consolidation, subject to the conditions hereinafter provided.

(f) Removal as fiduciary; discrimination

Where any consolidating bank or banking association, at the time of the consolidation, was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or committee of estates of lunatics, or in any other fiduciary capacity, the consolidated national banking association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such consolidating bank or banking association prior to the consolidation. Nothing contained in this section shall be considered to impair in any manner the right of any court to remove the consolidated national banking association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any consolidated national banking association be removed solely because of the fact that it is a national banking association.

(g) Issuance of stock by consolidated association; preemptive rights

Stock of the consolidated national banking association may be issued as provided by the terms of the consolidation agreement, free from any preemptive rights of the shareholders of the respective consolidating banks.

(Nov. 7, 1918, ch. 209, § 2, formerly § 1, as added Pub. L. 86–230, § 20, Sept. 8, 1959, 73 Stat. 460; renumbered § 2 and amended Pub. L. 103–328, title I, § 102(b)(4)(C), Sept. 29, 1994, 108 Stat. 2351.)

CODIFICATION

Provisions similar to those comprising this section were contained in sections 1 and 2 of act Nov. 7, 1918, ch. 209, 40 Stat. 1043, and section 3 of act Nov. 7, 1918, ch. 209, added Feb. 25, 1927, ch. 191, § 1, 44 Stat. 1225 (formerly classified to sections 33 to 34a of this title) prior to the complete amendment and renumbering of act Nov. 7, 1918, by Pub. L. 86–230.

AMENDMENTS

1994—Pub. L. 103–328 inserted section catchline and, in subsec. (a), inserted heading and substituted ''Any national bank'' for ''Any national banking association''.

SHORT TITLE

Section 1 of act Nov. 7, 1918, ch. 209, as added Sept. 29, 1994, Pub. L. 103–328, title I, § 102(b)(4)(C), 108 Stat. 2351, provided that: ''This Act [enacting this subchapter] may be cited as the 'National Bank Consolidation and Merger Act'.''

§ 215a. Merger of national banks or State banks into national banks

(a) Approval of Comptroller, board and shareholders; merger agreement; notice; capital stock; liability of receiving association

One or more national banking associations or one or more State banks, with the approval of the Comptroller, under an agreement not inconsistent with this subchapter, may merge into a national banking association located within the same State, under the charter of the receiving association. The merger agreement shall—

(1) be agreed upon in writing by a majority of the board of directors of each association or State bank participating in the plan of merger;

(2) be ratified and confirmed by the affirmative vote of the shareholders of each such association or State bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of a State bank if the laws of the State where it is organized so require, at a meeting to be held on the call of the directors, after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation published in the place where the association or State bank is located, or, if there is no such newspaper, then in the newspaper of general circulation published nearest thereto, and after sending such notice to each shareholder of record by certified or registered mail at least ten days prior to the meeting, except to those shareholders who specifically waive notice, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where it is organized. Publication of notice may be waived, in cases where the Comptroller determines that an emergency exists justifying such waiver, by unanimous action of the shareholders of the association or State banks;

(3) specify the amount of the capital stock of the receiving association, which shall not be less than that required under existing law for the organization of a national bank in the place in which it is located and which will be outstanding upon completion of the merger, the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association; and

(4) provide that the receiving association shall be liable for all liabilities of the association or State bank being merged into the receiving association.

(b) Dissenting shareholders

If a merger shall be voted for at the called meetings by the necessary majorities of the shareholders of each association or State bank participating in the plan of merger, and thereafter the merger shall be approved by the Comptroller, any shareholder of any association or State bank to be merged into the receiving association who has voted against such merger at the meeting of the association or bank of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of merger, shall be entitled to receive the value of the share so held by him when such merger shall be approved by the Comptroller upon written request made to the receiving association at any time before thirty days after the date of consummation of the merger, accompanied by the surrender of his stock certificates.

(c) Valuation of shares

The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the merger, by an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the receiving association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant.

(d) Application to shareholders of merging associations: appraisal by Comptroller; expenses of receiving association; sale and resale of shares; State appraisal and merger law

If, within ninety days from the date of consummation of the merger, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal or the appraisal, as the case may be, shall be paid by the receiving association. The value of the shares ascertained shall be promptly paid to the dissenting shareholders by the receiving association. The shares of stock of the receiving association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the receiving association at an advertised public auction, and the receiving association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders, the excess in such sale price shall be paid to such dissenting shareholders. The appraisal of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases, rather than as provided in this section, if such provision is made in the State law; and no such merger shall be in contravention of the law of the State under which such bank is incorporated. The provisions of this subsection shall apply only to shareholders of (and stock owned by them in) a bank or

association being merged into the receiving association.

(e) Status of receiving association; property rights and interests vested and held as fiduciary

The corporate existence of each of the merging banks or banking associations participating in such merger shall be merged into and continued in the receiving association and such receiving association shall be deemed to be the same corporation as each bank or banking association participating in the merger. All rights, franchises, and interests of the individual merging banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the receiving association by virtue of such merger without any deed or other transfer. The receiving association, upon the merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver and committee of estates of lunatics, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the merging banks or banking associations at the time of the merger, subject to the conditions hereinafter provided.

(f) Removal as fiduciary; discrimination

Where any merging bank or banking association, at the time of the merger, was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or committee of estates of lunatics, or in any other fiduciary capacity, the receiving association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such merging bank or banking association prior to the merger. Nothing contained in this section shall be considered to impair in any manner the right of any court to remove the receiving association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any receiving association be removed solely because of the fact that it is a national banking association.

(g) Issuance of stock by receiving association; preemptive rights

Stock of the receiving association may be issued as provided by the terms of the merger agreement, free from any preemptive rights of the shareholders of the respective merging banks.

(Nov. 7, 1918, ch. 209, §3, formerly §2, as added Pub. L. 86–230, §20, Sept. 8, 1959, 73 Stat. 463; renumbered §3, Pub. L. 103–328, title I, §102(b)(4)(A), Sept. 29, 1994, 108 Stat. 2351.)

CODIFICATION

Provisions similar to those comprising this section were contained in section 4 of act Nov. 7, 1918, ch. 209, as added July 14, 1952, ch. 722, §1, 66 Stat. 599 (formerly classified to section 34b of this title), prior to the complete amendment and renumbering of act Nov. 7, 1918, by Pub. L. 86–230.

§ 215a–1. Interstate consolidations and mergers

(a) In general

A national bank may engage in a consolidation or merger under this subchapter with an out-of-State bank if the consolidation or merger is approved pursuant to section 1831u of this title.

(b) Scope of application

Subsection (a) of this section shall not apply with respect to any consolidation or merger before June 1, 1997, unless the home State of each bank involved in the transaction has in effect a law described in section 1831u(a)(3) of this title.

(c) Definitions

The terms ''home State'' and ''out-of-State bank'' have the same meaning as in section 1831u(f) of this title.

(Nov. 7, 1918, ch. 209, §4, as added Pub. L. 103–328, title I, §102(b)(4)(D), Sept. 29, 1994, 108 Stat. 2351.)

§ 215b. Definitions

As used in this subchapter, the term—

(1) ''State bank'' means any bank, banking association, trust company, savings bank (other than a mutual savings bank), or other banking institution which is engaged in the business of receiving deposits and which is incorporated under the laws of any State, or which is operating under the Code of Law for the District of Columbia (except a national banking association located in the District of Columbia);

(2) ''State'' means the several States and Territories, the Commonwealth of Puerto Rico, the Virgin Islands, and the District of Columbia;

(3) ''Comptroller'' means the Comptroller of the Currency; and

(4) ''Receiving association'' means the national banking association into which one or more national banking associations or one or more State banks, located within the same State, merge.

(Nov. 7, 1918, ch. 209, §5, formerly §3, as added Pub. L. 86–230, §20, Sept. 8, 1959, 73 Stat. 465; renumbered §5, Pub. L. 103–328, title I, §102(b)(4)(B), Sept. 29, 1994, 108 Stat. 2351.)

CODIFICATION

Provisions similar to those comprising this section were contained in section 5 of act Nov. 7, 1918, ch. 209, as added July 14, 1952, ch. 722, §1, 66 Stat. 601 (formerly classified to section 34c of this title), prior to the complete amendment and renumbering of act Nov. 7, 1918, by Pub. L. 86–230.

§ 215c. Mergers, consolidations, and other acquisitions authorized

(a) In general

Subject to sections 1815(d)(3) and 1828(c) of this title and all other applicable laws, any national bank may acquire or be acquired by any insured depository institution.

(b) Expedited approval of acquisitions

(1) In general

Any application by a national bank to acquire or be acquired by another insured depository institution which is required to be filed with the Comptroller of the Currency under any applicable law or regulation shall be approved or disapproved in writing by the agency before the end of the 60-day period beginning on the date such application is filed with the agency.

(2) Extensions of period

The period for approval or disapproval referred to in paragraph (1) may be extended for an additional 30-day period if the Comptroller of the Currency determines that—

(A) an applicant has not furnished all of the information required to be submitted; or

(B) in the Comptroller's judgment, any material information submitted is substantially inaccurate or incomplete.

(c) Rule of construction

No provision of this section shall be construed as authorizing a national bank or a subsidiary of a national bank to engage in any activity not otherwise authorized under this Act[1] or any other law governing the powers of national banks.

(d) "Acquire" defined

For purposes of this section, the term ''acquire'' means to acquire, directly or indirectly, ownership or control through a merger or consolidation or an acquisition of assets or assumption of liabilities, provided that following such merger, consolidation, or acquisition, an acquiring insured depository institution may not own the shares of the acquired insured depository institution.

(R.S. 5156A, as added Pub. L. 102–242, title V, § 502(b), Dec. 19, 1991, 105 Stat. 2393; amended Pub. L. 104–208, div. A, title II, § 2201(b)(1), Sept. 30, 1996, 110 Stat. 3009–403.)

REFERENCES IN TEXT

This Act, referred to in subsec. (c), probably means the National Bank Act, act June 3, 1864, ch. 106, 13 Stat. 99, as amended, which is classified principally to chapter 2 (§ 21 et seq.) of this title. For complete classification of this Act to the Code, see References in Text note set out under section 38 of this title.

CODIFICATION

Section was not enacted as part of act Nov. 7, 1918, ch. 209, as added Sept. 8, 1959, Pub. L. 86–230, § 20, 73 Stat. 460, which comprises this subchapter.

AMENDMENTS

1996—Subsec. (b)(1). Pub. L. 104–208 substituted ''under any applicable law'' for ''by section 1815(d)(3) of this title or any other applicable law''.

SUBCHAPTER XVII—DISPOSITION OF UNCLAIMED PROPERTY RECOVERED FROM CLOSED NATIONAL BANKS

§ 216. Purpose

The purpose of this subchapter is to dispose of unclaimed property in the possession, custody, or control of the Comptroller of the Currency by—

(1) providing final notice of the availability of unclaimed property from closed national banks and closed banks in the District of Columbia;

(2) barring rights of claimants to obtain such property from the Comptroller after a reasonable period of time following such notice; and

(3) authorizing the Comptroller to dispose of such property for which no claims have been filed and validated under this subchapter.

(Pub. L. 96–221, title VII, § 731, as added Pub. L. 97–320, title IV, § 408, Oct. 15, 1982, 96 Stat. 1513.)

§ 216a. Definitions

For purposes of this subchapter—

(1) the term ''Comptroller'' means the Comptroller of the Currency;

(2) the term ''unclaimed property'' means any articles, items, assets, other property, or the proceeds thereof from safe deposit boxes or other safekeeping arrangements with closed national banks or closed banks in the District of Columbia, which are in the possession, custody, or control of the Comptroller in its capacity as successor to receivers of those banks; and

(3) the term ''claimant'' means any person or entity, including a State under applicable statutory law, asserting a demonstrable legal interest in title to, or custody or possession of, unclaimed property.

(Pub. L. 96–221, title VII, § 732, as added Pub. L. 97–320, title IV, § 408, Oct. 15, 1982, 96 Stat. 1513.)

§ 216b. Disposition of unclaimed property

(a) Limitations for filing claims; publication of notice in Federal Register; contents of notice; disclosure of descriptive information; inspection of specific property

(1) Within twelve months following October 15, 1982, the Comptroller shall publish formal notice in the Federal Register that all claims to rights of any claimant to obtain title to, or custody or possession of, any unclaimed property in the possession, custody, or control of the Comptroller must be filed within twelve months following the last date of publication of such formal notice in the Federal Register or shall thereafter be barred.

(2) Such notice shall contain the names of last known owners, if any, names and locations of affected closed banks, and a general description of the types of unclaimed property held by the Comptroller. The Comptroller may provide additional notice in local communities as it deems appropriate.

(3)(A) The Comptroller shall not disclose, by publication, inspection or otherwise, information relating to the ownership or description of any specific unclaimed property prior to publication of formal notice under this section.

(B) Thereafter, the Comptroller shall disclose descriptive information of specific unclaimed property only to a claimant thereof. The Comptroller may recoup expenses associated with any publication or other provision of notice from any sale of property authorized by this sub-

[1] See References in Text note below.

chapter. Reasonable opportunity for inspection of specific property by a claimant thereof shall be provided in Washington, District of Columbia.

(b) Delivery of property to claimant upon proof of entitlement; determination of validity of claims; recoupment of expenses; liability for losses; insurance requirements

(1) The Comptroller shall deliver such property to any claimant or his or her legally authorized representative upon receiving proof deemed adequate by the Comptroller that such claimant is entitled to the property, but only if the claimant files for the property within twelve months following the last date formal notice is published in the Federal Register.

(2)(A) The Comptroller shall have authority to determine the validity of all claims filed. The Comptroller may recoup expenses associated with the handling and processing of claims from any sale of property authorized by this subchapter.

(B) All expenses associated with the delivery of any property shall be borne by the claimant. The Comptroller shall not be responsible for any loss in connection with the handling, storage, or delivery of any property to the claimant. The Comptroller may require the claimant to purchase insurance to cover the risk of any loss.

(c) Vesting of rights, title and interest in unclaimed property in United States; sale, use, destruction or disposition of property; proceeds of sale as miscellaneous receipts

(1) If, after twelve months from the date formal notice is published in the Federal Register, any such property remains in the possession, custody, or control of the Comptroller for which no valid claim has been filed, all rights, title, and interest in such property shall immediately be vested in the United States.

(2) The Comptroller shall thereupon, in his discretion, sell, use, destroy, or otherwise dispose of any such unclaimed property. Such disposition may include donations to the Smithsonian Institution for addition to the national collection.

(3) The proceeds of any sale authorized by this section, after recoupment by the Comptroller of any expenses incurred hereunder, shall be covered into the Treasury as miscellaneous receipts.

(d) Liability for determination of validity of claims; liability for delivery, sale, etc., of property

The United States, the Comptroller, or any officer, employee, or agent thereof shall not be subject to personal or legal liability for any determination as to the validity of any claim or claims filed under this subchapter or for any delivery, sale, destruction, or other disposition of unclaimed property.

(e) Court action for determination of ownership, etc., in State or Federal court of competent jurisdiction; de novo nature of action; parties

(1) A court action to determine legal ownership, entitlement, or right to possession may be filed in any State or Federal court of competent jurisdiction other than against the United States, the Comptroller, or any officer, agent, or employee thereof.

(2) Such actions shall be determined de novo without regard to any agency determination or any disposition or delivery by the Comptroller of any particular property to any person.

(3) The United States, the Comptroller, or any officer, employee, or agent thereof shall neither be a party to any such judicial proceeding nor be bound by any decision, decree, or order resulting therefrom.

(f) Jurisdiction of United States Court of Federal Claims of actions against United States, Comptroller, officer, etc.; scope of review of actions of Comptroller; limitations; claims against Comptroller, officer, etc., as claim against United States

(1) The United States Court of Federal Claims shall have exclusive jurisdiction to hear and determine any suit brought against the United States, the Comptroller, or any officer, employee, or agent thereof with regard to any determination of a claim or the disposition of any unclaimed property.

(2) The United States Court of Federal Claims may set aside actions of the Comptroller only if such actions are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(3) All claims for which the United States Court of Federal Claims has jurisdiction under this subsection shall be barred unless suit is filed within two years from the date of expiration of the twelve-month notice period provided by this subchapter.

(4) For purposes of section 1491 of title 28, any Claim[1] against the Comptroller, the United States, or any officer, employee, or agent thereof shall be considered a claim against the United States.

(Pub. L. 96–221, title VII, § 733, as added Pub. L. 97–320, title IV, § 408, Oct. 15, 1982, 96 Stat. 1513; amended Pub. L. 102–572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516.)

AMENDMENTS

1992—Subsec. (f)(1) to (3). Pub. L. 102–572 substituted ''United States Court of Federal Claims'' for ''United States Claims Court''.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

§ 216c. Rules and regulations

The Comptroller may issue rules and regulations necessary or appropriate to carry out this subchapter.

(Pub. L. 96–221, title VII, § 734, as added Pub. L. 97–320, title IV, § 408, Oct. 15, 1982, 96 Stat. 1515.)

§ 216d. Severability

If any provision of this subchapter or the application of such provision to any person or circumstance is held invalid, the remainder of this

[1] So in original. Probably should not be capitalized.

subchapter and the application of such provision to other persons or circumstances shall not be affected thereby.

(Pub. L. 96–221, title VII, §735, as added Pub. L. 97–320, title IV, §408, Oct. 15, 1982, 96 Stat. 1515.)

CHAPTER 3—FEDERAL RESERVE SYSTEM

SUBCHAPTER I—DEFINITIONS, ORGANIZATION, AND GENERAL PROVISIONS AFFECTING SYSTEM

SUBCHAPTER II—BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

SUBCHAPTER III—FEDERAL ADVISORY COUNCIL

SUBCHAPTER IV—FEDERAL OPEN MARKET COMMITTEE

SUBCHAPTER V—FEDERAL DEPOSIT INSURANCE CORPORATION

SUBCHAPTER VI—CAPITAL AND STOCK OF FEDERAL RESERVE BANKS; DIVIDENDS AND EARNINGS

SUBCHAPTER VII—DIRECTORS OF FEDERAL RESERVE BANKS; RESERVE AGENTS AND ASSISTANTS

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 35, 1440, 1465, 1468, 1468b, 1813, 1817, 1831k, 1831r, 2254, 3108 of this title.

SUBCHAPTER I—DEFINITIONS, ORGANIZATION, AND GENERAL PROVISIONS AFFECTING SYSTEM

CROSS REFERENCES

Emergency limitations and restrictions of business of member banks, see section 95 of this title.

§ 221. Definitions

Wherever the word ''bank'' is used in this chapter, the word shall be held to include State bank, banking association, and trust company, except where national banks or Federal reserve banks are specifically referred to.

The terms ''national bank'' and ''national banking association'' used in this chapter shall be held to be synonymous and interchangeable. The term ''member bank'' shall be held to mean any national bank, State bank, or bank or trust company which has become a member of one of the Federal reserve banks. The term ''board'' shall be held to mean Board of Governors of the Federal Reserve System; the term ''district'' shall be held to mean Federal reserve district; the term ''reserve bank'' shall be held to mean Federal reserve bank; the term ''the continental United States'' means the States of the United States and the District of Columbia.

The terms ''bonds and notes of the United States'', ''bonds and notes of the Government of the United States'', and ''bonds or notes of the United States'' used in this chapter shall be held to include certificates of indebtedness and Treasury bills issued under section 3104 of title 31.

(Dec. 23, 1913, ch. 6, § 1, 38 Stat. 251; Aug. 23, 1935, ch. 614, title II, § 203(a), 49 Stat. 704; Pub. L. 86–70, § 8(a), June 25, 1959, 73 Stat. 142; Pub. L. 97–258, § 2(c), Sept. 13, 1982, 96 Stat. 1058.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning act Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended, known as the Federal Reserve Act. For complete classification of this Act to the Code, see References in Text note set out under section 226 of this title and Tables.

AMENDMENTS

1982—Pub. L. 97–258 inserted provisions defining ''bonds and notes of the United States'', ''bonds and notes of the Government of the United States'', and ''bonds or notes of the United States''. These provisions are based on acts Sept. 24, 1917, ch. 56, § 5(c), 40 Stat. 290; Apr. 4, 1918, ch. 44, § 4, 40 Stat. 504; Mar. 3, 1919, ch. 100, § 3, 40 Stat. 1311; restated June 17, 1929, ch. 26, 46 Stat. 20 (former 31 U.S.C. 754(c)).

1959—Pub. L. 86–70 inserted definition of ''the continental United States''.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 221a, 3102, 3105 of this title.

§ 221a. Additional definitions

As used in this chapter—

(a) The terms ''banks'', ''national bank'', ''national banking association'', ''member bank'',

''board'', ''district'', and ''reserve bank'' shall have the meanings assigned to them in section 221 of this title.

(b) Except where otherwise specifically provided, the term ''affiliate'' shall include any corporation, business trust, association, or other similar organization—

(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

(2) Of which control is held, directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or

(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank; or

(4) Which owns or controls, directly or indirectly, either a majority of the shares of capital stock of a member bank or more than 50 per centum of the number of shares voted for the election of directors of a member bank at the preceding election, or controls in any manner the election of a majority of the directors of a member bank, or for the benefit of whose shareholders or members all or substantially all the capital stock of a member bank is held by trustees.

(June 16, 1933, ch. 89, §2, 48 Stat. 162; Aug. 23, 1935, ch. 614, title III, §301, 49 Stat. 707; Pub. L. 89–485, §13(a), (b), July 1, 1966, 80 Stat. 242.)

REFERENCES IN TEXT

As used in this chapter, referred to in text, was in the original ''As used in this Act and in any provision of law amended by this Act'', meaning act June 16, 1933, ch. 89, 48 Stat. 162, as amended, known as the Banking Act of 1933. For complete classification of this Act to the Code, see References in Text note set out under section 227 of this title and Tables.

AMENDMENTS

1966—Subsec. (b)(4). Pub. L. 89–485, §13(a), added par. (4) which incorporates definitions of ''holding company affiliate'' contained in cls. (1) and (2) of former subsec. (c) of this section, and substituted ''a member bank'' for ''any one bank'' in first two places.

Subsec. (c). Pub. L. 89–485, §13(b), repealed definition of ''holding company affiliate'', cls. (1) and (2) thereof now being incorporated in the subsec. (b)(4) definition of ''affiliate'', substituting ''a member bank'' for ''any one bank'' in first two places and the par. excluding therefrom any corporations stock of which is fully owned by the United States and any organization determined by the Board of Governors of the Federal Reserve System not to be engaged, directly or indirectly, as a business in holding the stock of, or managing or controlling, banks, banking associations, savings banks, or trust companies.

1935—Subsec. (c). Act Aug. 23, 1935, added last par.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 371d, 377, 1464, 1828 of this title; title 26 section 601.

§ 222. Federal reserve districts; membership of national banks

The continental United States, excluding Alaska, shall be divided into not less than eight nor more than twelve districts. Such districts may be readjusted and new districts may from time to time be created by the Board of Governors of the Federal Reserve System, not to exceed twelve in all: *Provided*, That the districts shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States. Such districts shall be known as Federal Reserve districts and may be designated by number. When the State of Alaska or Hawaii is hereafter admitted to the Union the Federal Reserve districts shall be readjusted by the Board of Governors of the Federal Reserve System in such manner as to include such State. Every national bank in any State shall, upon commencing business or within ninety days after admission into the Union of the State in which it is located, become a member bank of the Federal Reserve System by subscribing and paying for stock in the Federal Reserve bank of its district in accordance with the provisions of this chapter and shall thereupon be an insured bank under the Federal Deposit Insurance Act [12 U.S.C. 1811 et seq.], and failure to do so shall subject such bank to the penalty provided by section 501a of this title.

(Dec. 23, 1913, ch. 6, §2, 38 Stat. 251; Aug. 23, 1935, ch. 614, title II, §203(a), 49 Stat. 704; Pub. L. 85–508, §19, July 7, 1958, 72 Stat. 350; Pub. L. 86–3, §17, Mar. 18, 1959, 73 Stat. 12.)

REFERENCES IN TEXT

The Federal Deposit Insurance Act, referred to in text, is act Sept. 21, 1950, ch. 967, §2, 64 Stat. 873, as amended, which is classified generally to chapter 16 (§1811 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1811 of this title and Tables.

AMENDMENTS

1959—Pub. L. 86–3 required readjustment of districts when the State of Hawaii is admitted to the Union.

1958—Pub. L. 85–508 required readjustment of districts when the State of Alaska is admitted to the Union, and inserted provisions requiring national banks to become members of the Federal Reserve System upon commencing business or within 90 Days after admission into the Union of the State in which they are located.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

ADMISSION OF ALASKA AND HAWAII TO STATEHOOD

Alaska was admitted into the Union on Jan. 3, 1959, on issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, and Hawaii was admitted into the Union on Aug. 21, 1959, on issuance of Proc. No. 3309, Aug. 21, 1959, 24 F.R. 6868, 73 Stat. c74. For Alaska Statehood Law, see Pub. L. 85–508, July 7, 1958, 72 Stat. 339, set out as a note preceding section 21 of Title 48, Territories and Insular Possessions. For Hawaii Statehood Law, see

Pub. L. 86–3, Mar. 18, 1959, 73 Stat. 4, set out as a note preceding section 491 of Title 48.

RULES OF ORGANIZATION OF BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; LIST OF FEDERAL RESERVE BANKS AND BRANCHES

26 F.R. 12638, as revised 46 F.R. 1777, 51 F.R. 42935, 54 F.R. 26251, and further amended effective January 1, 1993

RULES OF ORGANIZATION

SECTION 1—Basis and Scope

These rules are issued by the Board of Governors of the Federal Reserve System (the ''Board'') pursuant to the requirement of section 552 of Title 5 of the United States Code that each agency shall publish in the *Federal Register* a description of its central and field organization.

SECTION 2—Composition and Location

(a) *Governors, chairman, vice chairman*. The Board consists of seven members appointed by the President, by and with the advice and consent of the Senate, for 14 year terms. The members of the Board are required by law to devote their entire time to the business of the Board. One of them is designated by the President as chairman and one as vice chairman, to serve as such for terms of four years. At meetings, the chairman presides or, in his absence, the vice chairman presides. In the absence of the chairman and vice chairman, the member of the Board present with the longest service acts as chairman. The chairman of the Board, subject to its supervision, is its active executive officer. The Board meets regularly and frequently to consider matters relating to monetary and credit policies, regulatory and supervisory duties with which it has been charged by the Congress, and administrative and other questions arising in the conduct of the work of the Board.

(b) *Location and business hours*. The principal offices of the Board are at 20th Street and Constitution Avenue, N.W., Washington, D.C. 20551. The public entrance is at 20th and C Streets, N.W. The Board's regular business hours are from 8:45 a.m. to 5:15 p.m. each weekday except Saturday, but its business hours may be changed from time to time.

SECTION 3—Central Organization

The Board's central organization consists of the members of the Board and the following offices, divisions, and officials:

(a) *Office of Board Members* consists of the members of the Board, and assistants and special assistants to the Board assigned to public affairs and congressional liaison.

(b) *Division of Monetary Affairs*, headed by a director, is responsible for planning and coordinating programs, memoranda, and analyses and presenting decision-making options in areas of monetary and closely related financial policies. Responsibilities are carried out through various staff activities, including preparation of position papers and other documents on monetary policy issues such as open market, discount, and reserve requirement policy; performance of secretariat functions for the Federal Open Market Committee, including administration and record preparation and maintenance; coordination of regulatory and statistical issues closely related to monetary policy, including publication and interpretation of a variety of statistical series on money, reserves, and interest rates; and liaison with the trading desk at the Federal Reserve Bank of New York in connection with open market operations and market developments.

(c) *Office of Staff Director for Management* is responsible for the planning and coordination of staff operations and organization, for resource management, and supervision of the following functions: Board building administration and operations, Board budget and accounting activities, the Automation Policy and Programs Committee, personnel-related activities, equal employment opportunity, and contingency planning operations.

(d) *Office of the Secretary*, headed by the Board's secretary, coordinates and handles items requiring Board action, including actions under delegated authority; prepares agenda for Board meetings; implements actions taken at Board meetings; prepares, circulates, and indexes minutes of the Board; has responsibility for the Board's regulatory planning and review; publishes the *Federal Reserve Regulatory Service* and related manuals; provides liaison at the staff level with the Federal Advisory Council, the Thrift Institutions Advisory Council, and ad hoc groups of the Reserve Banks; makes arrangements for individuals and groups visiting the Board; maintains custody of and provides reference service to official records of the Board; handles correspondence and public requests for records; secures visas for official travel of System personnel; and provides relief secretarial and stenographic services.

(e) *Legal Division*, headed by the Board's general counsel, advises the Board in carrying out its statutory and regulatory responsibilities by the preparation of Board decisions, regulations, rules, instructions and legal interpretations of statutes and regulations administered by the Board; represents the Board in civil litigation and administrative proceedings; assists other divisions in fulfilling their responsibilities in such areas as contracting, fiscal agency activities, Federal Reserve Bank matters, labor law, personnel, and supervisory enforcement matters; and prepares testimony or comments on proposed legislation.

(f) *Division of Research and Statistics*, headed by a director, provides the Board and the Federal Open Market Committee with the economic analysis and information needed for current operations, for the formulation of monetary and credit policies, and for the exercise of responsibilities with regard to bank regulation; prepares, publishes, and interprets a variety of statistical series in the financial and nonfinancial fields; conducts basic research relating to the effects of monetary policy on economic activity and prices and to the effects of financial regulation on the structure and functioning of financial markets.

(g) *Division of International Finance*, headed by a director, provides the Board, the Federal Open Market Committee, and other System officials with assessments of current international economic and financial developments. Staff members analyze major economic and financial developments abroad, issues connected with exchange market developments, international financial flows and their implications, the international monetary and financial systems and their evolution, and the balance-of-payments adjustment process. The division provides economic data and analyses for public release. It also works with the chairman and other Board members in their roles as members of various interagency bodies dealing with international economic policy issues.

(h) *Division of Reserve Bank Operations and Payment Systems*, headed by a director, advises and assists the Board in its oversight of Reserve Bank operations. The division is responsible to the Board on matters concerning payments system policy, the price and level of Federal Reserve Bank services (check collection, funds transfer, automated clearinghouse, net settlement, securities, and coin and currency), and improvements to the efficiency of the payments mechanism. It also maintains liaison with interested parties on payments matters.

The division reviews and appraises Reserve Bank communications and automation plans and proposals, as well as Reserve Bank building plans. It reviews proposed Reserve Bank budgets; administers expense control and budgeting system for collection and analysis of budget and expense data; prescribes accounting principles, standards, and related requirements to be followed by the Reserve Banks; and provides certain centralized financial accounting services.

The division conducts an annual financial examination of each Reserve Bank. It also conducts operational reviews of various Reserve Bank functions, including: check collection, electronic payments, coin and cur-

rency, securities, fiscal agency, open market, protection, data processing, communications, accounting, and audit.

The division maintains liaison with the Treasury and other government agencies to facilitate the System's role as fiscal agent to the United States. It also coordinates the printing and distribution of Federal Reserve notes and is jointly responsible with the Bureau of the Mint for the production and distribution of coin.

(i) *Division of Banking Supervision and Regulation*, headed by a director, coordinates the bank supervisory functions of the System and evaluates the examination procedures of the Reserve Banks; exercises general supervision of the commercial and fiduciary activities of state member banks; administers the supervisory features of laws and regulations relating to affiliates and bank holding companies; supervises various foreign banking activities of member banks and foreign banking and financing corporations; administers the public disclosure provisions of the Securities Exchange Act of 1934, as amended, in their application to state member banks, and the provisions of the act giving responsibility to the Board for regulating security credit transactions; administers the pertinent provisions of the Financial Institutions Supervisory Act of 1966, and amendments contained in the Financial Institutions Regulatory and Interest Rate Control Act of 1978, in their application to state member banks, bank holding companies, nonbank subsidiaries, Edge Act corporations, foreign banks with domestic operations, and persons related to such institutions; monitors the Currency and Foreign Transactions Reporting Act in its application to state member banks and Edge Act corporations; processes and presents to the Board applications filed pursuant to the Bank Holding Company Act of 1956, as amended, and the Bank Merger Act and various other applications submitted under the provisions of the Federal Reserve Act or related statutes; and advises the Board regarding developments in banking and bank supervisory policies and procedures.

(j) *Division of Consumer and Community Affairs*, headed by a director, implements consumer affairs legislation for which the Board has responsibility. Its functions include drafting regulations and interpretations pursuant to the Truth in Lending Act, the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Fair Credit Billing Act, the Consumer Leasing Act, the Electronic Funds Transfer Act, and the Federal Trade Commission Improvements Act, for financial institutions and other firms engaged in consumer credit, electronic funds transfers, and leasing activities. The division also administers the Board's consumer complaint-handling system and monitors enforcement activities with regard to state member banks. The legislation enforced includes the acts already mentioned above as well as the Community Reinvestment, Fair Credit Reporting, Fair Debt Collection Practices, Fair Housing, Flood Disaster Protection, and Real Estate Settlement Procedures Acts and Regulation Q, Interest on Deposits. The division assists the community affairs activities of the Reserve Banks, which are related to the Federal Reserve's Community Reinvestment Act responsibilities.

(k) *Division of Human Resources Management*, headed by a director, is responsible for the development and implementation of Board personnel policies and programs, and advises and assists the Board and the Reserve Banks on personnel matters pertaining to the Federal Reserve Banks.

(*l*) *Division of Support Services*, headed by a director, is responsible for duplication and distribution of Board publications, press releases, speeches, and testimony; space management; printing, contracting, and supply services; communications; food service management; operation and maintenance of electrical and mechanical systems; building and grounds maintenance; personnel and building security.

(m) *Office of the Controller*, headed by the Board's controller, assists the Board's divisions and the Federal Financial Institutions Examination Council in establishing and operating within their organizational structures, in managing their resources, and in ensuring the propriety and accountability of resource utilization by: administering the budget functions of planning, formulating, executing, reviewing, and reporting; receiving and disbursing funds; maintaining books of account; developing means to improve operations; conducting organizational analyses; conducting program analyses; providing financial analysis and consultation; reporting results of operations; conducting special studies; maintaining records of organizational and financial transactions; ensuring that proper cost/benefit and lease/purchase analyses are a part of major capital investments; and participating in or supporting managerial committees and task forces.

(n) *Division of Information Resources Management*, headed by a director, is responsible for the overall planning, acquisition, implementation, operation, and maintenance of the Board's automation and data communications equipment, environmental operating and data base systems software, data processing and communications security, mainframe linkage to distributed processing, and other hardware and environmental software required at the Board and the Contingency Processing Center (CPC). The division is responsible for providing a climate in which users share responsibility in determining needs and translating these needs into services, and providing effective and efficient improvements in all automation and communication systems services to the Board and through the CPC to the Federal Reserve System.

The division is also responsible for the design, development, and implementation of applications software; for the collection, processing, and maintenance of statistical and regulatory data provided by commercial banks, bank holding companies, other financial institutions, and Federal Reserve Banks; and for the provision of technical consulting services relating to automation activities in other Board divisions and offices.

(*o*) *Office of Inspector General* is an independent office that operates under Public Law 100–504 and Board charter. It conducts and supervises audits, operations reviews, and investigations relating to the functions of the Board; recommends and provides leadership and coordination for activities that promote economy, efficiency, and effectiveness within the Board's programs and operations; detects and prevents fraud, waste, and abuse in the Board's programs and operations; and keeps the chairman and Congress fully informed about problems and deficiencies relating to the Board's programs and operations and the necessity for, and progress of, corrective actions.

(p) *Other personnel*. The Board does not employ administrative law judges or hearing officers as regular members of its staff; but, in accordance with applicable provisions of law and in individual cases as the need may arise, the Board obtains and utilizes administrative law judges and hearing officers, whose functions in such capacity are appropriately separated, as required by law, from investigative and prosecuting functions of the staff.

SECTION 4—Field Organization

(a) *Federal Reserve Banks*. The United States is divided into 12 Federal Reserve Districts. In one city in each Federal Reserve District there is located a Federal Reserve Bank; in 10 of the Districts there are one or more branches of the Federal Reserve Bank in other cities; and in some Districts there are offices or facilities with specialized functions. Each Federal Reserve Bank is a separate legal entity, created pursuant to the Federal Reserve Act and operating under the general supervision of the Board. The locations of the 12 Federal Reserve Banks and the 25 branches and the boundaries of the Federal Reserve district and branch territories are shown in the appendix. Each Federal Reserve Bank, in addition to its other duties, carries out local functions for the Board pursuant to instructions of the Board, and in many matters acts as the Board's field representative in the Bank's District. Each Reserve

Bank assists in the regional administration of the Board's regulations and policies, keeps the Board informed of local conditions, and recommends such actions as it thinks appropriate in particular cases. In general, persons concerned with Federal Reserve matters should deal in the first instance with the Federal Reserve Bank of the appropriate District or a branch thereof, and the Board requests all persons to follow this procedure.

(b) *Federal Reserve agents.* Each Federal Reserve Bank has nine directors, three of whom are appointed by the Board. One of the directors appointed by the Board is designated by the Board as chairman of the Board of Directors of the Bank and as Federal Reserve agent. He acts as the Board's official representative and maintains a local office of the Board on the premises of the Federal Reserve bank.

SECTION 5—Delegations of Authority

The Board does not delegate any of its functions relating to rule-making or pertaining principally to monetary or credit policies or involving any questions of general policy. However, the Board delegates certain of its supervisory and other functions prescribed by statute or regulations of the Board to its members or employees or to the Federal Reserve Banks as provided in its Rules Regarding Delegation of Authority (12 CFR 265). In addition, the Board delegates to the Federal Reserve Banks certain functions not provided for by statute or regulations of the Board, including authority to extend the time within which certain transactions may be consummated.

APPENDIX

Federal Reserve Banks

BOSTON*
600 Atlantic Avenue, Boston, Massachusetts 02106
NEW YORK*
33 Liberty Street (Federal Reserve P.O. Station), New York, New York 10045
Buffalo Branch
160 Delaware Avenue, Buffalo, New York 14202 (P.O. Box 961, Buffalo 14240–0961)
PHILADELPHIA
Ten Independence Mall, Philadelphia, Pennsylvania 19106 (P.O. Box 66, Philadelphia 19105)
CLEVELAND*
1455 East Sixth Street, Cleveland, Ohio 44114 (P.O. Box 6387, Cleveland 44101)
Cincinnati Branch
150 East Fourth Street, Cincinnati, Ohio 45202 (P.O. Box 999, Cincinnati 45201–0999)
Pittsburgh Branch
717 Grant Street, Pittsburgh, Pennsylvania 15219 (P.O. Box 867, Pittsburgh 15230)
RICHMOND*
701 East Byrd Street, Richmond, Virginia 23219 (P.O. Box 27622, Richmond 23261)
Baltimore Branch
502 S. Sharp Street, Baltimore, Maryland 21201 (P.O. Box 1378, Baltimore 21203)
Charlotte Branch
530 East Trade Street, Charlotte, North Carolina 28202 (P.O. Box 30248, Charlotte 28230)
Culpeper Communications and Records Center,
Mount Pony Rd., State Rte. 658, (P.O. Drawer 20), Culpeper, Virginia 22701–0020
ATLANTA
104 Marietta Street, N.W., Atlanta, Georgia 30303–2713
Birmingham Branch
1801 Fifth Avenue, North, Birmingham, Alabama 35203 (P.O. Box 830447, Birmingham 35283–0447)
Jacksonville Branch
800 Water Street, Jacksonville, Florida 32204 (P.O. Box 929, Jacksonville 32231–0044)
Miami Branch
9100 Northwest 36th Street, Miami, Florida 33178 (P.O. Box 520847, Miami 33152–0847)
Nashville Branch
301 Eighth Avenue, North, Nashville, Tennessee 37203 (P.O. Box 4407, Nashville 37203–4407)
New Orleans Branch
525 St. Charles Avenue, New Orleans, Louisiana 70130 (P.O. Box 61630, New Orleans 70161–1630)
CHICAGO*
230 South LaSalle Street, Chicago, Illinois 60604 (P.O. Box 834, Chicago 60690–0834)
Detroit Branch
160 W. Fort Street, Detroit, Michigan 48226 (P.O. Box 1059, Detroit 48231)
ST. LOUIS
411 Locust Street, St. Louis, Missouri 63102 (P.O. Box 442, St. Louis 63166)
Little Rock Branch
325 West Capitol Avenue, Little Rock, Arkansas 72201 (P.O. Box 1261, Little Rock 72203–1261)
Louisville Branch
410 South Fifth Street, Louisville, Kentucky 40201 (P.O. Box 32710, Louisville 40232–2710)
Memphis Branch
200 North Main Street, Memphis, Tennessee 38103 (P.O. Box 407, Memphis 38101–0407)
MINNEAPOLIS
250 Marquette Avenue, Minneapolis, Minnesota 55401–2171 (P.O. Box 291, Minneapolis 55480–0291)
Helena Branch
100 Neill Avenue, Helena, Montana 59601
KANSAS CITY
925 Grand Blvd., Kansas City, Missouri 64198
Denver Branch
1020 16th Street, Denver, Colorado 80202 (Terminal Annex-P.O. Box 5228, Denver 80217)
Oklahoma City Branch
226 Dean A. McGee Avenue (P.O. Box 25129), Oklahoma City, Oklahoma 73125
Omaha Branch
2201 Farnam Street, Omaha, Nebraska 68102 (P.O. Box 3958, Omaha 68103)
DALLAS
200 North Pearl Street, Dallas, Texas 75222 (P.O. Box 655906, Dallas 75265–5906)
El Paso Branch
301 East Main Street, El Paso, Texas 79901 (P.O. Box 100, El Paso 79999)
Houston Branch
1701 San Jacinto Street, Houston, Texas 77002 (P.O. Box 2578, Houston 77252)
San Antonio Branch
126 East Nueva Street, San Antonio, Texas 78204 (P.O. Box 1471, San Antonio 78295)
SAN FRANCISCO
101 Market Street, San Francisco, California 94105 (P.O. Box 7702, San Francisco 94120)
Los Angeles Branch
950 South Grand Avenue, Los Angeles, California 90015 (Terminal Annex-P.O. Box 2077, Los Angeles 90051)
Portland Branch
915 S.W. Stark Street, Portland, Oregon 97025 (P.O. Box 3436, Portland 97208)
Salt Lake City Branch
120 South State Street, Salt Lake City, Utah 84111 (P.O. Box 30780, Salt Lake City 84125)
Seattle Branch
1015 Second Avenue, Seattle, Washington 98104 (P.O. Box 3567, Seattle 98124)

*Additional offices of these Banks are located at Lewiston, Maine 04240; Windsor Locks, Connecticut 06096; Cranford, New Jersey 07016; Jericho, New York 11753; East Rutherford, New Jersey 07073; Utica at Oriskany, New York 13424; Columbus, Ohio 43216; Columbia, South Carolina 29210; Charleston, West Virginia 25328; Des Moines, Iowa 50306; Indianapolis, Indiana 46206; and Milwaukee, Wisconsin 53201.

RULES OF PROCEDURE

The rules of procedure of the Board of Governors of the Federal Reserve System are published in the Code of Federal Regulations, Part 262 of Title 12, Banks and Banking.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 377, 481 of this title.

§ 223. Number of Federal reserve cities in district

A Federal reserve district shall contain only one Federal reserve city.

(Dec. 23, 1913, ch. 6, § 2, 38 Stat. 251.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 377, 481 of this title.

§ 224. Status of reserve cities under former statutes

The organization of reserve districts and Federal reserve cities shall not be construed as changing the present status of reserve cities except insofar as this chapter changes the amount of reserves that may be carried with approved reserve agents located therein.

(Dec. 23, 1913, ch. 6, § 2, 38 Stat. 251; Pub. L. 86–114, § 3(b)(5), July 28, 1959, 73 Stat. 264.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning act Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended, known as the Federal Reserve Act. For complete classification of this Act to the Code, see References in Text note set out under section 226 of this title and Tables.

AMENDMENTS

1959—Pub. L. 86–114 struck out ''and central reserve cities'' after ''reserve cities''.

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86–114 effective three years after July 28, 1959, see section 3(b) of Pub. L. 86–114, set out as a Central Reserve and Reserve Cities note under section 141 of this title.

PRIOR PROVISIONS

Provisions relating to reserve cities and central reserve cities were contained in R.S. §§ 5191, 5192, and act Mar. 3, 1887, ch. 378, §§ 1, 2, 24 Stat. 559, 560.

CROSS REFERENCES

Reserve cities, see sections 141 and 142 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 377, 481 of this title.

§ 225. Federal reserve banks; title

A Federal reserve bank shall include in its title the name of the city in which it is situated, as ''Federal Reserve Bank of Chicago.''

(Dec. 23, 1913, ch. 6, § 2, 38 Stat. 252.)

CROSS REFERENCES

Designation of cities, see section 141 of this title.
Jurisdiction of actions by or against Federal reserve banks, see section 632 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 377, 481 of this title.

§ 225a. Maintenance of long run growth of monetary and credit aggregates; annual reports to Congress; transmittal to Congressional Committees; consultations with Committees; report of Committee; changing conditions affecting achievement of objectives and plans; explanation for deviations from objectives and plans

The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates. In furtherance of the purposes of the Full Employment and Balanced Growth Act of 1978 [15 U.S.C. 3101 et seq.], the Board of Governors of the Federal Reserve System shall transmit to the Congress, not later than February 20 and July 20 of each year, independent written reports setting forth (1) a review and analysis of recent developments affecting economic trends in the Nation, including an analysis of the impact of the exchange rate of the dollar on those trends; (2) the objectives and plans of the Board of Governors and the Federal Open Market Committee with respect to the ranges of growth or diminution of the monetary and credit aggregates for the calendar year during which the report is transmitted, taking account of past and prospective developments in employment, unemployment, production, investment, real income, productivity, international trade and payments, and prices; and (3) the relationship of the aforesaid objectives and plans to the short-term goals set forth in the most recent Economic Report of the President pursuant to section 1022(a)(2)(A) of title 15 and to any short-term goals approved by the Congress. In addition, as a part of its report on July 20 of each year, the Board of Governors shall include a statement of its objectives and plans with respect to the ranges of growth or diminution of the monetary and credit aggregates for the calendar year following the year in which the report is submitted. The reports required under the two preceding sentences shall be transmitted to the Congress and shall be referred in the Senate to the Committee on Banking, Housing, and Urban Affairs, and in the House of Representatives to the Committee on Banking, Finance and Urban Affairs. The Board shall consult with each such Committee on the reports and, thereafter, each such Committee shall submit to its respective body a report containing its views and recommendations with respect to the Federal Reserve's intended policies. Nothing in this chapter shall be interpreted to require that the objectives and plans with respect to the ranges of growth or diminution of the monetary and credit aggregates disclosed in the reports submitted under this section be achieved if the Board of Governors and the Federal Open Market Committee determine that they cannot or should not be achieved because of changing conditions: *Provided*, That in the subsequent consultations with, and reports to, the aforesaid Committees of the Congress pursuant to this section, the Board of Governors shall

include an explanation of the reasons for any revisions to or deviations from such objectives and plans.

(Dec. 23, 1913, ch. 6, § 2A, as added Pub. L. 95–188, title II, § 202, Nov. 16, 1977, 91 Stat. 1387; amended Pub. L. 95–523, title I, § 108(a), Oct. 27, 1978, 92 Stat. 1897; Pub. L. 100–418, title III, § 3005(c), Aug. 23, 1988, 102 Stat. 1375.)

REFERENCES IN TEXT

The Full Employment and Balanced Growth Act of 1978, referred to in text, is Pub. L. 95–523, Oct. 27, 1978, 92 Stat. 1887, which is classified principally to chapter 58 (§ 3101 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 3101 of Title 15 and Tables.

This chapter, referred to in text, was in the original ''this Act'', meaning act Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended, known as the Federal Reserve Act. For complete classification of this act to the Code, see References in Text note set out under section 226 of this title and Tables.

CODIFICATION

Another section 202 of Pub. L. 95–188 amended section 302 of this title.

AMENDMENTS

1988—Pub. L. 100–418 inserted '', including an analysis of the impact of the exchange rate of the dollar on those trends'' after ''the Nation'' in cl. (1).

1978—Pub. L. 95–523 substituted provisions relating to independent written reports of the Board of Governors to the Congress for provisions relating to the consultations of the Board of Governors with Congress at semiannual hearings, substituted ''the objectives and plans with respect to the ranges'' for ''such ranges'', inserted ''of the monetary and credit aggregates disclosed in the reports submitted under this section'' after ''growth or diminution'', and inserted proviso respecting the inclusion of an explanation of reasons for revisions or deviations in subsequent consultations and reports.

CHANGE OF NAME

Committee on Banking, Finance and Urban Affairs of House of Representatives treated as referring to Committee on Banking and Financial Services of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress.

EFFECTIVE DATE OF 1978 AMENDMENT

Section 108(b) of Pub. L. 95–523 provided that: ''The amendment made by subsection (a) [amending this section] takes effect on January 1, 1979.''

§ 226. "Federal Reserve Act"

The short title of the Act of December 23, 1913, ch. 6, 38 Stat. 251, shall be the ''Federal Reserve Act.''

(Dec. 23, 1913, ch. 6, § 1, 38 Stat. 251.)

REFERENCES IN TEXT

The Federal Reserve Act, referred to in text, is classified to sections 1, 35, 59, 64, 82, 90, 101a, 104, 121, 141, 142, 221, 222 to 226, 241 to 247a, 248(a) to (m), (*o*), 261 to 263, 281 to 283, 285 to 290, 301 to 308, 321 to 329, 330 to 336, 337, 338, 341 to 347c, 348 to 352, 352a, 353 to 360, 371 to 372, 374 to 376, 391 to 393, 411 to 416, 418 to 421, 441 to 444, 446 to 448, 461, 462, 462a–1, 462b, 462c, 463 to 467, 481 to 486, 501a to 503, 521, 522, 531, 601 to 604, 611 to 632 of this title, and section 409 of former Title 31, Money and Finance. See, also, section 19 of Title 15, Commerce and Trade; sections 217 to 219, 655, 1005, 1014, 1906 and 1909 of Title 18, Crimes and Criminal Procedure, and section 725(b) of former Title 31, Money and Finance. For complete classification of this Act to the Code, see Tables.

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104–208, div. A, title II, § 2001(a), Sept. 30, 1996, 110 Stat. 3009–394, provided that: ''This title [see Tables for classification] may be cited as the 'Economic Growth and Regulatory Paperwork Reduction Act of 1996'.''

SHORT TITLE OF 1992 AMENDMENT

Pub. L. 102–491, § 1, Oct. 24, 1992, 106 Stat. 3144, provided that: ''This Act [amending section 522 of this title] may be cited as the 'Federal Reserve Bank Branch Modernization Act'.''

SHORT TITLE OF 1987 AMENDMENT

Pub. L. 100–86, § 1(a), Aug. 10, 1987, 101 Stat. 552, provided that: ''This Act [enacting sections 371c–1, 1439–1, 1441, 1442a, 1467, 1467a, 1730h, 1730i, 1772b, 1772c, 3806, and 4001 to 4010 of this title and section 3334 of Title 31, Money and Finance, amending sections 24, 248a, 481, 619, 1430, 1436, 1464, 1467, 1725 to 1727, 1729 to 1730a, 1730h, 1757, 1761a, 1761b, 1764, 1766, 1767, 1785 to 1788, 1813, 1817, 1821, 1823, 1828, 1831d, 1832, 1841 to 1843, 1846, 1849, and 3106 of this title, sections 905 and 906 of Title 2, The Congress, sections 45, 46, and 57a of Title 15, Commerce and Trade, and sections 3328, 3702, 3712, 9101, and 9105 of Title 31, providing for future repeal of sections 1442a, 1467a, and 1730i of this title, enacting provisions set out as notes under sections 226, 248a, 619, 1437, 1441, 1464, 1467, 1467a, 1730, 1730a, 1751, 1811, 1841, and 4001 of this title and section 3328 of Title 31, and amending provisions set out as a note under section 1729 of this title] may be cited as the 'Competitive Equality Banking Act of 1987'.''

Pub. L. 100–86, title I, § 100, Aug. 10, 1987, 101 Stat. 554, provided that: ''This title [enacting section 371c–1 of this title, amending sections 24, 619, 1430, 1730, 1730a, 1813, 1828, 1831d, 1832, 1841 to 1843, and 1846 of this title, and enacting provisions set out as notes under sections 226, 619, 1730a, and 1841 of this title] may be cited as the 'Competitive Equality Amendments of 1987'.''

Pub. L. 100–86, title III, § 301, Aug. 10, 1987, 101 Stat. 585, provided that: ''This title [enacting section 1441 of this title, amending sections 1430, 1436, 1725, 1727, and 1730 of this title and section 9101 of Title 31, Money and Finance, and enacting provisions set out as a note under section 1730 of this title] may be cited as the 'Federal Savings and Loan Insurance Corporation Recapitalization Act of 1987'.''

Pub. L. 100–86, title IV, § 401, Aug. 10, 1987, 101 Stat. 604, provided that: ''This title [enacting sections 1442a, 1467, 1467a, 1730h, and 1730i of this title, amending sections 1464, 1467, 1729 to 1730a, and 1730h of this title, and section 9105 of Title 31, Money and Finance, providing for future repeal of sections 1442a, 1467a, and 1730i of this title, and enacting provisions set out as notes under sections 1437, 1441, 1467, and 1467a of this title] may be cited as the 'Thrift Industry Recovery Act'.''

SHORT TITLE OF 1982 AMENDMENT

Pub. L. 97–320, § 1, Oct. 15, 1982, 96 Stat. 1469, provided that: ''This Act [enacting sections 216 to 216d, 1701j–3, 1795j, 1866, 1867, 3208, and 3801 to 3805 of this title and section 1099 of Title 20, Education, amending sections 22, 24, 27, 29, 30, 84, 93, 94, 95, 371, 371c, 375a, 375b, 461, 484, 504, 505, 1425a, 1426, 1428a, 1430, 1431, 1436, 1437, 1462, 1464, 1718, 1719, 1725, 1726, 1727, 1728, 1729, 1730, 1730a, 1752, 1752a, 1753, 1755, 1757, 1760, 1761, 1761a, 1761b, 1761c, 1763, 1764, 1766, 1770, 1771, 1782, 1783, 1785, 1786, 1795f, 1813, 1814, 1815, 1817, 1818, 1820, 1821, 1822, 1823, 1828, 1831c, 1832, 1841, 1842, 1843, 1847, 1861, 1862, 1863, 1864, 1865, 1972, 3106, 3204, 3305, 3412, 3414, and 3503 of this title, section 109 of Title 11, Bankruptcy, sections 1602 and 1603 of Title 15, Commerce and Trade, and sections 8103 and 8105 of Title 42, The Public Health and Welfare, repealing section 82 of this title and provisions set out as a note under section

461 of this title, enacting provisions set out as notes under this section, sections 84, 371, 371c, 1461, 1464, 1811, 1817, 1823, 3503, and 3801 of this title, and sections 1602 and 1603 of Title 15, and amending provisions set out as notes under sections 92 and 191 of this title] may be cited as the 'Garn-St Germain Depository Institutions Act of 1982'.''

Pub. L. 97–320, title IV, §410(a), Oct. 15, 1982, 96 Stat. 1515, provided that: ''This section [amending sections 371c, 375b, 1820, 1828 and 1972 of this title, and enacting provisions set out as a note under section 371c of this title] may be cited as the 'Banking Affiliates Act of 1982'.''

SHORT TITLE OF 1980 AMENDMENT

Pub. L. 96–221, §1, Mar. 31, 1980, 94 Stat. 132, provided that: ''This Act [enacting sections 4a, 86a, 93a, 248a, 1730g, 1735f–7a, 1831d, and 3501 to 3524 of this title, and section 1646 of Title 15, Commerce and Trade, amending sections 24, 27, 29, 51b, 51b–1, 72, 85, 92, 95, 214a, 248, 342, 347b, 355, 360, 371a, 412, 461, 463, 481, 1425a, 1425b, 1431, 1464, 1724, 1726, 1728, 1752, 1757, 1763, 1785, 1787, 1795, to 1795i, 1813, 1817, 1821, 1828, 1832, 1842, and 1843 of this title, and sections 57a, 687, 1602 to 1607, 1610, 1612, 1613, 1631, 1632, 1635, 1637, 1638, 1640, 1641, 1643, 1663, 1664, 1665a, 1666, 1666d, 1667d, and 1691f of Title 15, repealing sections 86a, 371b–1, 1730e, and 1831a of this title, and sections 1614, 1636, and 1639 of Title 15, enacting provisions set out as notes under this section, sections 27, 85, 86a, 191, 248, 355, 371a, 1425a, 1724, 1730g, 1735f–7, 1735f–7a, 1787, 1813, 1817, 3101, 3501, and 3521 of this title, and sections 1601, 1602, and 1607 of Title 15, and repealing provisions set out as notes under sections 85, 86a, 371b–1, and 1831a of this title] may be cited as the 'Depository Institutions Deregulation and Monetary Control Act of 1980'.''

Pub. L. 96–221, title I, §101, Mar. 31, 1980, 94 Stat. 132, provided that: ''This title [enacting section 248a of this title, amending sections 248, 342, 347b, 355, 360, 412, 461, 463, and 1425a of this title and enacting provisions set out as notes under sections 248 and 355 of this title] may be cited as the 'Monetary Control Act of 1980'.''

Pub. L. 96–221, title III, §301, Mar. 31, 1980, 94 Stat. 145, provided that: ''This title [amending sections 371a, 1431, 1464, 1724, 1728, 1752, 1757, 1763, 1785, 1787, 1795 to 1795i, 1813, 1817, 1821, 1828, and 1832 of this title and enacting provisions set out as notes under sections 371a, 1724, 1787, 1813, and 1817 of this title] may be cited as the 'Consumer Checking Account Equity Act of 1980'.''

SHORT TITLE OF 1978 AMENDMENT

Pub. L. 95–630, §1, Nov. 10, 1978, 92 Stat. 3641, provided: ''That this Act [enacting sections 375b, 504, 505, 635a–1 to 635a–3, 1795 to 1795i, 1831c, 3106a, 3201 to 3207, 3301 to 3308, and 3401 to 3422 of this title, sections 1693 to 1693r of Title 15, Commerce and Trade, and section 2153e–1 of Title 42, The Public Health and Welfare, amending sections 27, 93, 375a, 412, 635, 635e to 635g, 1451, 1462, 1464, 1715z–10, 1726, 1728 to 1730a, 1752 to 1756, 1757 to 1759, 1761 to 1763, 1766, 1767, 1771, 1772a, 1781 to 1789, 1795b to 1795g, 1813, 1817 to 1821, 1828, 1832, 1843, 1844, 1847, 1865, 1972, and 2902 of this title, sections 5108, 5314, and 5315 of Title 5, Government Organization and Employees, sections 709 and 1114 of Title 18, Crimes and Criminal Procedure, and sections 67 and 856 of former Title 31, Money and Finance, enacting provisions set out as notes under sections 27, 93, 375b, 461, 601, 635, 1451, 1728, 1730, 1751, 1752, 1795, 1817, 1832, 3201, 3301, 3401, and 3415 of this title, and sections 1601 and 1693 of Title 15; and amending provisions set out as notes under this section, section 461 of this title, and section 1666f of Title 15] may be cited as the 'Financial Institutions Regulatory and Interest Rate Control Act of 1978'.''

SHORT TITLE OF 1977 AMENDMENT

Pub. L. 95–188, title II, §201, Nov. 16, 1977, 91 Stat. 1387, provided that: ''This title [enacting section 225a of this title, amending sections 242 and 302 of this title and section 208 of Title 18, Crimes and Criminal Procedure, and enacting provisions set out as a note under section 242 of this title] may be cited as the 'Federal Reserve Reform Act of 1977'.''

SHORT TITLE OF 1932 AMENDMENT

Act Feb. 27, 1932, ch. 58, 47 Stat. 56, which enacted sections 347a and 347b of this title, and amended section 412 of this title, is popularly known as the Glass-Steagall Act, 1932.

SEPARABILITY; RIGHT TO AMEND, ALTER OR REPEAL

Pub. L. 100–86, title XII, §1205, Aug. 10, 1987, 101 Stat. 663, provided that: ''If any provision of this Act [see Short Title of 1987 Amendment note above] or the application thereof to any person or circumstances is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.''

Sections 30 and 31, formerly 29 and 30, respectively, of act Dec. 23, 1913, as renumbered by act Nov. 10, 1978, Pub. L. 95–630, title I, §101, 92 Stat. 3641, provided:

''SEC. 30. If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

''SEC. 31. The right to amend, alter, or repeal this Act is hereby expressly reserved.''

§ 227. "Banking Act of 1933"

The short title of the Act of June 16, 1933, ch. 89, 48 Stat. 162, shall be the ''Banking Act of 1933.''

(June 16, 1933, ch. 89, §1, 48 Stat. 162.)

REFERENCES IN TEXT

The Banking Act of 1933, also known as the Glass-Steagall Act, 1933, referred to in text, is classified to sections 24, 33, 34a, 36, 51, 52, 61, 64a, 71a, 77, 78, 84, 85, 161, 197a, 221a, 227, 242, 244, 248, 289, 301, 304, 321, 329, 333 to 338, 347, 348a, 371a, 371b, 371c, 371d, 374a, 375a, 377, 378, 481, and 632 of this title. For complete classification of this Act to the Code, see Tables.

RIGHT TO AMEND, ALTER OR REPEAL; SEPARABILITY

Section 34 of act June 16, 1933, provided: ''The right to alter, amend, or repeal this Act is hereby expressly reserved. If any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby''.

§ 228. "Banking Act of 1935"

The act of August 23, 1935, ch. 614, 49 Stat. 684, may be cited as the ''Banking Act of 1935.''

(Aug. 23, 1935, ch. 614, §1, 49 Stat. 684.)

REFERENCES IN TEXT

The Banking Act of 1935, referred to in text, is classified to sections 2, 24, 33 to 34c, 35, 36, 51, 51a, 51b–1, 52, 59 to 61, 64a, 71a, 78, 84, 85, 170, 181, 192, 221a, 228, 241, 242, 244, 247a, 248, 263, 287, 288, 321, 324, 336, 341, 343, 347b, 352a, 355, 357, 371, 371a, 371b, 371c, 375a, 377, 378, 461, 462a–1, 462b, 465, 481, 482, 486, 619, 1702, 1703, 1709, and 1713 of this title; section 101 of Title 11, Bankruptcy; section 19 of Title 15, Commerce and Trade. See, also, sections 217, 218, 334, 655, 656, 709, 1005, 1906, 1909, and 2113 of Title 18, Crimes and Criminal Procedure. For complete classification of this Act to the Code see Tables.

SEPARABILITY

Section 346 of act Aug. 23, 1935, provided: ''If any provision of this Act, or the application thereof to any per-

son or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons and circumstances, shall not be affected thereby.''

SUBCHAPTER II—BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

§ 241. Creation; membership; compensation and expenses

The Board of Governors of the Federal Reserve System (hereinafter referred to as the ''Board'') shall be composed of seven members, to be appointed by the President, by and with the advice and consent of the Senate, after August 23, 1935, for terms of fourteen years except as hereinafter provided, but each appointive member of the Federal Reserve Board in office on such date shall continue to serve as a member of the Board until February 1, 1936, and the Secretary of the Treasury and the Comptroller of the Currency shall continue to serve as members of the Board until February 1, 1936. In selecting the members of the Board, not more than one of whom shall be selected from any one Federal Reserve district, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country. The members of the Board shall devote their entire time to the business of the Board and shall each receive basic compensation at the rate of $16,000 per annum, payable monthly, together with actual necessary traveling expenses.

(Dec. 23, 1913, ch. 6, § 10 (par.), 38 Stat. 260; June 3, 1922, ch. 205, 42 Stat. 620; Aug. 23, 1935, ch. 614, title II, § 203(b), 49 Stat. 704.)

CODIFICATION

Section is comprised of first par. of section 10 of act Dec. 23, 1913. Pars. 2–7 and 8 of section 10; par. 9 of section 10, as added June 3, 1922, ch. 205, 42 Stat. 621; and par. 10 of section 10, as added Aug. 23, 1935, ch. 614, § 203(d), 49 Stat. 705, are classified to sections 242 to 247, 1, 522, and 247a, respectively, of this title.

AMENDMENTS

1935—Act Aug. 23, 1935, § 203(b), increased the appointive membership from six to seven, terminated the membership of the Secretary of the Treasury and the Comptroller of the Currency, raised the tenure from twelve to fourteen years and increased the annual salary from $12,000 to $15,000.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, provided that: ''Hereafter the Federal Reserve Board shall be known as the 'Board of Governors of the Federal Reserve System,' and the governor and the vice governor of the Federal Reserve Board shall be known as the 'chairman' and the 'vice chairman,' respectively, of the Board of Governors of the Federal Reserve System.''

REPEALS

Act Oct. 15, 1949, ch. 695, § 4, 63 Stat. 880, formerly cited as a credit to this section, was repealed by Pub. L. 89–554, § 8(a), Sept. 6, 1966, 80 Stat. 655.

COMPENSATION OF BOARD OF GOVERNORS

Annual basic compensation of Chairman and Members of Board of Governors, see sections 5313 and 5314 of Title 5, Government Organization and Employees.

§ 242. Ineligibility to hold office in member banks; qualifications and terms of office of members; chairman and vice chairman; oath of office

The members of the Board shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank, except that this restriction shall not apply to a member who has served the full term for which he was appointed. Upon the expiration of the term of any appointive member of the Federal Reserve Board in office on August 23, 1935, the President shall fix the term of the successor to such member at not to exceed fourteen years, as designated by the President at the time of nomination, but in such manner as to provide for the expiration of the term of not more than one member in any two-year period, and thereafter each member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President. Of the persons thus appointed, one shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairman of the Board for a term of four years, and one shall be designated by the President, by and with the consent of the Senate, to serve as Vice Chairman of the Board for a term of four years. The Chairman of the Board, subject to its supervision, shall be its active executive officer. Each member of the Board shall within fifteen days after notice of appointment make and subscribe to the oath of office. Upon the expiration of their terms of office, members of the Board shall continue to serve until their successors are appointed and have qualified. Any person appointed as a member of the Board after August 23, 1935, shall not be eligible for reappointment as such member after he shall have served a full term of fourteen years.

(Dec. 23, 1913, ch. 6, § 10 (par.), 38 Stat. 260; June 3, 1922, ch. 205, 42 Stat. 620; June 16, 1933, ch. 89, § 6(a), 48 Stat. 166; Aug. 23, 1935, ch. 614, title II, § 203(b), 49 Stat. 704; Pub. L. 95–188, title II, § 204(a), Nov. 16, 1977, 91 Stat. 1388.)

CODIFICATION

Section is comprised of second par. of section 10 of act Dec. 23, 1913. For classification to this title of other pars. of section 10, see note set out under section 241 of this title.

AMENDMENTS

1977—Pub. L. 95–188 substituted in third sentence ''one shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairman of the Board for a term of four years, and one shall be designated by the President, by and with the consent of the Senate, to serve as Vice Chairman of the Board for a term of four years'' for ''one shall be designated by the President as chairman and one as vice chairman of the Board, to serve as such for a term of four years''.

1935—Act Aug. 23, 1935, § 203(b), extended term of appointive members from twelve to fourteen years, and inserted provisions for continuance in office until successor qualified and against reappointment.

1933—Act June 16, 1933, extended term of appointive members from ten to twelve years.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

EFFECTIVE DATE OF 1977 AMENDMENT; APPLICABILITY

Section 204(b) of Pub. L. 95–188 provided that: ''The amendment made by subsection (a) [amending this section] takes effect on January 1, 1979, and applies to individuals who are designated by the President on or after such date to serve as Chairman or Vice Chairman of the Board of Governors of the Federal Reserve System.''

REPEALS

Act Mar. 3, 1919, ch. 101, §2, 40 Stat. 1315, formerly cited as a credit to this section, was repealed by Pub. L. 89–554, §8(a), Sept. 6, 1966, 80 Stat. 644.

COMPENSATION OF CHAIRMAN OF BOARD

Annual basic compensation of Chairman of Board of Governors, see section 5313 of Title 5, Government Organization and Employees.

§ 243. Assessments upon Federal reserve banks to pay expenses

The Board of Governors of the Federal Reserve System shall have power to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment sufficient to pay its estimated expenses and the salaries of its members and employees for the half year succeeding the levying of such assessment, together with any deficit carried forward from the preceding half year and such assessments may include amounts sufficient to provide for the acquisition by the Board in its own name of such site or building in the District of Columbia as in its judgement alone shall be necessary for the purpose of providing suitable and adequate quarters for the performance of its functions. After approving such plans, estimates, and specifications as it shall have caused to be prepared, the Board may, notwithstanding any other provision of law, cause to be constructed on the site so acquired by it a building suitable and adequate in its judgement for its purposes and proceed to take all such steps as it may deem necessary or appropriate in connection with the construction, equipment, and furnishing of such building. The Board may maintain, enlarge, or remodel any building so acquired or constructed and shall have sole control of such building and space therein.

(Dec. 23, 1913, ch. 6, §10 (par.), 38 Stat. 261; June 3, 1922, ch. 205, 42 Stat. 621; June 19, 1934, ch. 653, §4, 48 Stat. 1108; Aug. 23, 1935, ch. 614, title II, §203(a), 49 Stat. 704.)

CODIFICATION

Section is comprised of third par. of section 10 of act Dec. 23, 1913. For classification to this title of other pars. of section 10, see note set out under section 241 of this title.

AMENDMENTS

1934—Act June 19, 1934, inserted provisions after ''the preceding half year'' in first sentence and inserted second and third sentences.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

§ 244. Principal offices of Board; chairman of Board; obligations and expenses; qualifications of members; vacancies

The principal offices of the Board shall be in the District of Columbia. At meetings of the Board the chairman shall preside, and, in his absence, the vice chairman shall preside. In the absence of the chairman and the vice chairman, the Board shall elect a member to act as chairman pro tempore. The Board shall determine and prescribe the manner in which its obligations shall be incurred and its disbursements and expenses allowed and paid, and may leave on deposit in the Federal Reserve banks the proceeds of assessments levied upon them to defray its estimated expenses and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this chapter and rules and regulations of the Board not inconsistent therewith; and funds derived from such assessments shall not be construed to be Government funds or appropriated moneys. No member of the Board of Governors of the Federal Reserve System shall be an officer or director of any bank, banking institution, trust company, or Federal Reserve bank or hold stock in any bank, banking institution, or trust company; and before entering upon his duties as a member of the Board of Governors of the Federal Reserve System he shall certify under oath that he has complied with this requirement, and such certification shall be filed with the secretary of the Board. Whenever a vacancy shall occur, other than by expiration of term, among the seven members of the Board of Governors of the Federal Reserve System appointed by the President as above provided, a successor shall be appointed by the President, by and with the advice and consent of the Senate, to fill such vacancy, and when appointed he shall hold office for the unexpired term of his predecessor.

(Dec. 23, 1913, ch. 6, §10 (par.), 38 Stat. 261; June 3, 1922, ch. 205, 42 Stat. 621; June 16, 1933, ch. 89, §6(b), 48 Stat. 167; Aug. 23, 1935, ch. 614, title II, §203(a)–(c), 49 Stat. 704, 705.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act, specific amendments thereof'', meaning act Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended, known as the Federal Reserve Act. For complete classification of this Act to the Code, see References in Text note set out under section 226 of this title and Tables.

CODIFICATION

Section is comprised of fourth par. of section 10 of act Dec. 23, 1913. For classification to this title of other pars. of section 10, see Codification note set out under section 241 of this title.

Word ''seven'' was substituted for ''six'' in last sentence on authority of section 203(b) of act Aug. 23, 1935, which increased membership of the Board of Governors.

AMENDMENTS

1935—Act Aug. 23, 1935, §203(c), substituted second and third sentences for former related provisions.

1933—Act June 16, 1933, fixed the principal offices of the Board, made the Secretary of the Treasury chairman, provided for chairman pro tempore, and referred to disbursements, obligations, salaries and leaves.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

§ 245. Vacancies during recess of Senate

The President shall have power to fill all vacancies that may happen on the Board of Governors of the Federal Reserve System during the recess of the Senate by granting commissions which shall expire with the next session of the Senate.

(Dec. 23, 1913, ch. 6, § 10 (par.), 38 Stat. 260; June 3, 1922, ch. 205, 42 Stat. 620; Aug. 23, 1935, ch. 614, title II, § 203(a), 49, Stat. 704.)

CODIFICATION

Section is comprised of fifth par. of section 10 of act Dec. 23, 1913. For classification to this title of other pars. of section 10, see Codification note set out under section 241 of this title.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

§ 246. Powers of Secretary of the Treasury as affected by chapter

Nothing in this chapter contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and bureaus under such department, and wherever any power vested by this chapter in the Board of Governors of the Federal Reserve System or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary.

(Dec. 23, 1913, ch. 6, § 10 (par.), 38 Stat. 261; June 3, 1922, ch. 205, 42 Stat. 621; Aug. 23, 1935, ch. 614, title II, § 203(a), 49 Stat. 704.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning act Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended, known as the Federal Reserve Act. For complete classification of this Act to the Code, see References in Text note set out under section 226 of this title and Tables.

CODIFICATION

Section is comprised of sixth par. of section 10 of act Dec. 23, 1913. For classification to this title of other pars. of section 10, see Codification note set out under section 241 of this title.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

§ 247. Reports to Congress

The Board of Governors of the Federal Reserve System shall annually make a full report of its operations to the Speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress.

(Dec. 23, 1913, ch. 6, § 10 (par.), 38 Stat. 261; June 3, 1922, ch. 205, 42 Stat. 621; Aug. 23, 1935, ch. 614, title II, § 203(a), 49 Stat. 704.)

CODIFICATION

Section is comprised of seventh par. of section 10 of act Dec. 23, 1913. For classification to this title of other pars. of section 10, see Codification note set out under section 241 of this title.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

MEMBERSHIP OF INTERNATIONAL BANKS IN FEDERAL RESERVE SYSTEM; REPORT TO CONGRESS

Pub. L. 95–369, § 3(g), Sept. 17, 1978, 92 Stat. 610, provided that the Board report to Congress not later than 270 days after Sept. 17, 1978 recommendations with respect to permitting corporations organized or operating under section 25 or 25(a) of the Federal Reserve Act to become members of Federal Reserve Banks.

EFFECT OF INTERNATIONAL BANKING ACT OF 1978 ON INTERNATIONAL BANKS; REPORT TO CONGRESS

Pub. L. 95–369, § 3(h), Sept. 17, 1978, 92 Stat. 610, provided that: ''As part of its annual report pursuant to section 10 of the Federal Reserve Act [this section], the Board shall include its assessment of the effects of the amendments made by this Act [see Short Title note set out under section 3101 of this title] on the capitalization and activities of corporations organized or operating under section 25 or 25(a) of the Federal Reserve Act [sections 601 to 604 and 611 to 631 of this title], and on commercial banks and the banking system.''

§ 247a. Records of action on policy relating to open-market operation and policies determined generally; inclusion in report to Congress

The Board of Governors of the Federal Reserve System shall keep a complete record of the action taken by the Board and by the Federal Open Market Committee upon all questions of policy relating to open-market operations and shall record therein the votes taken in connection with the determination of open-market policies and the reasons underlying the action of the Board and the Committee in each instance. The Board shall keep a similar record with respect to all questions of policy determined by the Board, and shall include in its annual report to the Congress a full account of the action so taken during the preceding year with respect to open-market policies and operations and with respect to the policies determined by it and shall include in such report a copy of the records required to be kept under the provisions of this section.

(Dec. 23, 1913, ch. 6, § 10 (par.), as added Aug. 23, 1935, ch. 614, title II, § 203(d), 49 Stat. 705.)

CODIFICATION

Section is comprised of tenth par. of section 10 of act Dec. 23, 1913, as added Aug. 23, 1935. For classification to this title of other pars. of section 10, see Codification note set out under section 241 of this title.

§ 248. Enumerated powers

The Board of Governors of the Federal Reserve System shall be authorized and empowered:

(a) Examination of accounts and affairs of banks; publication of weekly statements; reports of liabilities and assets of depository institutions; covered institutions

(1) To examine at its discretion the accounts, books, and affairs of each Federal reserve bank

and of each member bank and to require such statements and reports as it may deem necessary. The said board shall publish once each week a statement showing the condition of each Federal reserve bank and a consolidated statement for all Federal reserve banks. Such statements shall show in detail the assets and liabilities of the Federal reserve banks, single and combined, and shall furnish full information regarding the character of the money held as reserve and the amount, nature, and maturities of the paper and other investments owned or held by Federal reserve banks.

(2) To require any depository institution specified in this paragraph to make, at such intervals as the Board may prescribe, such reports of its liabilities and assets as the Board may determine to be necessary or desirable to enable the Board to discharge its responsibility to monitor and control monetary and credit aggregates. Such reports shall be made (A) directly to the Board in the case of member banks and in the case of other depository institutions whose reserve requirements under sections 461, 463, 464, 465, and 466 of this title exceed zero, and (B) for all other reports to the Board through the (i) Federal Deposit Insurance Corporation in the case of insured State nonmember banks, savings banks, and mutual savings banks, (ii) National Credit Union Administration Board in the case of insured credit unions, (iii) the Director of the Office of Thrift Supervision in the case of any savings association which is an insured depository institution (as defined in section 1813 of this title) or which is a member as defined in section 1422 of this title, and (iv) such State officer or agency as the Board may designate in the case of any other type of bank, savings and loan association, or credit union. The Board shall endeavor to avoid the imposition of unnecessary burdens on reporting institutions and the duplication of other reporting requirements. Except as otherwise required by law, any data provided to any department, agency, or instrumentality of the United States pursuant to other reporting requirement shall be made available to the Board. The Board may classify depository institutions for the purposes of this paragraph and may impose different requirements on each such class.

(b) Permitting or requiring rediscounting of paper at specified rate

To permit, or, on the affirmative vote of at least five members of the Board of Governors, to require Federal reserve banks to rediscount the discounted paper of other Federal reserve banks at rates of interest to be fixed by the Board.

(c) Suspending reserve requirements

To suspend for a period not exceeding thirty days, and from time to time to renew such suspension for periods not exceeding fifteen days, any reserve requirements specified in this chapter.

(d) Supervising and regulating issue and retirement of notes

To supervise and regulate through the Secretary of the Treasury the issue and retirement of Federal Reserve notes, except for the cancellation and destruction, and accounting with respect to such cancellation and destruction, of notes unfit for circulation, and to prescribe rules and regulations under which such notes may be delivered by the Secretary of the Treasury to the Federal Reserve agents applying therefor.

(e) Adding to or reclassifying reserve cities

To add to the number of cities classified as reserve cities under existing law in which national banking associations are subject to the reserve requirements set forth in section 20 of this Act, or to reclassify existing reserve cities or to terminate their designation as such.

(f) Suspending or removing officers or directors of reserve banks

To suspend or remove any officer or director of any Federal reserve bank, the cause of such removal to be forthwith communicated in writing by the Board of Governors of the Federal Reserve System to the removed officer or director and to said bank.

(g) Requiring writing off of doubtful or worthless assets of banks

To require the writing off of doubtful or worthless assets upon the books and balance sheets of Federal reserve banks.

(h) Suspending operations of or liquidating or reorganizing banks

To suspend, for the violation of any of the provisions of this chapter, the operations of any Federal reserve bank, to take possession thereof, administer the same during the period of suspension, and, when deemed advisable, to liquidate or reorganize such bank.

(i) Requiring bonds of agents; safeguarding property in hands of agents

To require bonds of Federal reserve agents, to make regulations for the safeguarding of all collateral, bonds, Federal reserve notes, money, or property of any kind deposited in the hands of such agents, and said board shall perform the duties, functions, or services specified in this chapter, and make all rules and regulations necessary to enable said board effectively to perform the same.

(j) Exercising supervision over reserve banks

To exercise general supervision over said Federal reserve banks.

(k) Delegation of certain functions; power to delegate; review of delegated activities

To delegate, by published order or rule and subject to subchapter II of chapter 5, and chapter 7, of title 5, any of its functions, other than those relating to rulemaking or pertaining principally to monetary and credit policies, to one or more administrative law judges, members or employees of the Board, or Federal Reserve banks. The assignment of responsibility for the performance of any function that the Board determines to delegate shall be a function of the Chairman. The Board shall, upon the vote of one member, review action taken at a delegated level within such time and in such manner as the Board shall by rule prescribe.

(*l*) Employing attorneys, experts, assistants, and clerks; salaries and fees

To employ such attorneys, experts, assistants, clerks, or other employees as may be deemed

necessary to conduct the business of the board. All salaries and fees shall be fixed in advance by said board and shall be paid in the same manner as the salaries of the members of said board.

(m) Percentage of capital and surplus represented by loans; determination by Board

Upon the affirmative vote of not less than six of its members the Board of Governors of the Federal Reserve System shall have power to fix from time to time for each Federal reserve district the percentage of individual bank capital and surplus which may be represented by loans secured by stock or bond collateral made by member banks within such district, but no such loan shall be made by any such bank to any person in an amount in excess of 15 percent of the unimpaired capital and surplus of such bank: *Provided*, That with respect to loans represented by obligations secured by not less than a like amount of bonds or notes of the United States issued since April 24, 1917, certificates of indebtedness of the United States, Treasury bills of the United States, or obligations fully guaranteed both as to principal and interest by the United States, such limitation of 15 percent on loans to any person shall not apply, but State member banks shall be subject to the same limitations and conditions as are applicable in the case of national banks under section 84(c)(4) of this title. Any percentage so fixed by the Board of Governors of the Federal Reserve System shall be subject to change from time to time upon ten days' notice, and it shall be the duty of the Board to establish such percentages with a view to preventing the undue use of bank loans for the speculative carrying of securities. The Board of Governors of the Federal Reserve System shall have power to direct any member bank to refrain from further increase of its loans secured by stock or bond collateral for any period up to one year under penalty of suspension of all rediscount privileges at Federal reserve banks.

(n) Board's authority to examine depository institutions and affiliates

To examine, at the Board's discretion, any depository institution, and any affiliate of such depository institution, in connection with any advance to, any discount of any instrument for, or any request for any such advance or discount by, such depository institution under this chapter.

***(o)* Authority to appoint conservator or receiver**

The Board may appoint the Federal Deposit Insurance Corporation as conservator or receiver for a State member bank under section 1821(c)(9) of this title.

(p) Authority

The Board may act in its own name and through its own attorneys in enforcing any provision of this title,[1] regulations promulgated hereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Board is a party and which involves the Board's regulation or supervision of any bank, bank holding company (as defined in section 1841 of this title), or other entity, or the administration of its operations.

(Dec. 23, 1913, ch. 6, § 11, 38 Stat. 261; Sept. 7, 1916, ch. 461, 39 Stat. 752; Sept. 26, 1918, ch. 177, § 2, 40 Stat. 968; Mar. 3, 1919, ch. 101, § 3, 40 Stat. 1315; Feb. 27, 1921, ch. 75, 41 Stat. 1146; June 26, 1930, ch. 612, 46 Stat. 814; Mar. 9, 1933, ch. 1, title I, § 3, 48 Stat. 2; June 16, 1933, ch. 89, § 7, 48 Stat. 167; Aug. 23, 1935, ch. 614, title II, § 203(a), title III, §§ 321(a), 342, 49 Stat. 704, 713, 722; June 12, 1945, ch. 186, § 1(c), 59 Stat. 237; Pub. L. 86–114, § 3(b)(6), July 28, 1959, 73 Stat. 264; Pub. L. 86–251, § 3(c), Sept. 9, 1959, 73 Stat. 488; Pub. L. 87–722, § 3, Sept. 28, 1962, 76 Stat. 670; Pub. L. 89–427, § 2, May 20, 1966, 80 Stat. 161; Pub. L. 89–765, Nov. 5, 1966, 80 Stat. 1314; Pub. L. 90–269, § 1, Mar. 18, 1968, 82 Stat. 50; Pub. L. 95–251, § 2(a)(3), Mar. 27, 1978, 92 Stat. 183; Pub. L. 96–221, title I, § 102, Mar. 31, 1980, 94 Stat. 132; Pub. L. 97–258, § 5(b), Sept. 13, 1982, 96 Stat. 1068; Pub. L. 97–457, § 17(b), Jan. 12, 1983, 96 Stat. 2509; Pub. L. 101–73, title VII, § 744(i)(1), Aug. 9, 1989, 103 Stat. 439; Pub. L. 102–242, title I, §§ 133(f), 142(c), Dec. 19, 1991, 105 Stat. 2273, 2281; Pub. L. 102–550, title XVI, § 1603(d)(9), Oct. 28, 1992, 106 Stat. 4080; Pub. L. 103–325, title III, §§ 322(d), 331(d), title VI, § 602(g)(2), Sept. 23, 1994, 108 Stat. 2227, 2232, 2293.)

REFERENCES IN TEXT

Sections 461, 463, 464, 465, and 466 of this title, referred to in subsec. (a)(2), was in the original ''section 19 of the Federal Reserve Act''. Provisions of section 19 relating to reserve requirements are classified to the cited sections. For complete classification of section 19 to the Code, see References in Text note set out under section 461 of this title.

This chapter, referred to in subsecs, (c), (h), (i), and (n), was in the original ''this Act'', meaning act Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended, known as the Federal Reserve Act. For complete classification of this Act to the Code, see References in Text note set out under section 226 of this title and Tables.

Reference in subsec. (e) to ''section 20 of this Act'' means section 20 of the Federal Reserve Act which is not classified to the code. Since section 20 does not set forth any reserve requirements, section 19 of the Federal Reserve Act might have been intended. For provisions of section 19 relating to reserve requirements, see note above.

This title, referred to in subsec. (p), probably should read ''this Act'', meaning act Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended, known as the Federal Reserve Act, which does not contain titles. For complete classification of this Act to the Code, see References in Text note set out under section 226 of this title and Tables.

CODIFICATION

In subsec. (k), ''subchapter II of chapter 5, and chapter 7, of title 5'' was substituted for ''the Administrative Procedure Act'' on authority of section 7(b) of Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Provisions of subsec. (*l*), which authorized appointment of attorneys, experts, assistants, clerks and other employees without regard to the provisions of the act of January sixteenth, eighteen hundred and eighty-three, and amendments thereto, or any rule or regulation made in pursuance thereof, were omitted as obsolete. Appointments in the executive branch are now subject to the civil service laws unless specifically excepted by such laws or by laws enacted subsequent to Executive Order No. 8743, Apr. 23, 1941, issued by the President pursuant to act Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions

[1] See References in Text note below.

into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees. All positions under the Board of Governors, Federal Reserve System are now excepted from the competitive service under Schedule A of the Civil Service Rules.

Section is comprised of section 11 of act Dec. 23, 1913. The fourteenth par. of section 16 of act Dec. 23, 1913, which formerly constituted subsec. (*o*) of this section, is now classified to section 248–1 of this title.

AMENDMENTS

1994—Subsec. (d). Pub. L. 103–325, §602(g)(2), substituted ''Secretary of the Treasury'' for ''bureau under the charge of the Comptroller of the Currency'' before ''the issue and retirement'' and for ''Comptroller'' before ''to the Federal Reserve agents''.

Subsec. (m). Pub. L. 103–325, §322(d), which directed substitution of ''15 percent'' for ''10 percentum'' wherever appearing, was executed by substituting ''15 percent'' for ''10 per centum'' in two places to reflect the probable intent of Congress.

Subsec. (p). Pub. L. 103–325, §331(d), added subsec. (p).

1992—Subsecs. (*o*), (p). Pub. L. 102–550 redesignated subsec. (p) as (*o*).

1991—Subsec. (n). Pub. L. 102–242, §142(c), which directed addition of subsec. (n) at end of section, was executed by adding subsec. (n) after subsec. (m). See Construction of 1991 Amendment note below.

Subsec. (p). Pub. L. 102–242, §133(f), added subsec. (p).

1989—Subsec. (a)(2)(iii). Pub. L. 101–73 substituted ''the Director of the Office of Thrift Supervision in the case of any savings association which is an insured depository institution (as defined in section 1813 of this title)'' for ''Federal Home Loan Bank Board in the case of any institution insured by the Federal Savings and Loan Insurance Corporation''.

1983—Subsec. (m). Pub. L. 97–457 substituted ''under section 84(c)(4) of this title'' for ''under paragraph (8) of section 84 of this title'' after ''in the case of national banks''.

1982—Subsec. (n). Pub. L. 97–258 struck out subsec. (n) which provided that, whenever in the judgment of the Secretary of the Treasury such action was necessary to protect the currency system of the United States, the Secretary of the Treasury, in his discretion, could require any or all individuals, partnerships, associations, and corporations to pay and deliver to the Treasurer of the United States any or all gold coin, gold bullion, and gold certificates owned by such individuals, partnerships, associations, and corporations and that, upon receipt of such gold coin, gold bullion or gold certificates, the Secretary of the Treasury would pay therefor an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States.

1980—Subsec. (a). Pub. L. 96–221 designated existing provisions as par. (1) and added par. (2).

1978—Subsec. (k). Pub. L. 95–251 substituted ''administrative law judges'' for ''hearing examiners''.

1968—Subsec. (c). Pub. L. 90–269 struck out requirements for establishment by the Board of Governors of the Federal Reserve System of a graduated tax on the deficiency in the gold reserve whenever the reserve held against Federal Reserve notes fell below 25 percent and for an automatic increase in the rates of interest or discount fixed by the Board in an amount equal to the graduated tax imposed.

1966—Subsec. (d). Pub. L. 89–427 excepted the cancellation and destruction, and the accounting with respect to the cancellation and destruction, of notes unfit for circulation from the area of responsibility exercised by the Board of Governors of the Federal Reserve System through the Bureau of the Comptroller of the Currency over the issue and retirement of Federal Reserve notes.

Subsec. (k). Pub. L. 89–765 added subsec. (k). A former subsec. (k) was repealed by Pub. L. 87–722, §3, Sept. 28, 1962, 76 Stat. 670.

1962—Subsec. (k). Pub. L. 87–722 repealed subsec. (k) which related to the authority of the Board of Governors of the Federal Reserve System to permit national banks to act as trustees, etc., and is now covered by section 92a of this title.

1959—Subsec. (e). Pub. L. 86–114 substituted ''reserve cities'' for ''reserve and central reserve cities'' in two places.

Subsec. (m). Pub. L. 86–251 struck out ''in the form of notes'' after ''represented by obligations'' in proviso.

1945—Subsec. (c). Act June 12, 1945, substituted ''25 per centum'' for ''40 per centum'', and ''20 per centum'' for ''32½ per centum'' wherever appearing.

1935—Subsec. (k). Act Aug. 23, 1935, §342, amended last sentence of third par.

Subsec. (m). Act Aug. 23, 1935, §321(a), inserted proviso at end of first sentence.

1933—Subsec. (m). Act June 16, 1933, amended provisions generally.

Subsec. (n). Act Mar. 9, 1933, added subsec. (n).

1930—Subsec. (k). Act June 26, 1930, added last par.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–550 effective as if included in the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102–242, as of Dec. 19, 1991, except that where amendment is to any provision of law added or amended by Pub. L. 102–242 effective after Dec. 19, 1992, then amendment by Pub. L. 102–550 effective on effective date of amendment by Pub. L. 102–242, see section 1609 of Pub. L. 102–550, set out as a note under section 191 of this title.

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by section 133(f) of Pub. L. 102–242 effective 1 year after Dec. 19, 1991, see section 133(g) of Pub. L. 102–242, set out as a note under section 191 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Section 108 of title I of Pub. L. 96–221 provided that: ''This title [enacting section 248a of this title, amending this section and sections 342, 347b, 355, 360, 412, 461, 463, 505, and 1425a of this title, and enacting provisions set out as notes under sections 226 and 355 of this title] shall take effect on the first day of the sixth month which begins after the date of the enactment of this title [Mar. 31, 1980], except that the amendments regarding sections 19(b)(7) and 19(b)(8)(D) of the Federal Reserve Act [section 461(b)(7) and (b)(8)(D) of this title] shall take effect on the date of enactment of this title.''

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86–114 effective three years after July 28, 1959, see section 3(b) of Pub. L. 86–114, set out as a Central Reserve and Reserve Cities note under section 141 of this title.

CONSTRUCTION OF 1991 AMENDMENT

Section 1603(e)(2) of Pub. L. 102–550 provided that: ''The amendment made by section 142(c) of the Federal Deposit Insurance Corporation Improvement Act of 1991 [Pub. L. 102–242] (adding a paragraph at the end of section 11 of the Federal Reserve Act [this section]) shall be considered to have been executed before the amendment made by section 133(f) of the Federal Deposit Insurance Corporation Improvement Act of 1991 [amending this section].''

TRANSFER OF FUNCTIONS

For transfer of functions to Secretary of the Treasury, see note set out under section 121 of this title.

EXECUTIVE ORDER NO. 6359

Ex. Ord. No. 6359, Oct. 25, 1933, as amended by Ex. Ord. No. 11825, Dec. 31, 1974, 40 F.R. 1003, which provided for

receipt on consignment of gold by the United States mints and assay offices, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

EX. ORD. NO. 10547. INSPECTION OF STATISTICAL TRANSCRIPT CARDS

Ex. Ord. No. 10547, July 27, 1954, 19 F.R. 4661, required statistical transcript cards submitted with, or prepared by the Internal Revenue Service from, corporation income tax returns for the taxable years ending after June 30, 1951, and before July 1, 1952, to be open to inspection by the Board of Governors of the Federal Reserve System as an aid in executing the powers conferred upon such Board by this section, such inspection to be in accordance and upon compliance with the rules and regulations prescribed by the Secretary of the Treasury in T.D. 6081, 19 F.R. 4666.

CROSS REFERENCES

Consolidation with State banks, see section 215 of this title.

Expansion of credit, see section 5301 et seq. of Title 31, Money and Finance.

Federal reserve bank's liability under subsec. (h) for certification of check when amount of deposit is inadequate, see section 501 of this title.

Right to amend, separability of provisions, of act Mar. 9, 1933, see sections 212 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 212, 467, 501, 3105 of this title; title 5 section 5373.

§ 248–1. Rules and regulations for transfer of funds and charges therefor among banks; clearing houses

The Board of Governors of the Federal Reserve System shall make and promulgate from time to time regulations governing the transfer of funds and charges therefor among Federal reserve banks and their branches, and may at its discretion exercise the functions of a clearing house for such Federal reserve banks, or may designate a Federal reserve bank to exercise such functions, and may also require each such bank to exercise the functions of a clearing house for depository institutions.

(Dec. 23, 1913, ch. 6, § 16 (par.), 38 Stat. 268; Aug. 23, 1935, ch. 614, § 203(a), 49 Stat. 704; Pub. L. 96–221, title I, § 105(d), Mar. 31, 1980, 94 Stat. 140.)

CODIFICATION

Section is comprised of fourteenth par. of section 16 of act Dec. 23, 1913, which was formerly classified to section 248(*o*) of this title. For classification to this title of other pars. of section 16, see Codification note set out under section 411 of this title.

AMENDMENTS

1980—Pub. L. 96–221 substituted ''depository institutions'' for ''its member banks''.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed the name of the Federal Reserve Board to Board of Governors of the Federal Reserve System.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–221 effective on first day of sixth month which begins after Mar. 31, 1980, see section 108 of Pub. L. 96–221, set out as a note under section 248 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 461 of this title.

§ 248a. Pricing of services

(a) Publication of pricing principles and proposed schedule of fees; effective date of schedule of fees

Not later than the first day of the sixth month after March 31, 1980, the Board shall publish for public comment a set of pricing principles in accordance with this section and a proposed schedule of fees based upon those principles for Federal Reserve bank services to depository institutions, and not later than the first day of the eighteenth month after March 31, 1980, the Board shall begin to put into effect a schedule of fees for such services which is based on those principles.

(b) Covered services

The services which shall be covered by the schedule of fees under subsection (a) of this section are—

(1) currency and coin services;
(2) check clearing and collection services;
(3) wire transfer services;
(4) automated clearinghouse services;
(5) settlement services;
(6) securities safekeeping services;
(7) Federal Reserve float; and
(8) any new services which the Federal Reserve System offers, including but not limited to payment services to effectuate the electronic transfer of funds.

(c) Criteria applicable

The schedule of fees prescribed pursuant to this section shall be based on the following principles:

(1) All Federal Reserve bank services covered by the fee schedule shall be priced explicitly.

(2) All Federal Reserve bank services covered by the fee schedule shall be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks, except that nonmembers shall be subject to any other terms, including a requirement of balances sufficient for clearing purposes, that the Board may determine are applicable to member banks.

(3) Over the long run, fees shall be established on the basis of all direct and indirect costs actually incurred in providing the Federal Reserve services priced, including interest on items credited prior to actual collection, overhead, and an allocation of imputed costs which takes into account the taxes that would have been paid and the return on capital that would have been provided had the services been furnished by a private business firm, except that the pricing principles shall give due regard to competitive factors and the provision of an adequate level of such services nationwide.

(4) Interest on items credited prior to collection shall be charged at the current rate applicable in the market for Federal funds.

(d) Budgetary consequences of decline in volume of services

The Board shall require reductions in the operating budgets of the Federal Reserve banks

commensurate with any actual or projected decline in the volume of services to be provided by such banks. The full amount of any savings so realized shall be paid into the United States Treasury.

(e) Parity in clearing

All depository institutions, as defined in section 461(b)(1) of this title, may receive for deposit and as deposits any evidences of transaction accounts, as defined by section 461(b)(1) of this title from other depository institutions, as defined in section 461(b)(1) of this title or from any office of any Federal Reserve bank without regard to any Federal or State law restricting the number or the physical location or locations of such depository institutions.

(Dec. 23, 1913, ch. 6, § 11A, as added Pub. L. 96–221, title I, § 107, Mar. 31, 1980, 94 Stat. 140; amended Pub. L. 100–86, title VI, § 612(a), Aug. 10, 1987, 101 Stat. 652.)

AMENDMENTS

1987—Subsec. (e). Pub. L. 100–86 added subsec. (e).

EFFECTIVE DATE OF 1987 AMENDMENT

Section 612(b) of Pub. L. 100–86 provided that: ''The amendment made by subsection (a) [amending this section] shall take effect on the date of enactment of this title [Aug. 10, 1987].''

EFFECTIVE DATE

Section effective on first day of sixth month which begins after Mar. 31, 1980, see section 108 of Pub. L. 96–221, set out as an Effective Date of 1980 Amendment note under section 248 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 461, 1431, 1795f, 1841 of this title.

§ 249. Repealed. Pub. L. 94–412, title V, § 501(c), Sept. 14, 1976, 90 Stat. 1258

Section, act Aug. 8, 1947, ch. 517, 61 Stat. 921, dealt with regulation of consumer credit.

SAVINGS PROVISION

Repeal by Pub. L. 94–412 not to affect any action taken or proceeding pending at the time of repeal, see section 501(h) of Pub. L. 94–412, set out as a note under section 1601 of Title 50, War and National Defense.

§ 250. Independence of financial regulatory agencies

No officer or agency of the United States shall have any authority to require the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, or the National Credit Union Administration to submit legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the agency submitting them and do not necessarily represent the views of the President.

(Pub. L. 93–495, title I, § 111, Oct. 28, 1974, 88 Stat. 1506; Pub. L. 101–73, title VII, § 744(j), Aug. 9, 1989, 103 Stat. 439; Pub. L. 103–325, title III, § 331(a), Sept. 23, 1994, 108 Stat. 2232.)

CODIFICATION

Section was not enacted as part of the Federal Reserve Act which comprises this chapter.

AMENDMENTS

1994—Pub. L. 103–325 inserted ''the Comptroller of the Currency,'' after ''Federal Deposit Insurance Corporation,''.

1989—Pub. L. 101–73, which directed that section 3 of Pub. L. 93–495 be amended by substituting ''Director of the Office of Thrift Supervision'' for ''Federal Home Loan Bank Board'', was executed to section 111 of Pub. L. 93–495, which is classified to this section, as the probable intent of Congress.

§ 251. Repealed. Pub. L. 104–208, div. A, title II, § 2224(a), Sept. 30, 1996, 110 Stat. 3009–415

Section, Pub. L. 102–242, title IV, § 477, Dec. 19, 1991, 105 Stat. 2387; Pub. L. 102–550, title XVI, § 1606(i)(3), Oct. 28, 1992, 106 Stat. 4089, required Board of Governors of Federal Reserve System to collect and publish information on availability of credit to small businesses.

§ 252. Credit availability assessment

(a) Study

(1) In general

Not later than 12 months after September 30, 1996, and once every 60 months thereafter, the Board, in consultation with the Director of the Office of Thrift Supervision, the Comptroller of the Currency, the Board of Directors of the Corporation, the Administrator of the National Credit Union Administration, the Administrator of the Small Business Administration, and the Secretary of Commerce, shall conduct a study and submit a report to the Congress detailing the extent of small business lending by all creditors.

(2) Contents of study

The study required under paragraph (1) shall identify, to the extent practicable, those factors which provide policymakers with insights into the small business credit market, including—

(A) the demand for small business credit, including consideration of the impact of economic cycles on the levels of such demand;

(B) the availability of credit to small businesses;

(C) the range of credit options available to small businesses, such as those available from insured depository institutions and other providers of credit;

(D) the types of credit products used to finance small business operations, including the use of traditional loans, leases, lines of credit, home equity loans, credit cards, and other sources of financing;

(E) the credit needs of small businesses, including, if appropriate, the extent to which such needs differ, based upon product type, size of business, cash flow requirements, characteristics of ownership or investors, or other aspects of such business;

(F) the types of risks to creditors in providing credit to small businesses; and

(G) such other factors as the Board deems appropriate.

(b) Use of existing data

The studies required by this section shall not increase the regulatory or paperwork burden on regulated financial institutions, other sources of small business credit, or small businesses.

(Pub. L. 104–208, div. A, title II, § 2227, Sept. 30, 1996, 110 Stat. 3009–417.)

CODIFICATION

Section was enacted as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, and also as part of the Omnibus Consolidated Appropriations Act, 1997, and not as part of the Federal Reserve Act which comprises this chapter.

DEFINITIONS

Section 2001(c) of title II of div. A of Pub. L. 104–208, provided that: ''Except as otherwise specified in this title [see Tables for classification], the following definitions shall apply for purposes of this title:

''(1) APPRAISAL SUBCOMMITTEE.—The term 'Appraisal Subcommittee' means the Appraisal Subcommittee established under section 1011 of the Federal Financial Institutions Examination Council Act of 1978 [12 U.S.C. 3310] (as in existence on the day before the date of enactment of this Act [Sept. 30, 1996]).

''(2) APPROPRIATE FEDERAL BANKING AGENCY.—The term 'appropriate Federal banking agency' has the same meaning as in section 3 of the Federal Deposit Insurance Act [12 U.S.C. 1813].

''(3) BOARD.—The term 'Board' means the Board of Governors of the Federal Reserve System.

''(4) CORPORATION.—The term 'Corporation' means the Federal Deposit Insurance Corporation.

''(5) COUNCIL.—The term 'Council' means the Financial Institutions Examination Council established under section 1004 of the Federal Financial Institutions Examination Council Act of 1978 [12 U.S.C. 3303].

''(6) INSURED CREDIT UNION.—The term 'insured credit union' has the same meaning as in section 101 of the Federal Credit Union Act [12 U.S.C. 1752].

''(7) INSURED DEPOSITORY INSTITUTION.—The term 'insured depository institution' has the same meaning as in section 3 of the Federal Deposit Insurance Act.''

SUBCHAPTER III—FEDERAL ADVISORY COUNCIL

§ 261. Creation; membership; compensation; meetings; officers; procedure; quorum; vacancies

There is created a Federal Advisory Council, which shall consist of as many members as there are Federal reserve districts. Each Federal reserve bank by its board of directors shall annually select from its own Federal reserve district one member of said council, who shall receive such compensation and allowances as may be fixed by his board of directors subject to the approval of the Board of Governors of the Federal Reserve System. The meetings of said advisory council shall be held at Washington, District of Columbia, at least four times each year, and oftener if called by the Board of Governors of the Federal Reserve System. The council may in addition to the meetings above provided for hold such other meetings in Washington, District of Columbia, or elsewhere, as it may deem necessary, may select its own officers and adopt its own methods of procedure, and a majority of its members shall constitute a quorum for the transaction of business. Vacancies in the council shall be filled by the respective reserve banks, and members selected to fill vacancies shall serve for the unexpired term.

(Dec. 23, 1913, ch. 6, § 12 (par.), 38 Stat. 263; Aug. 23, 1935, ch. 614, title II, § 203(a), 49 Stat. 704.)

CODIFICATION

Section is comprised of first par. of section 12 of act Dec. 23, 1913. Second par. of section 12 is classified to section 262 of this title.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

§ 262. Powers

The Federal Advisory Council shall have power, by itself or through its officers, (1) to confer directly with the Board of Governors of the Federal Reserve System on general business conditions; (2) to make oral or written representations concerning matters within the jurisdiction of said board; (3) to call for information and to make recommendations in regard to discount rates, rediscount business, note issues, reserve conditions in the various districts, the purchase and sale of gold or securities by reserve banks, open-market operations by said banks, and the general affairs of the reserve banking system.

(Dec. 23, 1913, ch. 6, § 12 (par.), 38 Stat. 263; Aug. 23, 1935, ch. 614, title II, § 203(a), 49 Stat. 704.)

CODIFICATION

Section is comprised of second par. of section 12 of act Dec. 23, 1913. First par. of section 12 is classified to section 261 of this title.

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

CROSS REFERENCES

Gold coinage discontinued, see section 5112 of Title 31, Money and Finance.

Provisions for payment of obligations containing a gold clause, see section 5118 of Title 31.

SUBCHAPTER IV—FEDERAL OPEN MARKET COMMITTEE

§ 263. Federal Open Market Committee; creation; membership; regulations governing open-market transactions

(a) There is hereby created a Federal Open Market Committee (hereinafter referred to as the ''Committee''), which shall consist of the members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve banks to be selected as hereinafter provided. Such representatives shall be presidents or first vice presidents of Federal Reserve banks and, beginning with the election for the term commencing March 1, 1943, shall be elected annually as follows: One by the board of directors of the Federal Reserve Bank of New York, one by the boards of directors of the Federal Reserve Banks of Boston, Philadelphia, and

Richmond, one by the boards of directors of the Federal Reserve Banks of Cleveland and Chicago, one by the boards of directors of the Federal Reserve Banks of Atlanta, Dallas, and St. Louis, and one by the boards of directors of the Federal Reserve Banks of Minneapolis, Kansas City, and San Francisco. In such elections each board of directors shall have one vote; and the details of such elections may be governed by regulations prescribed by the committee, which may be amended from time to time. An alternate to serve in the absence of each such representative shall likewise be a president or first vice president of a Federal Reserve bank and shall be elected annually in the same manner. The meetings of said Committee shall be held at Washington, District of Columbia, at least four times each year upon the call of the chairman of the Board of Governors of the Federal Reserve System or at the request of any three members of the Committee.

(b) No Federal Reserve bank shall engage or decline to engage in open-market operations under sections 348a and 353 to 359 of this title except in accordance with the direction of and regulations adopted by the Committee. The Committee shall consider, adopt, and transmit to the several Federal Reserve banks, regulations relating to the open-market transactions of such banks.

(c) The time, character, and volume of all purchases and sales of paper described in sections 348a and 353 to 359 of this title as eligible for open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.

(Dec. 23, 1913, ch. 6, §12A, as added June 16, 1933, ch. 89, §8, 48 Stat. 168; amended Aug. 23, 1935, ch. 614, title II, §205, 49 Stat. 705; July 7, 1942, ch. 488, §1, 56 Stat. 647.)

AMENDMENTS

1942—Subsec. (a). Act July 7, 1942, substituted second, third, and fourth sentences for former second and third sentences.

1935—Act Aug. 23, 1935, amended provisions relating to membership in subsec. (a), substituted ''Committee'' for ''Federal Reserve Board'' and ''Board'' in subsec. (b), and omitted subsec. (d).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 355 of this title.

SUBCHAPTER V—FEDERAL DEPOSIT INSURANCE CORPORATION

§ 264. Transferred

CODIFICATION

Section, act Dec. 23, 1913, ch. 6, §12B, as added June 16, 1933, ch. 89, §8, 48 Stat. 168; amended June 16, 1934, ch. 546, §1 (1)–(10), 48 Stat. 969, 970; June 28, 1935, ch. 335, 49 Stat. 435; Aug. 23, 1935, ch. 614, title I, §101, 49 Stat. 684; Apr. 21, 1936, ch. 244, 49 Stat. 1237; May 25, 1938, ch. 276, 52 Stat. 442; June 16, 1938, ch. 489, 52 Stat. 767; June 20, 1939, ch. 214, §2, 53 Stat. 842; Apr. 13, 1943, ch. 62, §1, 57 Stat. 65; Aug. 5, 1947, ch. 492, §§2, 4, 61 Stat. 773; June 25, 1948, ch. 645, §21, 62 Stat. 862; Oct. 15, 1949, ch. 695, §4, 63 Stat. 880; Aug. 17, 1950, ch. 729, §§5–7, 64 Stat. 457, relating to the Federal Deposit Insurance Corporation, was withdrawn from the Federal Reserve Act and made a separate act to be known as the Federal Deposit Insurance Act, by section 1 of act Sept. 21, 1950, ch. 967, 64 Stat. 873. The Federal Deposit Insurance Act is classified to chapter 16 (§1811 et seq.) of this title.

§ 265. Insured banks as depositaries of public money; duties; security; discrimination between banks prohibited; repeal of inconsistent laws

All insured banks designated for that purpose by the Secretary of the Treasury shall be depositaries of public money of the United States (including, without being limited to, revenues and funds of the United States, and any funds the deposit of which is subject to the control or regulation of the United States or any of its officers, agents, or employees, and Postal Savings funds), and the Secretary is authorized to deposit public money in such depositaries, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government as may be required of them. The Secretary of the Treasury shall require of the insured banks thus designated satisfactory security by the deposit of United States bonds or otherwise, for the safekeeping and prompt payment of public money deposited with them and for the faithful performance of their duties as financial agents of the Government: *Provided*, That no such security shall be required for the safekeeping and prompt payment of such parts of the deposits of the public money in such banks as are insured deposits and each officer, employee, or agent of the United States having official custody of public funds and lawfully depositing the same in an insured bank shall, for the purpose of determining the amount of the insured deposits, be deemed a depositor in such custodial capacity separate and distinct from any other officer, employee, or agent of the United States having official custody of public funds and lawfully depositing the same in the same insured bank in custodial capacity. Notwithstanding any other provision of law, no department, board, agency, instrumentality, officer, employee, or agent of the United States shall issue or permit to continue in effect any regulations, rulings, or instructions or enter into or approve any contracts or perform any other acts having to do with the deposit, disbursement, or expenditure of public funds, or the deposit, custody, or advance of funds subject to the control of the United States as trustee or otherwise which shall discriminate against or prefer national banking associations, State banks members of the Federal Reserve System, or insured banks not members of the Federal Reserve System, by class, or which shall require those enjoying the benefits, directly or indirectly, of disbursed public funds so to discriminate. All Acts or parts thereof in conflict herewith are repealed. The terms ''insured bank'' and ''insured deposit'' as used in this section shall be construed according to the definitions of such terms in section 1813 of this title.

(June 11, 1942, ch. 404, §10, 56 Stat. 356; Sept. 3, 1954, ch. 1263, §26, 68 Stat. 1235.)

CODIFICATION

Section was formerly classified to section 1110 of the Appendix to Title 50, War and National Defense.

AMENDMENTS

1954—Act Sept. 3, 1954, substituted ''section 1813'' for ''section 264'' in last sentence.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 49 section 22106.

§ 266. State-chartered banks and other institutions as depositaries of public money; fiscal agents; duties

Banks, savings banks, and savings and loan, building and loan, homestead associations (including cooperative banks), and credit unions created under the laws of any State and the deposits or accounts of which are insured by a State or agency thereof or corporation chartered pursuant to the laws of any State may be depositaries of public money and may be employed as fiscal agents of the United States. The Secretary of the Treasury is authorized to deposit public money in any such institution, and shall prescribe such regulations as may be necessary to enable such institutions to become depositaries of public money and fiscal agents of the United States. Each such institution shall perform all such reasonable duties as depositary of public money and fiscal agent of the United States as may be required of it including services in connection with the collection of taxes and other obligations owed the United States.

(Pub. L. 95–147, § 2(d), Oct. 28, 1977, 91 Stat. 1228.)

CODIFICATION

Section was not enacted as part of the Federal Reserve Act, which comprises this chapter.

SUBCHAPTER VI—CAPITAL AND STOCK OF FEDERAL RESERVE BANKS; DIVIDENDS AND EARNINGS

§ 281. Capital

No Federal reserve bank shall commence business with a subscribed capital less than $4,000,000.

(Dec. 23, 1913, ch. 6, § 2, 38 Stat. 253.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 377, 481 of this title.

§ 282. Subscription to capital stock by national banking association

Every national banking association within each Federal reserve district shall be required to subscribe to the capital stock of the Federal reserve bank for that district in a sum equal to 6 per centum of the paid-up capital stock and surplus of such bank, one-sixth of the subscription to be payable on call of the Board of Governors of the Federal Reserve System, one-sixth within three months and one-sixth within six months thereafter, and the remainder of the subscription, or any part thereof, shall be subject to call when deemed necessary by the Board, said payments to be in gold or gold certificates.

(Dec. 23, 1913, ch. 6, § 2, 38 Stat. 252; Aug. 23, 1935, ch. 614, title II, § 203(a), 49 Stat. 704.)

CHANGE OF NAME

Section 203(a) of act Aug. 23, 1935, changed name of Federal Reserve Board to Board of Governors of the Federal Reserve System.

CROSS REFERENCES

Payment of obligations containing a gold clause, see section 5118 of Title 31, Money and Finance.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 377, 481 of this title.

TITLE 11—BANKRUPTCY

This title was enacted by Pub. L. 95–598, title I, §101, Nov. 6, 1978, 92 Stat. 2549

AMENDMENTS

1994—Pub. L. 103–394, title V, §501(d)(39), Oct. 22, 1994, 108 Stat. 4147, struck out item for chapter 15, ''United States Trustees''.

1986—Pub. L. 99–554, title II, §257(a), Oct. 27, 1986, 100 Stat. 3114, added item for chapter 12.

TABLE I

This Table lists the sections of former Title 11, Bankruptcy, and indicates the sections of Title 11, as revised by Pub. L. 95–598 which cover similar and related subject matter.

Title 11 Former Sections	*Title 11 New Sections*
1(1)–(3)	Rep.
1(4)	101(12)
1(5)–(7)	Rep.
1(8)	101(8)
1(9), (10)	Rep.
1(11)	101(9)
1(12), (13)	Rep.
1(14)	101(11)
1(15), (16)	Rep.
1(17)	101(17), (18)
1(18)	Rep.
1(19)	101(26)
1(20)–(22)	Rep.
1(23)	101(30)
1(24)	101(31)
1(25), (26)	Rep.
1(27)	101(34)
1(28), (29)	Rep.
1(29a)	101(38)
1(30)	101(40)
1(31)	Rep.
1(32)	101(24)
1(33), (34)	Rep.
1(35)	102(7)
11(a)(1)	109(a)
11(a)(2)	502(j)
11(a)(2A)	505(a), (b)
11(a)(3), (4)	Rep.
11(a)(5)	721
11(a)(6)	Rep.
11(a)(7)	363
11(a)(8)	350
11(a)(9)–(14)	Rep.
11(a)(15)	105
11(a)(16)	Rep.
11(a)(17)	324
11(a)(18)	303(i)
11(a)(19), (20)	Rep.
11(a)(21)	543(b), (c)

[1] So in original. Does not conform to chapter heading.

TABLE I—CONTINUED

Title 11 Former Sections	*Title 11 New Sections*
11(a)(22)	305(a)(2)
11(b)	Rep.
21	303(h)
22	109(b)
22(a)	301
22(b)	303(a)
23(a)	Rep.
23(b)	303(b)
23(c)–(f)	Rep.
23(g)	723
23(h)–(k)	Rep.
24	522
25(a)(1)	343, 521(4)
25(a)(2)	Rep.
25(a)(3)	521(2)
25(a)(4)	521(3)
25(a)(5)	521(3)
25(a)(6)	521(2)
25(a)(7)	521(2)
25(a)(8), (9)	521(1)
25(a)(10)	343, 344
25(a)(11)	521(3)
25(b)	Rep.
26	541(a)
27, 28	Rep.
29(a)	362
29(b)–(d)	Rep.
29(e)	108(a), (b)
29(f)	108(c)
30, 31	(See former 501–1103)
32(a)	727(a)(10), 1141(d)(4)
32(b)	727(c)
32(c)(1)	727(a)(2), (4)
32(c)(2)	727(a)(3)
32(c)(3)	727(a)(4)
32(c)(4)	727(a)(2)
32(c)(5)	727(a)(8), (9)
32(c)(6)	727(a)(6)
32(c)(7)	727(a)(5)
32(c)(8)	Rep.
32(d), (e)	Rep.
32(f)	524(a)
32(g), (h)	Rep.
33	727(d), (e), 1328(e)
34	524(e)
35(a)(1)	523(a)(1)
35(a)(2)	523(a)(2)
35(a)(3)	523(a)(3)
35(a)(4)	523(a)(4)
35(a)(5), (6)	Rep.
35(a)(7)	523(a)(5)
35(a)(8)	523(a)(6)
35(b)	523(b), 349(a)
35(c)	523(c)
35(c)(4)	362
41(a)	Rep.
41(b)	303(d)
41(c)–(e)	Rep.
41(f)	301
42	T. 28 §1480
43	Rep.
44(a)	343
44(b)–(f)	Rep.
44(g)	549(c)
44(h)–(*l*)	Rep.
45–51	Rep.
52, 53	Rep.
54	Rep.
55	T. 28 §1475
61–71	Rep.
72(a)	702
72(b)	705
72(c)	327(c)
73	321
74	325, 703(a)
75(a)(1)	704(1)
75(a)(2)	345
75(a)(3)	704(2)
75(a)(4)	Rep.
75(a)(5)	704(2)

TABLE I—CONTINUED

Title 11 Former Sections	*Title 11 New Sections*
75(a)(6)	Rep.
75(a)(7)	704(3)
75(a)(8)	704(4)
75(a)(9)	704(5)
75(a)(10)	704(6)
75(a)(11), (12)	Rep.
75(a)(13)	704(8)
75(a)(14)	Rep.
75(b), (c)	Rep.
76(a), (b)	Rep.
76(c)	326(a), 330
76(d)	Rep.
76(e)	326(d)
76(f), (g)	Rep.
76a	330
77	107
78(a)	Rep.
78(b)	322(a)
78(c)	322(b)(1)
78(d)	322(b)(2)
78(e)	Rep.
78(f), (g)	322(b)(2)
78(h)	Rep.
78(i)	322(c)
78(j)–(*l*)	Rep.
78(m)	322(d)
78(n)	Rep.
79–82	Rep.
91, 92	341
93(a)–(c)	Rep.
93(d)	502(a), (c)
93(e)	Rep.
93(f)	502(b)
93(g)	502(d)
93(h)	506(a), (b)
93(i)	501(b), 509
93(j)	724(a)
93(k)	502(j)
93(*l*), (m)	Rep.
93(n)	501(a), 726(a)(3)
93a	Rep.
94	342
95(a)	301
95(b)	303(b)
95(c), (d)	Rep.
95(e)	303(b)
95(f)	303(c)
95(g)	303(j), 707
95(h)	Rep.
96	547
96(a)(4)	547(e)(1)(B)
96(b)	550, 551
96(c)	547(c)(4), 553
96(d)	329
96(e)(1)	741
96(e)(2)	745, 751, 752
96(e)(3)	753
96(e)(5)	749
101	345
101a	Rep.
102(a)(1)	503(b)(2)
102(a)(2)–(4)	Rep.
102(b)	Rep.
102(c)	504
102(d)	Rep.
103	101(4)
103(a)(9)	502(b)(7)
103(c)	365
103a	Rep.
104(a)	507
104(a)(1)	503(b)
104(a)(2)	507(a)(3)
104(a)(4)	502(b)(4), 505(a), (b)
104(b)	Rep.
105(a)–(c)	Rep.
105(d)	508
105(e)	Rep.
106(a)	347(a)
106(b)	Rep.
107(a)	349(b), 547(b), (d), 551
107(b), (c)	545
107(c)(1)(A)	545(1)
107(c)(1)(B)	545(2), 546(b)
107(c)(1)(C)	545(3), (4)
107(c)(2)	551
107(c)(3)	724(b)
107(d)(1)(a)–(c)	Rep.
107(d)(1)(d)	101(26)
107(d)(1)(e)	Rep.
107(d)(2)	548(a)
107(d)(3)	550
107(d)(4)	548(b)
107(d)(5)	548(d)(1)
107(d)(6)	548(c), 550, 551
107(d)(7)	Rep.
107(e), (f)	Rep.
108	502(b)(3), 553
109(a)	303(e)
109(b)	303(i)
109(c)	Rep.

TABLE I—CONTINUED

Title 11 Former Sections	*Title 11 New Sections*
109(d)	303(g), 543(b), (c)
110(a)	541(a)
110(a)(3)	541(b)
110(a)(5)	522(d)(7), (8)
110(b)	365
110(c)	541(e), 544(a)
110(d)(1)	549(a)
110(d)(2), (3)	542(c)
110(d)(4), (5)	Rep.
110(e)	544(b)
110(f)	363
110(g)–(i)	Rep.
111, 112	Rep.
201, 202	(See former 501–1103)
202a–204	Rep.
205(a)	Rep.
205(b)	1171(b), 1172
205(c)(1)	1163
205(c)(2)	1166
205(c)(3)–(5)	Rep.
205(c)(6)	1169
205(c)(7)–(13)	Rep.
205(d)	Rep.
205(e)	1173
205(f)–(i)	Rep.
205(j)	1168
205(k), (*l*)	Rep.
205(m)	101(33)
205(n)	1167, 1171(a)
205(*o*)	1170
205(p)–(s)	Rep.
205a	Rep.
206, 207	(See former 501–1103)
208	Rep.
301–303	Rep.
401(1)	101(4)
401(2)	Rep.
401(3)	101(9)
401(4)	Rep.
401(5)	101(11)
401(6)	101(28)
401(7)	101(30)
401(8)	101(12)
401(9)	Rep.
401(10)	902(2)
401(11)	903(3)
402(a)	Rep.
402(b)(1), (2)	901
402(b)(3)	Rep.
402(c)	904
402(d)	921(b)
403	903
404	101(29), 109(c)
405(a)	921(a), (c)–(f)
405(b)	901, 924
405(c)	Rep.
405(d)	923
405(e)	901
405(e)(1)	922(a)
405(f), (g)	Rep.
405(h)	901, 926
406, 407	Rep.
408(a)	925
408(b)	901
408(c)	Rep.
409	901
410(a)	941, 942
410(b)	942
411, 412	901
413	901, 943(a)
414(a)	901
414(b)(1)	943(b)(5), (6)
414(b)(2)	943(b)(2)
414(b)(3)	Rep.
414(b)(4)	943(b)(3)
414(b)(5)	Rep.
414(b)(6)	943(b)(4)
415(a)	944(a)
415(b)(1)	944(b)
415(b)(2)	944(c)
416(a)	Rep.
416(b)	901
416(c)	Rep.
416(d)	347(b), 901
416(e)	945(a)
416(f)	Rep.
417	946
418	927
501, 502	Rep.
506(1)	101(4)
506(2), (3)	Rep.
506(4)	101(9)
506(5)	101(12)
506(6)	101(11)
506(7)	Rep.
506(8)	101(23)
506(9)	101(31)
506(10)	Rep.
506(11)	101(35)
506(12), (13)	Rep.

TABLE I—CONTINUED

Title 11 Former Sections	*Title 11 New Sections*
507	1124
511, 512	Rep.
513	362
514, 515	Rep.
516(1)	365
516(2)	364
516(3)	363
516(4)	362
516(5), (6)	1110
517–521	Rep.
526	303(b)
527	Rep.
528	T. 28 § 1472
529–533	Rep.
536, 537	303(d)
541–549	Rep.
556	1104(a)
557	327
558	101(13)
559	1105
560	324, 1104(c)
561, 562	Rep.
563	1107(a)
564	1106(a)(2)
565	Rep.
566	107
567(1)	1106(a)(3)
567(2)	Rep.
567(3)	1106(a)(4)(A)
567(4)	Rep.
567(5)	1106(a)(4)
567(6)	Rep.
568	1104(b), 1106(b)
569	1106(a)(5)
570	1121
571–574	Rep.
575	1125(d)
576	1125(b)
577, 578	Rep.
579	1126, 1128(a)
580	1128(b)
586	541(a)
587	1106
588	1107(a)
589	1108
590	Rep.
591	327
596	501(a), 1111
597	1122
598	501(a)
599	1126(a)
600, 601	Rep.
602	502(b)(7)
603	1126(e)
604	1143
605	347(b)
606	1109(b)
607	1109
608	1109(a)
609–613	Rep.
616(1)	1123(b)(1)
616(2)	1123(a)(5), (b)(4)
616(3)	Rep.
616(4)	1123(b)(2)
616(5)	1123(a)(3)
616(6)	1123(a)(2)
616(7)–(9)	Rep.
616(10)	1123(a)(5)
616(11)	1123(a)(7)
616(12)(a)	1123(a)(6)
616(12)(b)	Rep.
616(13)	1123(b)(3)
616(14)	1123(b)(5)
621(1)	1129(a)(1)
621(2)	1129(a)(7), (11)
621(3)	1129(a)(3)
621(4)	1129(a)(4)
621(5)	1129(a)(5)
622	1127
623	1127(d)
624(1)	1141(a)
624(2)	1129(a)(6), 1142(a)
624(3), (4)	Rep.
625	Rep.
626	1141(c)
627	1142(b)
628(1)	1141(d)(1)–(3)
628(2)–(4)	Rep.
629(a)	1101(2)
629(b)	Rep.
629(c)	1127(b)
636	1112(b)
637	Rep.
638	348
641(1), (2)	Rep.
641(3), (4)	330
641(5)	503(b)(4)
642(1)	503(b)(3), (5)
642(2)	Rep.
642(3)	503(b)(4)

TABLE I—CONTINUED

Title 11 Former Sections	*Title 11 New Sections*
643	503(b)(3), (4)
644(1)	330
644(2)	503(b)(4)
644(3)	330
644(4)	503(b)(3), (4)
645–650	Rep.
656–659	Rep.
661	108(c)
662	Rep.
663	362
664(a)	1145(a)
664(b)	1145(b)
665, 666	Rep.
667	1146(c)
668	346(j)(1)
669	1129(d)
670	346(j)(5)
671, 672	Rep.
676	Rep.
701, 702	Rep.
706(1), (2)	Rep.
706(3)	101(12), 109(d)
706(4)	Rep.
706(5)	101(31)
707(1)	101(9)
707(2)	101(4), (11)
708	1124
711, 712	Rep.
713(1)	365
713(2)	363
713(3)	Rep.
714	362
715, 716	Rep.
721–728	Rep.
731–733	Rep.
734	341
735	341
735(3)	1128(a)
736	341
736(2)	501(a)
736(3)	343
737(1)	Rep.
737(2)	1129(a)(9)
737(3)	1128(a)
738	1102
739(1)(a)	1103(c)(2)
739(1)(b)–(e)	1103(c)(3)
739(1)(f)	1104(c)(5)
739(2)	503(b)(4), 1103(a)
741	Rep.
742	1107(a)
743	1108
744	364
751	1122
752	Rep.
753	502(b)(7)
754, 755	Rep.
755a	501(a)
756	Rep.
757(1)	Rep.
757(2)	1123(b)(2)
757(3)–(7)	Rep.
757(8)	1123(b)(5)
761	1129(a)(3)
762	Rep.
763	1127
764	1127(d)
765	1127(c)
766(1)	1129(a)(1)
766(2)	1129(a)(7), (11)
766(3)	1129(a)(2)
766(4)	1129(a)(3)
767(1)	1141(a)
767(2)–(4)	Rep.
768–770	Rep.
771	1141(d)(1)–(3)
772	Rep.
776, 777	1112(b)
778	348
779–781	Rep.
786	1144
787(1)	1127(b)
787(2)	1127(c)
787(3)	1127(d)
787(4)	Rep.
791	108(c)
792	Rep.
793(a)	1145(a)
793(b)	1145(b)
794	Rep.
795	346(j)(1)
796	346(j)(5)
797	Rep.
799	Rep.
801, 802	Rep.
806(1)	Rep.
806(2)	101(4)
806(3), (4)	Rep.
806(5)	101(9)
806(6)	101(12), 109(d)

TABLE I—CONTINUED

Title 11 Former Sections	*Title 11 New Sections*
806(7)	101(11)
806(8)	101(23)
806(9)	101(31)
807	1124
811, 812	Rep.
813(1)	365
813(2)	363
813(3)	Rep.
814	362
815, 816	Rep.
821–827	Rep.
828	362
831	Rep.
832	1104(a)
833	Rep.
834	341
835	341, 1128(a)
836	341
836(2)	501(a)
836(3)	343
837(1)	1104(a)
837(2)	Rep.
837(3)	1128(a)
841	Rep.
842	1106
843	348
844	1107(a)
845	1108
846	364
851	501(a), 1111
852	1122
853	Rep.
854	501(a)
855–857	Rep.
858	502(b)(7)
859	Rep.
861(1)–(3)	Rep.
861(4)	1123(b)(2)
861(5), (6)	Rep.
861(7)	1123(b)(4)
861(8)	Rep.
861(9)	1123(a)(3)
861(10)	1123(a)(2)
861(11)	Rep.
861(12)	1123(a)(5)
861(13)	1123(b)(5)
866	Rep.
867	1129(a)(3)
868	Rep.
869	1127(a), (b)
870	1127(d)
871	1127(c)
872(1)	1129(a)(1)
872(2)	1129(a)(7), (11)
872(3)	1129(a)(2)
872(4)	1129(a)(3)
872(5)	1129(a)(4)
873(1)	1141(a)
873(2)	1142(a)
873(3)	Rep.
874	1141(c)
875	1142(b)
876	1141(d)(1)–(3)
877	Rep.
881, 882	1112(b)
883	348
884–886	Rep.
891(1)	Rep.
891(2), (3)	330
892(1)	503(b)(3)
892(2)	Rep.
892(3)	503(b)(4)
893(1)	Rep.
893(2)	503(b)(4)
893(3)	330
893(4)	503(b)(4)
894–898	Rep.
906–909	Rep.
911	1144
916	108(c)
917	362
918(a)	1145(a)
918(b)	1145(b)
919	Rep.
920	346(j)(1)
921	1129(d)
922	346(j)(5)
923	Rep.
926	Rep.
1001, 1002	Rep.
1006(1)	101(4)
1006(2)	101(9)
1006(3)	101(12), 109(e)
1006(4)	101(11)
1006(5)	Rep.
1006(6)	101(31)
1006(7)	Rep.
1006(8)	101(24), 109(e)
1007	Rep.
1011, 1012	Rep.

TABLE I—CONTINUED

Title 11 Former Sections	*Title 11 New Sections*
1013(1)	365
1013(2)	Rep.
1014	362
1015, 1016	Rep.
1021–1026	Rep.
1031	Rep.
1032, 1033	341
1033(1)	343, 501(a)
1033(2)	1321
1033(5)	1324
1036	1303
1037	Rep.
1041–1044	Rep.
1046(1)	1322(b)(1)
1046(2)	1322(b)(2)
1046(3)	1322(a)(2)
1046(4)	1322(a)(1)
1046(5)	1329(a)
1046(6)	1322(b)(7)
1046(7)	1322(b)(10)
1051	1325(a)(3)
1052	Rep.
1053	1323(a)
1054	1323(c)
1055	Rep.
1056(a)(1)	1325(a)(1)
1056(a)(2)	1325(a)(6)
1056(a)(3)	Rep.
1056(a)(4)	1325(a)(3)
1056(b)	502(b)
1057	1327(a)
1058	Rep.
1059	1326(a)
1060	1328(a), (c), (d)
1061	1328(b)
1062	Rep.
1066	348, 1307
1067	348
1068, 1069	Rep.
1071	1330
1076	108(c)
1077–1079	Rep.
1080	1305(a)(1)
1086	Rep.
1101–1103	Rep.
1200–1255	Rep.

TABLE II

This Table lists the sections of revised Title 11, Bankruptcy, and indicates the sections of former Title 11, which covered similar and related subject matter.

Title 11 New Sections	*Title 11 Former Sections*
101(1)–(3)	
101(4)	103, 401(1), 506(1), 707(2), 806(2), 1006(1)
101(5)–(7)	
101(8)	1(8)
101(9)	1(11), 401(3), 506(4), 707(1), 806(5), 1062(2)
101(10)	
101(11)	1(14), 401(5), 506(6), 707(2), 806(7), 1006(4)
101(12)	1(4), 401(8), 506(5), 706(3), 806(6), 1006(3)
101(13)	558
101(14)–(16)	
101(17), (18)	1(17)
101(19)–(21)	
101(22)	T. 15 §77ccc(7)
101(23)	506(8), 806(8)
101(24)	1(32), 1006(8)
101(25)	
101(26)	1(19), 107(d)(1)(d)
101(27)	
101(28)	401(6)
101(29)	404
101(30)	1(23), 401(7)
101(31)	1(24), 506(9), 706(5), 806(9), 1006(6)
101(32)	
101(33)	205(m)
101(34)	1(27)
101(35)	506(11)
101(36), (37)	
101(38)	1(29a)
101(39)	T. 15 §78c(a)(4), (5)
101(40)	1(30)
102(1)–(6)	
102(7)	1(35)
102(8)	
103, 104	
105	11(a)(15)
106	
107	77, 566
108(a), (b)	29(e)
108(c)	29(f), 661, 791, 1076

TABLE II—CONTINUED

Title 11 New Sections	*Title 11 Former Sections*
109(a)	11(a)(1)
109(b)	22
109(c)	404
109(d)	706(3), 806(6)
109(e)	1006(3), (8)
301	22(a), 41(f), 95(a)
302	
303(a)	22(b)
303(b)	23(b), 95(b), (e), 526
303(c)	95(f)
303(d)	41(b), 536, 537
303(e)	109(a)
303(f)	
303(g)	109(d)
303(h)	21
303(i)	11(a)(18), 19(b)
303(j)	95(g)
303(k)	
304	
305(a)(1)	
305(a)(2)	11(a)(22)
305(b), (c)	
306	
321	73
322(a)	78(b)
322(b)(1)	78(c)
322(b)(2)	78(d), (f), (g)
322(c)	78(i)
322(d)	78(m)
323	
324	11(a)(17), 560
325	74
326(a)	76(c)
326(b), (c)	
326(d)	76(e)
327	557, 591
327(c)	72(c)
328	
329	96(d)
330	76(c), 76a, 641(3), (4), 644(1), (3), 891(2), (3), 893(3)
331	
341	91, 92, 734–736, 834–836, 1032, 1033
342	94
343	44(a), 25(a)(1), (10), 736(3), 836(3), 1033(1)
344	25(a)(10)
345	101, 75(a)(2)
346(a)–(i)	
346(j)(1)	668, 795, 920
346(j)(2)–(4)	
346(j)(5)	670, 796, 922
346(j)(6), (7)	
347(a)	106(a)
347(b)	416(d), 605
348	638, 778, 843, 1066, 1067
349(a)	35(b)
349(b)	107(a)
350	11(a)(8)
361	
362	29(a), 35(c)(4), 513, 516(4), 663, 714, 814, 828, 917, 1014
363	11(a)(7), 110(f), 516(3), 713(2), 813(2)
364	516(2), 744, 846
365	103(c), 110(b), 516(1), 713(1), 813(1), 1013(1)
366	
501(a)	93(n), 596, 598, 736(2), 755a, 836(2), 851, 854, 1033(1)
501(b)	93(i)
501(c), (d)	
502(a)	93(d)
502(b)	93(f), 1056(b)
502(b)(3)	108
502(b)(4)	104(a)(4)
502(b)(7)	103(a)(9), 602, 753, 858
502(c)	93(d)
502(d)	93(g)
502(e)–(i)	
502(j)	93(k), 11(a)(2)
503(a)	
503(b)	104(a)(1)
503(b)(2)	102(a)(1)
503(b)(3)	642(1), 643, 644(4), 892(1)
503(b)(4)	641(5), 642(3), 643, 644(2), (4), 739(2), 892(3), 893(2), (4)
503(b)(5)	642(1)
504	102(c)
505(a), (b)	11(a)(2A), 104(a)(4)
505(c)	
506(a), (b)	93(h)
506(c), (d)	
507	104(a)
507(a)(3)	104(a)(2)
508	105(d)
509	93(i)
510	
521(1)	25(a)(8), (9)
521(2)	25(a)(3), (6), (7)

TABLE II—CONTINUED

Title 11 New Sections	*Title 11 Former Sections*
521(3)	25(a)(4), (5), (11)
521(4)	25(a)(1)
522	24
523(a)(1)	35(a)(1)
523(a)(2)	35(a)(2)
523(a)(3)	35(a)(3)
523(a)(4)	35(a)(4)
523(a)(5)	35(a)(7)
523(a)(6)	35(a)(8)
523(a)(7)–(9)	
523(b)	35(b)
523(c)	35(c)
523(d)	
524(a)	32(f)
524(b)–(d)	
524(e)	34
525	
541(a)	26, 110(a), 586
541(b)	110(a)(3)
541(c), (d)	
541(e)	110(c)
542(a), (b)	
542(c)	110(d)(2), (3)
542(d), (e)	
543(a)	
543(b), (c)	11(a)(21), 109(d)
543(d)	
544(a)	110(c)
544(b)	110(e)
545	107(b), (c)
545(1)	107(c)(1)(A)
545(2)	107(c)(1)(B)
545(3), (4)	107(c)(1)(C)
546(a)	
546(b)	107(c)(1)(B)
546(c)	
547	96
547(b)	107(a)
547(c)(4)	96(c)
547(d)	107(a)
547(e)(1)(B)	96(a)(4)
548(a)	107(d)(2)
548(b)	107(d)(4)
548(c)	107(d)(6)
548(d)(1)	107(d)(5)
548(d)(2)	
549(a)	110(d)(1)
549(b)	
549(c)	44(g)
549(d)	
550	96(b), 107(d)(3), (6)
551	96(b), 107(a)(3), (c)(2), (d)(6), 110(e)(2)
552	
553	96(c), 108
554	
701	
702	72(a)
703(a)	74
703(b), (c)	
704(1)	75(a)(1)
704(2)	75(a)(3), (5)
704(3)	75(a)(7)
704(4)	75(a)(8)
704(5)	75(a)(9)
704(6)	75(a)(10)
704(7)	
704(8)	75(a)(13)
705	72(b)
706	
707	95(g)
721	11(a)(5)
722	
723	23(g)
724(a)	93(j)
724(b)	107(c)(3)
724(c), (d)	
725	
726(a)(1), (2)	
726(a)(3)	93(n)
726(a)(4)–(6), (b), (c)	
727(a)(1)	
727(a)(2)	32(c)(1), (4)
727(a)(3)	32(c)(2)
727(a)(4)	32(c)(1), (3)
727(a)(5)	32(c)(7)
727(a)(6)	32(c)(6)
727(a)(7)	
727(a)(8), (9)	32(c)(5)
727(a)(10)	32(a)
727(b)	
727(c)	32(b)
727(d), (e)	33
728	
741	96(e)(1)
742–744	
745	96(e)(2)
746–748	
749	96(e)(5)
750	

TABLE II—CONTINUED

Title 11 New Sections	*Title 11 Former Sections*
751	96(e)(2)
752	96(e)(2), (3)
761–766	
901	402(b)(1), (2), 405(b), (e), (h), 408(b), 409, 411, 412, 413, 414(a), 416(b), (d)
902(1)	
902(2)	401(10)
902(3)	401(11)
902(4)	
903	403
904	402(c)
921(a)	405(a)
921(b)	402(d)
921(c)–(f)	405(a)
922(a)	405(e)(1)
922(b)	
923	405(d)
924	405(b)
925	408(a)
926	405(h)
927	418
941	410(a)
942	410(a), (b)
943(a)	413
943(b)(1)	
943(b)(2)	414(b)(2)
943(b)(3)	414(b)(4)
943(b)(4)	414(b)(6)
943(b)(5), (6)	414(b)(1)
944(a)	415(a)
944(b)	415(b)(1)
944(c)	415(b)(2)
945(a)	416(e)
945(b)	
946	417
1101(1)	
1101(2)	629(a)
1102	738
1103(a)	739(2)
1103(b), (c)(1)	
1103(c)(2)	739(1)(a)
1103(c)(3)	739(1)(b)–(e)
1103(c)(4)	
1103(c)(5)	739(1)(f)
1103(d)	
1104(a)	556, 832, 837(1)
1104(b)	568
1104(c)	560
1105	559
1106	587, 842
1106(a)(2)	564
1106(a)(3)	567(1)
1106(a)(4)	567(5)
1106(a)(4)(A)	567(3)
1106(a)(5)	569
1106(b)	568
1107(a)	563, 588, 742, 844
1107(b)	
1108	589, 743, 845
1109	607
1109(a)	608
1109(b)	606
1110	516(5), (6)
1111	596, 851
1112(a)	
1112(b)	636, 776, 777, 881, 882
1112(c)–(e)	
1121	570
1122	597, 751, 852
1123(a)(1)	
1123(a)(2)	616(6), 861(10)
1123(a)(3)	616(5), 861(9)
1123(a)(4)	
1123(a)(5)	616(2), (10), 861(12)
1123(a)(6)	616(12)(a)
1123(a)(7)	616(11)
1123(b)(1)	616(1)
1123(b)(2)	616(4), 757(2), 861(4)
1123(b)(3)	616(13)
1123(b)(4)	616(2), 861(7)
1123(b)(5)	616(14), 757(8), 861(13)
1123(c)	
1124	507, 708, 807
1125(a)	
1125(b)	576
1125(c)	
1125(d)	575
1125(e)	
1126	579
1126(a)	599
1126(e)	603
1127	622, 763
1127(a)	869
1127(b)	629(c), 787(1), 869
1127(c)	765, 787(2), (3), 871
1127(d)	623, 764, 870
1128(a)	579, 735(3), 737(3), 835, 837(3)
1128(b)	580
1129(a)(1)	621(1), 766(1), 872(1)

TABLE II—CONTINUED

Title 11 New Sections	*Title 11 Former Sections*
1129(a)(2)	766(3), 872(3)
1129(a)(3)	621(3), 761, 766(4), 867, 872(4)
1129(a)(4)	621(4), 872(5)
1129(a)(5)	621(5)
1129(a)(6)	624(2)
1129(a)(7)	621(2), 766(2), 872(2)
1129(a)(8)	
1129(a)(9)	737(2)
1129(a)(10)	
1129(a)(11)	621(2), 766(2), 872(2)
1129(b), (c)	
1129(d)	669, 921
1141(a)	624(1), 767(1), 873(1)
1141(b)	
1141(c)	626, 874
1141(d)(1)–(3)	628(1), 771, 876
1141(d)(4)	32(a)
1142(a)	624(2), 873(2)
1142(b)	627, 875
1143	604
1144	786, 911
1145(a)	664(a), 793(a), 918(a)
1145(b)	664(b), 793(b), 918(b)
1145(c), (d)	
1146(a), (b)	
1146(c)	667
1146(d)	
1161, 1162	
1163	205(c)(1)
1164, 1165	
1166	205(c)(2)
1167	205(n)
1168	205(j)
1169	205(c)(6)
1170	205(*o*)
1171(a)	205(n)
1171(b)	205(b)
1172	205(b)
1173	205(e)
1174	
1301, 1302	
1303	1036
1304	
1305(a)(1)	1080
1305(a)(2), (b), (c)	
1306	
1307	1066
1321	1033(2)
1322(a)(1)	1046(4)
1322(a)(2)	1046(3)
1322(a)(3)	
1322(b)(1)	1046(1)
1322(b)(2)	1046(2)
1322(b)(3)–(6)	
1322(b)(7)	1046(6)
1322(b)(8), (9)	
1322(b)(10)	1046(7)
1322(c)	
1323(a)	1053
1323(b)	
1323(c)	1054
1324	1033(5)
1325(a)(1)	1056(a)(1)
1325(a)(2)	
1325(a)(3)	1051, 1056(a)(4)
1325(a)(4), (5)	
1325(a)(6)	1056(a)(2)
1325(b)	
1326(a)	1059
1326(b)	
1327(a)	1057
1327(b), (c)	
1328(a)	1060
1328(b)	1061
1328(c), (d)	1060
1328(e)	33
1329(a)	1046(5)
1329(b), (c)	
1330	1071
1501–151326	

ENACTING CLAUSE

Pub. L. 95–598, title I, §101, Nov. 6, 1978, 92 Stat. 2549, provided in part: ''The law relating to bankruptcy is codified and enacted as title 11 of the United States Code, entitled 'Bankruptcy', and may be cited as 11 U.S.C. §—.''

REPEALS

Pub. L. 95–598, title IV, §401(a), Nov. 6, 1978, 92 Stat. 2682, provided that: ''The Bankruptcy Act [act July 1, 1898, ch. 541, 30 Stat. 544, as amended] is repealed.''

EFFECTIVE DATE

Pub. L. 95–598, title IV, §402, Nov. 6, 1978, 92 Stat. 2682, as amended by Pub. L. 98–249, §1(a), Mar. 31, 1984, 98

Stat. 116; Pub. L. 98–271, §1(a), Apr. 30, 1984, 98 Stat. 163; Pub. L. 98–299, §1(a), May 25, 1984, 98 Stat. 214; Pub. L. 98–325, §1(a), June 20, 1984, 98 Stat. 268; Pub. L. 98–353, title I, §§113, 121(a), July 10, 1984, 98 Stat. 343, 345; Pub. L. 98–454, title X, §1001, Oct. 5, 1984, 98 Stat. 1745, provided that:

''(a) Except as otherwise provided in this title [sections 401 to 411], this Act [for classification to the Code, see Tables] shall take effect on October 1, 1979.

''(b) Except as provided in subsections (c) and (d) of this section, the amendments made by title II [sections 201 to 252] of this Act shall not be effective.

''(c) The amendments made by sections 210, 214, 219, 220, 222, 224, 225, 228, 229, 235, 244, 245, 246, 249, and 251 of this Act shall take effect on October 1, 1979.

''(d) The amendments made by sections 217, 218, 230, 247, 302, 314(j), 317, 327, 328, 338, and 411 of this Act shall take effect on the date of enactment of this Act [Nov. 6, 1978].

''(e) [Repealed. Pub. L. 98–454, title X, §1001, Oct. 5, 1984, 98 Stat. 1745].''

[Amendment of section 402(b) of Pub. L. 95–598, set out above, by section 113 of Pub. L. 98–353 effective June 27, 1984, see section 122(c) of Pub. L. 98–353, set out as an Effective Date note under section 151 of Title 28, Judiciary and Judicial Procedure.]

SAVINGS PROVISION

Pub. L. 95–598, title IV, §403, Nov. 6, 1978, 92 Stat. 2683, as amended by Pub. L. 98–353, title III, §382, July 10, 1984, 98 Stat. 364, provided that:

''(a) A case commenced under the Bankruptcy Act, [act July 1, 1898, ch. 541, 30 Stat. 544, as amended], and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the [this] Act had not been enacted.

''(b) Notwithstanding subsection (a) of this section, sections 1165, 1167, 1168, 1169, and 1171 of title 11 of the United States Code, as enacted by section 101 of this Act, apply to cases pending under section 77 of the Bankruptcy Act ([former] 11 U.S.C. 205) on the date of enactment of this Act [Nov. 6, 1978] in which the trustee has not filed a plan of reorganization.

''(c) The repeal [of the Bankruptcy Act] made by section 401(a) of this Act does not affect any right of a referee in bankruptcy, United States bankruptcy judge, or survivor of a referee in bankruptcy or United States bankruptcy judge to receive any annuity or other payment under the civil service retirement laws.

''(d) The amendments made by section 314 of this Act [for classification to the Code, see Tables] do not affect the application of chapter 9, chapter 96, section 2516, section 3057, or section 3284 of title 18 of the United States Code to any act of any person—

''(1) committed before October 1, 1979; or

''(2) committed after October 1, 1979, in connection with a case commenced before such date.

''(e) Notwithstanding subsection (a) of this section—

''(1) a fee may not be charged under section 40c(2)(a) of the Bankruptcy Act [former 11 U.S.C. 68(c)(2)(a)] in a case pending under such Act after September 30, 1979, to the extent that such fee exceeds $200,000;

''(2) a fee may not be charged under section 40c(2)(b) of the Bankruptcy Act in a case in which the plan is confirmed after September 30, 1978, or in which the final determination as to the amount of such fee is made after September 30, 1979, notwithstanding an earlier confirmation date, to the extent that such fee exceeds $100,000;

''(3) after September 30, 1979, all moneys collected for payment into the referees' salary and expense fund in cases filed under the Bankruptcy Act shall be collected and paid into the general fund of the Treasury; and

''(4) any balance in the referees' salary and expense fund in the Treasury on October 1, 1979, shall be transferred to the general fund of the Treasury and the referees' salary and expense fund account shall be closed.''

Pub. L. 98–353, title III, §381, July 10, 1984, 98 Stat. 364, provided that: ''This subtitle [(§§381, 382) amending section 403(e) of Pub. L. 95–598, set out above] may be cited as the 'Referees Salary and Expense Fund Act of 1984'.''

HISTORY OF BANKRUPTCY ACTS

The bankruptcy laws were revised generally and enacted as Title 11, Bankruptcy, by Pub. L. 96–598, Nov. 6, 1978, 92 Stat. 2549.

Earlier bankruptcy laws included the following acts:

Apr. 4, 1800, ch. 19, 2 Stat. 19, repealed Dec. 19, 1803, ch. 6, 2 Stat. 248.

Aug. 19, 1841, ch. 9, 5 Stat. 440, repealed Mar. 3, 1843, ch. 82, 5 Stat. 614.

Mar. 2, 1867, ch. 176, 14 Stat. 517, the provisions of which were incorporated in Rev. Stat. Title LXI, §§4972 to 5132, were materially amended June 22, 1874, ch. 390, 18 Stat. 178, and were repealed June 7, 1878, ch. 160, 20 Stat. 99.

The Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544, as amended, sometimes called the Nelson Act, repealed by Pub. L. 95–598.

The Chandler Act of July 22, 1938, ch. 575, 52 Stat. 883, which revised the Bankruptcy Act generally and materially amended the provisions covering corporate reorganizations, repealed by Pub. L. 95–598.

NATIONAL BANKRUPTCY REVIEW COMMISSION

Pub. L. 103–394, title VI, Oct. 22, 1994, 108 Stat. 4147, provided that:

''SEC. 601. SHORT TITLE.

''This title may be cited as the 'National Bankruptcy Review Commission Act'.

''SEC. 602. ESTABLISHMENT.

''There is established the National Bankruptcy Review Commission (referred to as the 'Commission').

''SEC. 603. DUTIES OF THE COMMISSION.

''The duties of the Commission are—

''(1) to investigate and study issues and problems relating to title 11, United States Code (commonly known as the 'Bankruptcy Code');

''(2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems;

''(3) to prepare and submit to the Congress, the Chief Justice, and the President a report in accordance with section 608; and

''(4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system.

''SEC. 604. MEMBERSHIP.

''(a) NUMBER AND APPOINTMENT.—The Commission shall be composed of 9 members as follows:

''(1) Three members appointed by the President, 1 of whom shall be designated as chairman by the President.

''(2) One member shall be appointed by the President pro tempore of the Senate.

''(3) One member shall be appointed by the Minority Leader of the Senate.

''(4) One member shall be appointed by the Speaker of the House of Representatives.

''(5) One member shall be appointed by the Minority Leader of the House of Representatives.

''(6) Two members appointed by the Chief Justice.

Members of Congress, and officers and employees of the executive branch, shall be ineligible for appointment to the Commission.

''(b) TERM.—Members of the Commission shall be appointed for the life of the Commission.

''(c) QUORUM.—Five members of the Commission shall constitute a quorum, but a lesser number may conduct meetings.

''(d) APPOINTMENT DEADLINE.—The first appointments made under subsection (a) shall be made within 60 days after the date of enactment of this Act [Oct. 22, 1994].

''(e) FIRST MEETING.—The first meeting of the Commission shall be called by the chairman and shall be held within 210 days after the date of enactment of this Act.

''(f) VACANCY.—A vacancy on the Commission resulting from the death or resignation of a member shall not affect its powers and shall be filled in the same manner in which the original appointment was made.

''(g) CONTINUATION OF MEMBERSHIP.—If any member of the Commission who was appointed to the Commission as an officer or employee of a government leaves that office, or if any member of the Commission who was not appointed in such a capacity becomes an officer or employee of a government, the member may continue as a member of the Commission for not longer than the 90-day period beginning on the date the member leaves that office or becomes such an officer or employee, as the case may be.

''(h) CONSULTATION PRIOR TO APPOINTMENT.—Prior to the appointment of members of the Commission, the President, the President pro tempore of the Senate, the Speaker of the House of Representatives, and the Chief Justice shall consult with each other to ensure fair and equitable representation of various points of view in the Commission and its staff.

''SEC. 605. COMPENSATION OF THE COMMISSION.

''(a) PAY.—

''(1) NONGOVERNMENT EMPLOYEES.—Each member of the Commission who is not otherwise employed by the United States Government shall be entitled to receive the daily equivalent of the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which he or she is engaged in the actual performance of duties as a member of the Commission.

''(2) GOVERNMENT EMPLOYEES.—A member of the Commission who is an officer or employee of the United States Government shall serve without additional compensation.

''(b) TRAVEL.—Members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

''SEC. 606. STAFF OF COMMISSION; EXPERTS AND CONSULTANTS.

''(a) STAFF.—

''(1) APPOINTMENT.—The chairman of the Commission may, without regard to the civil service laws and regulations, appoint, and terminate an executive director and such other personnel as are necessary to enable the Commission to perform its duties. The employment of an executive director shall be subject to confirmation by the Commission.

''(2) COMPENSATION.—The chairman of the Commission may fix the compensation of the executive director and other personnel without regard to the provisions of chapter 51 and subchapter II of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates, except that the rate of pay for the executive director and other personnel may not exceed the rate payable for level V of the Executive Schedule under section 5316 of that title.

''(b) EXPERTS AND CONSULTANTS.—The Commission may procure temporary and intermittent services of experts and consultants under section 3109(b) of title 5, United States Code.

''SEC. 607. POWERS OF THE COMMISSION.

''(a) HEARINGS AND MEETINGS.—The Commission or, on authorization of the Commission, a member of the Commission, may hold such hearings, sit and act at such time and places, take such testimony, and receive such evidence, as the Commission considers appropriate. The Commission or a member of the Commission may administer oaths or affirmations to witnesses appearing before it.

''(b) OFFICIAL DATA.—The Commission may secure directly from any Federal department, agency, or court information necessary to enable it to carry out this title. Upon request of the chairman of the Commission, the head of a Federal department or agency or chief judge of a Federal court shall furnish such information, consistent with law, to the Commission.

''(c) FACILITIES AND SUPPORT SERVICES.—The Administrator of General Services shall provide to the Commission on a reimbursable basis such facilities and support services as the Commission may request. Upon request of the Commission, the head of a Federal department or agency may make any of the facilities or services of the agency available to the Commission to assist the Commission in carrying out its duties under this title.

''(d) EXPENDITURES AND CONTRACTS.—The Commission or, on authorization of the Commission, a member of the Commission may make expenditures and enter into contracts for the procurement of such supplies, services, and property as the Commission or member considers appropriate for the purposes of carrying out the duties of the Commission. Such expenditures and contracts may be made only to such extent or in such amounts as are provided in appropriation Acts.

''(e) MAILS.—The Commission may use the United States mails in the same manner and under the same conditions as other Federal departments and agencies of the United States.

''(f) GIFTS.—The Commission may accept, use, and dispose of gifts or donations of services or property.

''SEC. 608. REPORT.

''The Commission shall submit to the Congress, the Chief Justice, and the President a report not later than 2 years after the date of its first meeting. The report shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislative or administrative action as it considers appropriate.

''SEC. 609. TERMINATION.

''The Commission shall cease to exist on the date that is 30 days after the date on which it submits its report under section 608.

''SEC. 610. AUTHORIZATION OF APPROPRIATIONS.

''There is authorized to be appropriated $1,500,000 to carry out this title.''

COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES

Pub. L. 91–354, §§1–6, July 24, 1970, 84 Stat. 468, as amended by Pub. L. 92–251, Mar. 17, 1972, 86 Stat. 63; Pub. L. 93–56, §1, July 1, 1973, 87 Stat. 140, established the Commission on the Bankruptcy Laws of the United States, to study and recommend changes to this title, which ceased to exist 30 days after the date of submission of its final report which was required prior to July 31, 1973.

TITLE REFERRED TO IN OTHER SECTIONS

This title is referred to in title 7 sections 12, 24; title 8 section 1154; title 10 sections 1151, 2005, 2130a; title 12 sections 1150, 1467a, 1787, 1817, 1821; title 15 sections 77c, 77ccc, 78eee, 78fff, 78fff–1, 78fff–2, 78fff–4, 78*lll*, 79k, 80a–2, 80a–25, 80b–2, 1681c, 1870; title 17 section 201; title 18 sections 151, 152, 154, 155, 156, 157, 1961, 2516, 3284, 3613; title 19 section 1485; title 20 section 1087–3; title 25 sections 1613a, 1616a; title 26 sections 108, 351, 355, 368, 382, 401, 422, 542, 856, 1017, 1361, 1398, 1399, 3302, 4980B, 6012, 6036, 6103, 6161, 6212, 6213, 6229, 6255, 6327, 6503, 6512, 6532, 6658, 6871, 6872, 7437, 7464, 7508; title 28 sections 156, 157, 158, 526, 586, 1334, 1408, 1409, 1411, 1412, 1930, 2075, 3003; title 29 sections 152, 402, 1054, 1163, 1341, 1343, 1362, 1368, 1391, 1402, 1405, 1413; title 30 section 934; title 31 section 3713; title 33 sections 511, 2716; title 37 sections 301b, 301d, 301e, 302, 302b, 302d, 302e, 302g, 302h, 308e, 308f, 308g, 308h, 308i, 314, 315, 317; title 38 sections 3732, 7634; title 40 section 316; title 41 section 41; title 42 sections 254*o*, 292f, 292*o*, 294f, 300ff–76, 656, 1473, 2000e, 3602, 6924, 6991b, 6991c, 9602, 9608; title 43 sections 617p, 1606, 1636; title 45 sec-

tions 701, 791, 912, 1007; title 48 sections 1424–4, 1614, 1821; title 49 sections 5309, 14301.

CHAPTER 1—GENERAL PROVISIONS

AMENDMENTS

1994—Pub. L. 103–394, title III, § 308(b), Oct. 22, 1994, 108 Stat. 4137, added item 110.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 103 of this title; title 15 section 78fff.

§ 101. Definitions

In this title—

(1) ''accountant'' means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized;

(2) ''affiliate'' means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement;

(4)[1] ''attorney'' means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law;

(5) ''claim'' means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(6) ''commodity broker'' means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761 of this title;

(7) ''community claim'' means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of the commencement of the case;

(8) ''consumer debt'' means debt incurred by an individual primarily for a personal, family, or household purpose;

(9) ''corporation''—

(A) includes—

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association;

(iii) joint-stock company;

(iv) unincorporated company or association; or

(v) business trust; but

(B) does not include limited partnership;

(10) ''creditor'' means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

(11) ''custodian'' means—

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

(B) assignee under a general assignment for the benefit of the debtor's creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors;

(12) ''debt'' means liability on a claim;

(12A) ''debt for child support'' means a debt of a kind specified in section 523(a)(5) of this title for maintenance or support of a child of the debtor;

(13) ''debtor'' means person or municipality concerning which a case under this title has been commenced;

[1] So in original. There is no par. (3).

(14) ''disinterested person'' means person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

(15) ''entity'' includes person, estate, trust, governmental unit, and United States trustee;

(16) ''equity security'' means—

(A) share in a corporation, whether or not transferable or denominated ''stock'', or similar security;

(B) interest of a limited partner in a limited partnership; or

(C) warrant or right, other than a right to convert, to purchase, sell, or subscribe to a share, security, or interest of a kind specified in subparagraph (A) or (B) of this paragraph;

(17) ''equity security holder'' means holder of an equity security of the debtor;

(18) ''family farmer'' means—

(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $1,500,000 and not less than 80 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded;

(19) ''family farmer with regular annual income'' means family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title;

(20) ''farmer'' means (except when such term appears in the term ''family farmer'') person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person;

(21) ''farming operation'' includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state;

(21A) ''farmout agreement'' means a written agreement in which—

(A) the owner of a right to drill, produce, or operate liquid or gaseous hydrocarbons on property agrees or has agreed to transfer or assign all or a part of such right to another entity; and

(B) such other entity (either directly or through its agents or its assigns), as consideration, agrees to perform drilling, reworking, recompleting, testing, or similar or related operations, to develop or produce liquid or gaseous hydrocarbons on the property;

(21B) ''Federal depository institutions regulatory agency'' means—

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act) for which no conservator or receiver has been appointed, the appropriate Federal banking agency (as defined in section 3(q) of such Act);

(B) with respect to an insured credit union (including an insured credit union for which the National Credit Union Administration has been appointed conservator or liquidating agent), the National Credit Union Administration;

(C) with respect to any insured depository institution for which the Resolution Trust Corporation has been appointed conservator or receiver, the Resolution Trust Corporation; and

(D) with respect to any insured depository institution for which the Federal Deposit Insurance Corporation has been appointed conservator or receiver, the Federal Deposit Insurance Corporation;

(22) ''financial institution'' means a person that is a commercial or savings bank, industrial savings bank, savings and loan association, or trust company and, when any such person is acting as agent or custodian for a customer in connection with a securities contract, as defined in section 741 of this title, such customer;

(23) ''foreign proceeding'' means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;

(24) ''foreign representative'' means duly selected trustee, administrator, or other representative of an estate in a foreign proceeding;

(25) ''forward contract'' means a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon;

(26) ''forward contract merchant'' means a person whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade;

(27) ''governmental unit'' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;

(28) ''indenture'' means mortgage, deed of trust, or indenture, under which there is outstanding a security, other than a voting-trust certificate, constituting a claim against the debtor, a claim secured by a lien on any of the debtor's property, or an equity security of the debtor;

(29) ''indenture trustee'' means trustee under an indenture;

(30) ''individual with regular income'' means individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker;

(31) ''insider'' includes—

(A) if the debtor is an individual—

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation—

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership—

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor;

(32) ''insolvent'' means—

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts; and

(C) with reference to a municipality, financial condition such that the municipality is—

(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or

(ii) unable to pay its debts as they become due;

(33) ''institution-affiliated party''—

(A) with respect to an insured depository institution (as defined in section 3(c)(2) of

the Federal Deposit Insurance Act), has the meaning given it in section 3(u) of the Federal Deposit Insurance Act; and

(B) with respect to an insured credit union, has the meaning given it in section 206(r) of the Federal Credit Union Act;

(34) ''insured credit union'' has the meaning given it in section 101(7) of the Federal Credit Union Act;

(35) ''insured depository institution''—

(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and

(B) includes an insured credit union (except in the case of paragraphs (21B) and (33)(A) of this subsection);

(35A) ''intellectual property'' means—

(A) trade secret;

(B) invention, process, design, or plant protected under title 35;

(C) patent application;

(D) plant variety;

(E) work of authorship protected under title 17; or

(F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable nonbankruptcy law; and

(36) ''judicial lien'' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(37) ''lien'' means charge against or interest in property to secure payment of a debt or performance of an obligation;

(38) ''margin payment'' means, for purposes of the forward contract provisions of this title, payment or deposit of cash, a security or other property, that is commonly known in the forward contract trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, or variation payments; and[2]

(39) ''mask work'' has the meaning given it in section 901(a)(2) of title 17.

(40) ''municipality'' means political subdivision or public agency or instrumentality of a State;

(41) ''person'' includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—

(A) acquires an asset from a person—

(i) as a result of the operation of a loan guarantee agreement; or

(ii) as receiver or liquidating agent of a person;

(B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or

(C) is the legal or beneficial owner of an asset of—

(i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or

(ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit;

(42) ''petition'' means petition filed under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title;

(42A) ''production payment'' means a term overriding royalty satisfiable in cash or in kind—

(A) contingent on the production of a liquid or gaseous hydrocarbon from particular real property; and

(B) from a specified volume, or a specified value, from the liquid or gaseous hydrocarbon produced from such property, and determined without regard to production costs;

(43) ''purchaser'' means transferee of a voluntary transfer, and includes immediate or mediate transferee of such a transferee;

(44) ''railroad'' means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier;

(45) ''relative'' means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree;

(46) ''repo participant'' means an entity that, on any day during the period beginning 90 days before the date of the filing of the petition, has an outstanding repurchase agreement with the debtor;

(47) ''repurchase agreement'' (which definition also applies to a reverse repurchase agreement) means an agreement, including related terms, which provides for the transfer of certificates of deposit, eligible bankers' acceptances, or securities that are direct obligations of, or that are fully guaranteed as to principal and interest by, the United States or any agency of the United States against the transfer of funds by the transferee of such certificates of deposit, eligible bankers' acceptances, or securities with a simultaneous agreement by such transferee to transfer to the transferor thereof certificates of deposit, eligible bankers' acceptances, or securities as described above, at a date certain not later than one year after such transfers or on demand, against the transfer of funds;

(48) ''securities clearing agency'' means person that is registered as a clearing agency under section 17A of the Securities Exchange Act of 1934 or whose business is confined to the performance of functions of a clearing agency with respect to exempted securities, as defined in section 3(a)(12) of such Act for the purposes of such section 17A;

(49) ''security''—

(A) includes—

(i) note;

(ii) stock;

(iii) treasury stock;

(iv) bond;

(v) debenture;

(vi) collateral trust certificate;

(vii) pre-organization certificate or subscription;

[2] So in original. The word ''and'' probably should not appear.

(viii) transferable share;
(ix) voting-trust certificate;
(x) certificate of deposit;
(xi) certificate of deposit for security;
(xii) investment contract or certificate of interest or participation in a profit-sharing agreement or in an oil, gas, or mineral royalty or lease, if such contract or interest is required to be the subject of a registration statement filed with the Securities and Exchange Commission under the provisions of the Securities Act of 1933, or is exempt under section 3(b) of such Act from the requirement to file such a statement;
(xiii) interest of a limited partner in a limited partnership;
(xiv) other claim or interest commonly known as ''security''; and
(xv) certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase or sell, a security; but

(B) does not include—
(i) currency, check, draft, bill of exchange, or bank letter of credit;
(ii) leverage transaction, as defined in section 761 of this title;
(iii) commodity futures contract or forward contract;
(iv) option, warrant, or right to subscribe to or purchase or sell a commodity futures contract;
(v) option to purchase or sell a commodity;
(vi) contract or certificate of a kind specified in subparagraph (A)(xii) of this paragraph that is not required to be the subject of a registration statement filed with the Securities and Exchange Commission and is not exempt under section 3(b) of the Securities Act of 1933 from the requirement to file such a statement; or
(vii) debt or evidence of indebtedness for goods sold and delivered or services rendered;

(50) ''security agreement'' means agreement that creates or provides for a security interest;
(51) ''security interest'' means lien created by an agreement;
(51A) ''settlement payment'' means, for purposes of the forward contract provisions of this title, a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade;
(51B) ''single asset real estate'' means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate noncontingent, liquidated secured debts in an amount no more than $4,000,000;
(51C) ''small business'' means a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed $2,000,000;
(52) ''State'' includes the District of Columbia and Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title;
(53) ''statutory lien'' means lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;
(53A) ''stockbroker'' means person—
(A) with respect to which there is a customer, as defined in section 741 of this title; and
(B) that is engaged in the business of effecting transactions in securities—
(i) for the account of others; or
(ii) with members of the general public, from or for such person's own account;

(53B) ''swap agreement'' means—
(A) an agreement (including terms and conditions incorporated by reference therein) which is a rate swap agreement, basis swap, forward rate agreement, commodity swap, interest rate option, forward foreign exchange agreement, spot foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency option, any other similar agreement (including any option to enter into any of the foregoing);
(B) any combination of the foregoing; or
(C) a master agreement for any of the foregoing together with all supplements;

(53C) ''swap participant'' means an entity that, at any time before the filing of the petition, has an outstanding swap agreement with the debtor;
(56A)[3] ''term overriding royalty'' means an interest in liquid or gaseous hydrocarbons in place or to be produced from particular real property that entitles the owner thereof to a share of production, or the value thereof, for a term limited by time, quantity, or value realized;
(53D) ''timeshare plan'' means and shall include that interest purchased in any arrangement, plan, scheme, or similar device, but not including exchange programs, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement, or by any other means, whereby a purchaser, in exchange for consideration, receives a right to use accom-

[3] So in original.

modations, facilities, or recreational sites, whether improved or unimproved, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years. A ''timeshare interest'' is that interest purchased in a timeshare plan which grants the purchaser the right to use and occupy accommodations, facilities, or recreational sites, whether improved or unimproved, pursuant to a timeshare plan;

(54) ''transfer'' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

(55) ''United States'', when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States;

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2549; Pub. L. 97–222, §1, July 27, 1982, 96 Stat. 235; Pub. L. 98–353, title III, §§391, 401, 421, July 10, 1984, 98 Stat. 364, 366, 367; Pub. L. 99–554, title II, §§201, 251, 283(a), Oct. 27, 1986, 100 Stat. 3097, 3104, 3116; Pub. L. 100–506, §1(a), Oct. 18, 1988, 102 Stat. 2538; Pub. L. 100–597, §1, Nov. 3, 1988, 102 Stat. 3028; Pub. L. 101–311, title I, §101, title II, §201, June 25, 1990, 104 Stat. 267, 268; Pub. L. 101–647, title XXV, §2522(e), Nov. 29, 1990, 104 Stat. 4867; Pub. L. 102–486, title XXX, §3017(a), Oct. 24, 1992, 106 Stat. 3130; Pub. L. 103–394, title I, §106, title II, §§208(a), 215, 217(a), 218(a), title III, §304(a), title V, §501(a), (b)(1), (d)(1), Oct. 22, 1994, 108 Stat. 4111, 4124, 4126–4128, 4132, 4141–4143.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 101(2) defines ''affiliate.'' The House amendment contains a provision that is a compromise between the definition in the House-passed version of H.R. 8200 and the Senate amendment in the nature of a substitute to H.R. 8200. Subparagraphs (A) and (B) are derived from the Senate amendment and subparagraph (D) is taken from the House bill, while subparagraph (C) represents a compromise, taking the House position with respect to a person whose business is operated under a lease or an operating agreement by the debtor and with respect to a person substantially all of whose property is operated under an operating agreement by the debtor and with respect to a person substantially all of whose property is operated under an operating agreement by the debtor and the Senate position on leased property. Thus, the definition of ''affiliate'' excludes persons substantially all of whose property is operated under a lease agreement by a debtor, such as a small company which owns equipment all of which is leased to a larger nonrelated company.

Section 101(4)(B) represents a modification of the House-passed bill to include the definition of ''claim'' a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. This is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a ''claim'' for purposes of a proceeding under title 11.

On the other hand, rights to an equitable remedy for a breach of performance with respect to which such breach does not give rise to a right to payment are not ''claims'' and would therefore not be susceptible to discharge in bankruptcy.

In a case under chapter 9 to title 11, ''claim'' does not include a right to payment under an industrial development bond issued by a municipality as a matter of convenience for a third party.

Municipalities are authorized, under section 103(c) of the Internal Revenue Code of 1954, as amended [title 26], to issue tax-exempt industrial development revenue bonds to provide for the financing of certain projects for privately owned companies. The bonds are sold on the basis of the credit of the company on whose behalf they are issued, and the principal, interest, and premium, if any, are payable solely from payments made by the company to the trustee under the bond indenture and do not constitute claims on the tax revenues or other funds of the issuing municipalities. The municipality merely acts as the vehicle to enable the bonds to be issued on a tax-exempt basis. Claims that arise by virtue of these bonds are not among the claims defined by this paragraph and amounts owed by private companies to the holders of industrial development revenue bonds are not to be included among the assets of the municipality that would be affected by the plan.

Section 101(6) defines ''community claim'' as provided by the Senate amendment in order to indicate that a community claim exists whether or not there is community property in the estate as of the commencement of the case.

Section 101(7) of the House amendment contains a definition of consumer debt identical to the definition in the House bill and Senate amendment. A consumer debt does not include a debt to any extent the debt is secured by real property.

Section 101(9) of the Senate amendment contained a definition of ''court.'' The House amendment deletes the provision as unnecessary in light of the pervasive jurisdiction of a bankruptcy court under all chapters of title 11 as indicated in title II of the House amendment to H.R. 8200.

Section 101(11) defines ''debt'' to mean liability on a claim, as was contained in the House-passed version of H.R. 8200. The Senate amendment contained language indicating that ''debt'' does not include a policy loan made by a life insurance company to the debtor. That language is deleted in the House amendment as unnecessary since a life insurance company clearly has no right to have a policy loan repaid by the debtor, although such company does have a right of offset with respect to such policy loan. Clearly, then, a ''debt'' does not include a policy loan made by a life insurance company. Inclusion of the language contained in the Senate amendment would have required elaboration of other legal relationships not arising by a liability on a claim. Further the language would have required clarification that interest on a policy loan made by a life insurance company is a debt, and that the insurance company does have right to payment to that interest.

Section 101(14) adopts the definition of ''entity'' contained in the Senate-passed version of H.R. 8200. Since the Senate amendment to H.R. 8200 deleted the U.S. trustee, a corresponding definitional change is made in chapter 15 of the House amendment for U.S. trustees under the pilot program. Adoption by the House amendment of a pilot program for U.S. trustees under chapter 15 requires insertion of ''United States trustee'' in many sections. Several provisions in chapter 15 of the House amendment that relate to the U.S. trustee were not contained in the Senate amendment in the nature of a substitute.

Section 101(17) defines ''farmer,'' as in the Senate amendment with an income limitation percentage of 80 percent instead of 75 percent.

Section 101(18) contains a new definition of ''farming operation'' derived from present law and the definition of ''farmer'' in the Senate amendment. This definition gives a broad construction to the term ''farming operation''.

Section 101(20) contains a definition of ''foreign representative''. It clarifies the House bill and Senate amendment by indicating that a foreign representative must be duly selected in a foreign proceeding.

Section 101(35) defines ''security'' as contained in the Senate amendment. H.R. 8200 as adopted by the House excluded certain commercial notes from the definition of ''security'', and that exclusion is deleted.

Section 101(40) defines ''transfer'' as in the Senate amendment. The definition contained in H.R. 8200 as passed by the House included ''setoff'' in the definition of ''transfer''. Inclusion of ''setoff'' is deleted. The effect is that a ''setoff'' is not subject to being set aside as a preferential ''transfer'' but will be subject to special rules.

SENATE REPORT NO. 95–989

Section 101 of title 11 contains 40 definitions:

Paragraph (1) defines ''accountant'' as an accountant authorized under applicable law to practice accounting. The term includes a professional accounting association, corporation, or partnership if applicable law authorizes such a unit to practice accounting.

Paragraph (2) defines ''affiliate.'' An affiliate is an entity with a close relationship to the debtor. It includes a 20 percent parent or subsidiary of the debtor, whether a corporate, partnership, individual, or estate parent.

The use of ''directly or indirectly'' in subparagraphs (A) and (B) is intended to cover situations in which there is an opportunity to control, and where the existence of that opportunity operates as indirect control.

''Affiliate'' is defined primarily for use in the definition of insider, infra, and for use in the chapter 11 reorganization cases. The definition of ''affiliate'' does not include an entity acting in a fiduciary or agency capacity if the entity does not have the sole discretionary power to vote 20 percent of the voting securities but hold them solely as security and have not exercised the power to vote. This restriction applies to a corporate affiliate under subparagraph (B) of paragraph (2).

Subsections (C) and (D) of paragraph (2) define affiliate also as those persons and entities whose business or substantially all of whose property is operated under a lease or operating agreement by a debtor and whose business or property is more than 50 percent under the control of the debtor.

The definition of ''attorney'' in paragraph (3) is similar to the definition of accountant.

Paragraph (4) defines ''claim.'' The effect of the definition is a significant departure from present law. Under present law, ''claim'' is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in section 63 of the Bankruptcy Act [section 103 of former title 11], to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters. The definition is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. The definition also includes as a claim an equitable right to performance that does not give rise to a right to payment. By this broadest possible definition and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

Paragraph (5) defines ''commodity broker'' by reference to various terms used and defined in subchapter IV of chapter 7, Commodity Broker Liquidation. The terms are described in connection with section 761, infra.

Paragraph (6) defines ''community claim'' for those eight States that have community property laws. The definition is keyed to the liability of the debtor's property for a claim against either the debtor or the debtor's spouse. If the debtor's property is liable for a claim against either, that claim is a community claim.

Paragraph (7) defines ''consumer debt''. The definition is adapted from the definition used in various consumer protection laws. It encompasses only a debt incurred by an individual primarily for a personal, family, or household purpose.

The definition of ''corporation'' in paragraph (8) is similar to the definition in current law, section 1(8) [section 1(8) of former title 11]. The term encompasses any association having the power or privilege that a private corporation, but not an individual or partnership, has; partnership associations organized under a law that makes only the capital subscribed responsible for the debts of the partnership; joint-stock company; unincorporated company or association; and business trust. ''Unincorporated association'' is intended specifically to include a labor union, as well as other bodies that come under that phrase as used under current law. The exclusion of limited partnerships is explicit, and not left to the case law.

Paragraph (9) defines ''court'' as the bankruptcy judge in the district in which the case is pending except in municipal adjustment and railroad reorganization cases, where ''court'' means the Federal district judge.

Paragraph (10) [enacted as (9)] defines ''creditor'' to include holders of prepetition claims against the debtor. However, it also encompasses certain holders of claims that are deemed to arise before the date of the filing of the petition, such as those injured by the rejection of an executory contract or unexpired lease, certain investment tax credit recapture claim holders, ''involuntary gap'' creditors, and certain holders of the right of setoff. The term also includes the holder of a prepetition community claim. A guarantor of or surety for a claim against the debtor is also a creditor, because he holds a contingent claim against the debtor that becomes fixed when he pays the creditor whose claim he has guaranteed or insured.

Paragraph (11) [enacted as (10)] defines ''custodian.'' There is no similar definition in current law. It is defined to facilitate drafting, and means a prepetition liquidator of the debtor's property, such as an assignee for the benefit of creditors, a receiver of the debtor's property, or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive, and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee.

''Debt'' is defined in paragraph (12) [enacted as (11)] as a liability on a claim. The terms ''debt'' and ''claim'' are coextensive: a creditor has a ''claim'' against the debtor; the debtor owes a ''debt'' to the creditor. This definition of ''debt'' and the definition of ''claim'' on which it is based, proposed 11 U.S.C. 101(4), does not include a transaction such as a policy loan on an insurance policy. Under that kind of transaction, the debtor is not liable to the insurance company for repayment; the amount owed is merely available to the company for setoff against any benefits that become payable under the policy. As such, the loan is not a claim (it is not a right to payment) that the company can assert against the estate; nor is the debtor's obligation a debt (a liability on a claim) that will be discharged under proposed 11 U.S.C. 523 or 524.

Paragraph (13) [enacted as (12)] defines ''debtor.'' Debtor means person or municipality concerning which a case under title II has been commenced. This is a change in terminology from present law, which identifies the person by or against whom a petition is filed in a straight bankruptcy liquidation case as the ''bankrupt'', and a person or municipality that is proceeding under a debtor rehabilitation chapter (chapters VIII through XIII of the Bankruptcy Act) [chapters 8 through 13 of former title 11] as a ''debtor.'' The term ''debtor'' is used for both kinds of cases in this bill, for ease of reference in chapters 1, 3, and 5 (which apply to straight bankruptcy and reorganization cases).

Paragraph (14) [enacted as (13)] defines ''disinterested person.'' The definition is adapted from section 158 of chapter X of current law [section 558 of former title 11], though it is expanded and modified in some respects. A person is a disinterested person if the person is not a creditor, equity security holder, or insider; is not and was not an investment banker of the debtor for any outstanding security of the debtor (the change from underwriter in current law to investment banker is to make the term more descriptive and to avoid conflict with the definition of underwriter in section 2(11) of the Securities Act of 1933 (15 U.S.C. 77b(11)); has not been an investment banker for a security of the debtor within 3 years before the date of the filing of the petition (the change from five years to three years here conforms the definition with the statute of limitations in the Securities Act of 1933) [15 U.S.C. 77m], or an attorney for such an investment banker; is not an insider of the debtor or of such an investment banker; and does not have an interest materially adverse to the estate.

''Entity'' is defined, for convenience, in paragraph (15) [enacted as (14)], to include person, estate, trust, and governmental unit. It is the most inclusive of the various defined terms relating to bodies or units.

Paragraph (16) defines ''equity security.'' The term includes a share or stock in a corporation, a limited partner's interest in a limited partnership, and a warrant or right to subscribe to an equity security. The term does not include a security, such as a convertible debenture, that is convertible into equity security, but has not been converted.

Paragraph (17) [enacted as (15)] defines ''equity security holder'' for convenience as the holder of an equity securing of the debtor.

Paragraph (18) [enacted as (17)] defines ''farmer''. It encompasses only those persons for whom farming operations contribute 75 percent or more of their total income.

Paragraphs (19) and (20) define ''foreign proceeding'' and ''foreign representative''. A foreign proceeding is a proceeding in another country in which the debtor has some substantial connection for the purpose of liquidating the estate of the debtor or the purpose of financial rehabilitation of the debtor. A foreign representative is the representative of the estate in a foreign proceeding, such as a trustee or administrator.

Paragraph (21) defines ''governmental unit'' in the broadest sense. The definition encompasses the United States, a State, Commonwealth, District, Territory, municipality, or foreign state, and a department, agency, or instrumentality of any of those entities. ''Department, agency, or instrumentality'' does not include an entity that owes its existence to State action, such as the granting of a charter or a license but that has no other connection with a State or local government or the Federal Government. The relationship must be an active one in which the department, agency, or instrumentality is actually carrying out some governmental function.

Paragraph (22) defines ''indenture.'' It is similar to the definition of indenture in the Trust Indenture Act of 1939 [15 U.S.C. 77ccc(7)]. An indenture is the instrument under which securities, either debt or equity, of the debtor are outstanding.

Paragraph (23) defines ''indenture trustee'' as the trustee under an indenture.

Paragraph (24) defines ''individual with regular income.'' The effect of this definition, and of its use in section 109(e), is to expand substantially the kinds of individuals that are eligible for relief under chapter 13, Adjustment of Debts of an Individual with Regular Income. Chapter XIII [chapter 13 of former title 11] is now available only for wage earners. The definition encompasses all individuals with incomes that are sufficiently stable and regular to enable them to make payments under a chapter 13 plan. Thus, individuals on welfare, social security, fixed pension incomes, or who live on investment incomes, will be able to work out repayment plans with their creditors rather than being forced into straight bankruptcy. Also, self-employed individuals will be eligible to use chapter 13 if they have regular incomes.

However, the definition excludes certain stockbrokers and commodity brokers, in order to prohibit them from proceeding under chapter 13 and avoiding the customer protection provisions of chapter 7.

''Insider'', defined in paragraph (25), is a new term. An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor. If the debtor is an individual, then a relative of the debtor, a partnership in which the debtor is a general partner, a general partner of the debtor, and a corporation controlled by the debtor are all insiders. If the debtor is a corporation, then a controlling person, a relative of a controlling person, a partnership in which the debtor is a general partner, and a general partner of the debtor are all insiders. If the debtor is a partnership, then a general partner of or in the debtor, a relative of a general partner in the debtor, and a person in control are all insiders. If the debtor is a municipality, then an elected official of the debtor is an insider. In addition, affiliates of the debtor and managing agents are insiders.

The definition of ''insolvent'' in paragraph (26) is adopted from section 1(19) of current law [section 1(19) of former title 11]. An entity is insolvent if its debts are greater than its assets, at a fair valuation, exclusive of property exempted or fraudulently transferred. It is the traditional bankruptcy balance sheet test of insolvency. For a partnership, the definition is modified to account for the liability of a general partner for the partnership's debts. The difference in this definition from that in current law is in the exclusion of exempt property for all purposes in the definition of insolvent.

Paragraph (27) defines ''judicial lien.'' It is one of three kinds of liens defined in this section. A judicial lien is a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.

Paragraph (28) defines ''lien.'' The definition is new and is very broad. A lien is defined as a charge against or interest in property to secure payment of a debt or performance of an obligation. It includes inchoate liens. In general, the concept of lien is divided into three kinds of liens: judicial liens, security interests, and statutory liens. Those three categories are mutually exclusive and are exhaustive except for certain common law liens.

Paragraph (29) defines ''municipality.'' The definition is adapted from the terms used in the chapter IX (municipal bankruptcy) [chapter 9 of former title 11] amendment to the Bankruptcy Act enacted in 1976 (Pub. L. 94–260). That amendment spoke in terms of ''political subdivision or public agency or instrumentality of a State''. Bankruptcy Act Sec. 84 [section 404 of former title 11]. The term municipality is defined by those three terms for convenience. It does not include the District of Columbia or any territories of the United States.

''Person'' is defined in paragraph (30). The definition is a change in wording, but not in substance, from the definition in section 1(23) of the Bankruptcy Act [section 1(23) of former title 11]. The definition is also similar to the one contained in 1 U.S.C. sec. 1, but is repeated here for convenience and ease of reference. Person includes individual partnership, and corporation. The exclusion of governmental units is made explicit in order to avoid any confusion that may arise if, for example, a municipality is incorporated and thus is legally a corporation as well as governmental unit. The definition does not include an estate or a trust, which are included only in the definition of ''entity'' in proposed 11 U.S.C. 101(14).

''Petition'' is defined for convenience in paragraph (31). Petition is a petition under section 301, 302, 303, or 304 of the bankruptcy code—that is, a petition that commences a case under title 11.

Paragraph (32) defines purchaser as a transferee of a voluntary transfer, such as a sale or gift, and includes an immediate or mediate transferee of a purchaser.

The definition of ''railroad'' in paragraph (33) is derived from section 77 of the Bankruptcy Act [section 205 of former title 11]. A railroad is a common carrier by railroad engaged in the transportation of individuals or property, or an owner of trackage facilities leased by such a common carrier. The effect of the definition and the use of the term in section 109(d) is to eliminate the limitation now found in section 77 of the Bankruptcy Act that only railroads engaged in interstate commerce may proceed under the railroad reorganization provisions. The limitation may have been inserted because of a doubt that the commerce power could not reach intrastate railroads. Be that as it may, this bill is enacted under the bankruptcy power.

Paragraph (34) defines ''relative'' as an individual related by affinity or consanguinity within the third degree as determined by the common law, and includes individuals in a step or adoptive relationship. The definition is similar to current law, but adds the latter phrase. This definition should be applied as of the time when the transaction that it concerns took place. Thus, a former spouse is not a relative, but if, for example, for purposes of the preference section, proposed 11 U.S.C. 547(b)(4)(B), the transferee was a spouse of the debtor at the time of the transfer sought to be avoided, then the transferee would be relative and subject to the insider rules, even if the transferee was no longer married to the debtor at the time of the commencement of the case or at the time of the commencement of the preference recovery proceeding.

Paragraph (35) defines ''security.'' The definition is new and is modeled on the most recent draft of the American Law Institute's proposed securities code, with some exceptions. The interest of a limited partner in a limited partnership is included in order to make sure that everything that is defined as an equity security is also a ''security.'' The definition, as with the definition of ''entity'', ''insider'', and ''person'', is open-ended because the term is not susceptible of precise specification. Thus the courts will be able to use the characterization provided in this definition to treat with new kinds of documents on a flexible basis.

Paragraphs (36) and (37) defined ''security agreement'' and ''security interest.'' A security interest is one of the kinds of liens. It is a lien created by an agreement. Security agreement is defined as the agreement creating the security interest. Though these terms are similar to the same terms in the Uniform Commercial Code, article IX, they are broader. For example, the U.C.C. does not cover real property mortgages. Under this definition, such a mortgage is included, as are all other liens created by agreement, even though not covered by the U.C.C. All U.C.C. security interests and security agreements are, however, security interests and security agreements under this definition. Whether a consignment or a lease constitutes a security interest under the bankruptcy code will depend on whether it constitutes a security interest under applicable State or local law.

Paragraph (38) defines another kind of lien, ''statutory lien.'' The definition, derived from current law, states that a statutory lien is a lien arising solely by force of statute on specified circumstances or conditions and includes a lien of distress for rent (whether statutory, common law, or otherwise). The definition excludes judicial liens and security interests, whether or not they are provided for or are dependent on a statute, and whether or not they are made fully effective by statute. A statutory lien is only one that arises automatically, and is not based on an agreement to give a lien or on judicial action. Mechanics', materialmen's, and warehousemen's liens are examples. Tax liens are also included in the definition of statutory lien.

''Stockbroker'' is defined in paragraph (39) as a person engaged in the business of effecting transactions in securities for the account of others or with members of the general public from or for such person's own account, if the person has a customer, as defined. Thus, the definition, derived from a combination of the definitions of ''broker'' and ''dealer'' in the Securities Exchange Act of 1934 [15 U.S.C. 78c], encompasses both brokers and dealers. The definition is used in section 109 and in subchapter III of chapter 7, Stockholder Liquidation. The term does not encompass an employee who acts for a principal that ''effects'' transaction or deals with the public, because such an employee will not have a ''customer''.

Paragraph (40) defines ''transfer.'' It is derived and adapted, with stylistic changes, from section 1(30) of the Bankruptcy Act [section 1(30) of former title 11]. A transfer is a disposition of an interest in property. The definition of transfer is as broad as possible. Many of the potentially limiting words in current law are deleted, and the language is simplified. Under this definition, any transfer of an interest in property is a transfer, including a transfer of possession, custody, or control even if there is no transfer of title, because possession, custody, and control are interests in property. A deposit in a bank account or similar account is a transfer.

REFERENCES IN TEXT

Section 3 of the Federal Deposit Insurance Act, referred to in pars. (21B)(A), (33)(A), and (35)(A), is classified to section 1813 of Title 12, Banks and Banking.

Sections 101(7) and 206(r) of the Federal Credit Union Act, referred to in pars. (33)(B) and (34), are classified to sections 1752(7) and 1786(r), respectively, of Title 12.

Sections 414(d) and 457(b) of the Internal Revenue Code of 1986, referred to in par. (41)(C), are classified to sections 414(d) and 457(b), respectively, of Title 26, Internal Revenue Code.

Sections 3(a)(12) and 17A of the Securities Exchange Act of 1934, referred to in par. (48), are classified to sections 78c(a)(12) and 78q–1, respectively, of Title 15, Commerce and Trade.

The Securities Act of 1933, referred to in par. (49)(A)(xii), is act May 27, 1933, ch. 38, title I, 48 Stat. 74, as amended, which is classified generally to subchapter I (§ 77a et seq.) of chapter 2A of Title 15. Section 3(b) of the Act is classified to section 77c(b) of Title 15. For complete classification of this Act to the Code, see section 77a of Title 15 and Tables.

AMENDMENTS

1994—Par. (3). Pub. L. 103–394, § 501(a)(1), redesignated par. (3) as (21B) and inserted it after par. (21A).

Par. (6). Pub. L. 103–394, § 501(b)(1)(A), substituted ''section 761'' for ''section 761(9)'' after ''customer, as defined in''.

Par. (12A). Pub. L. 103–394, § 304(a), added par. (12A).

Par. (21B). Pub. L. 103–394, § 501(a)(1), redesignated par. (3) as (21B).

Par. (22). Pub. L. 103–394, § 501(b)(1)(B), substituted ''section 741'' for ''section 741(7)''.

Par. (33)(A). Pub. L. 103–394, § 501(d)(1)(A)(i), struck out ''(12 U.S.C. 1813(u))'' after ''section 3(u) of the Federal Deposit Insurance Act''.

Par. (33)(B). Pub. L. 103–394, § 501(d)(1)(A)(ii), struck out ''(12 U.S.C. 1786(r))'' after ''Act''.

Par. (34). Pub. L. 103–394, § 501(d)(1)(B), struck out ''(12 U.S.C. 1752(7))'' after ''Act''.

Par. (35). Pub. L. 103–394, § 501(b)(1)(C), (d)(1)(C), struck out ''(12 U.S.C. 1813(c)(2))'' after ''Act'' in subpar. (A) and substituted ''paragraphs (21B)'' for ''paragraphs (3)'' in subpar. (B).

Par. (35A). Pub. L. 103–394, § 501(a)(4), redesignated par. (56) defining ''intellectual property'' as (35A) and inserted it after par. (35).

Par. (39). Pub. L. 103–394, § 501(a)(5), redesignated par. (57) defining ''mask work'' as (39) and inserted it after par. (38). Former par. (39) redesignated (51A).

Par. (41). Pub. L. 103–394, § 106, amended par. (41) generally. Prior to amendment, par. (41) read as follows: '' 'person' includes individual, partnership, and corporation, but does not include governmental unit, *Provided, however*, That any governmental unit that acquires an asset from a person as a result of operation of a loan

guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title.''

Par. (42A). Pub. L. 103–394, §208(a)(1), added par. (42A).

Par. (48). Pub. L. 103–394, §501(d)(1)(D), struck out ''(15 U.S.C. 78q–1)'' after ''Act of 1934'' and ''(15 U.S.C. 78c(12))'' after ''such Act''.

Par. (49)(A)(xii). Pub. L. 103–394, §501(d)(1)(E)(i), struck out ''(15 U.S.C. 77a et seq.)'' after ''Act of 1933'' and ''(15 U.S.C. 77c(b))'' after ''such Act''.

Par. (49)(B). Pub. L. 103–394, §501(b)(1)(D), (d)(1)(E)(ii), substituted ''section 761'' for ''section 761(13)'' in cl. (ii) and struck out ''(15 U.S.C. 77c(b))'' after ''Act of 1933'' in cl. (vi).

Par. (51A). Pub. L. 103–394, §501(a)(2), redesignated par. (39) as (51A) and inserted it after par. (51).

Par. (51B). Pub. L. 103–394, §218(a), added par. (51B).

Par. (51C). Pub. L. 103–394, §217(a), added par. (51C).

Par. (53A). Pub. L. 103–394, §501(a)(3), (b)(1)(E), redesignated par. (54) defining ''stockbroker'' as (53A) and substituted ''section 741'' for ''section 741(2)'' in subpar. (A).

Par. (53B). Pub. L. 103–394, §501(a)(3), redesignated par. (55) defining ''swap agreement'' as (53B).

Par. (53C). Pub. L. 103–394, §501(a)(3), redesignated par. (56) defining ''swap participant'' as (53C).

Par. (53D). Pub. L. 103–394, §501(a)(3), (d)(1)(F), redesignated par. (57) defining ''timeshare plan'' as (53D) and substituted semicolon for period at end.

Par. (54). Pub. L. 103–394, §501(a)(3), redesignated par. (54) defining ''stockbroker'' as (53A).

Par. (55). Pub. L. 103–394, §501(a)(3), redesignated par. (55) defining ''swap agreement'' as (53B).

Pub. L. 103–394, §215, inserted ''spot foreign exchange agreement,'' after ''forward foreign exchange agreement,''.

Par. (56). Pub. L. 103–394, §501(a)(3), redesignated par. (56) defining ''swap participant'' as (53C).

Pub. L. 103–394, §501(a)(4), redesignated par. (56) defining ''intellectual property'' as (35A) and inserted it after par. (35).

Par. (56A). Pub. L. 103–394, §208(a)(2), added par. (56A) and inserted it after par. defining ''swap participant''.

Par. (57). Pub. L. 103–394, §501(a)(3), redesignated par. (57) defining ''timeshare plan'' as (53D).

Pub. L. 103–394, §501(a)(5), redesignated par. (57) defining ''mask work'' as (39) and inserted it after par. (38).

1992—Par. (21A). Pub. L. 102–486 added par. (21A).

1990—Par. (3). Pub. L. 101–647, §2522(e)(4), added par. (3). Former par. (3) redesignated (4).

Pars. (4) to (23). Pub. L. 101–647, §2522(e)(3), redesignated pars. (3) to (22) as (4) to (23), respectively. Former par. (23) redesignated (24).

Par. (24). Pub. L. 101–647, §2522(e)(3), redesignated par. (23) as (24). Former par. (24) redesignated (25).

Pub. L. 101–311, §201(1), inserted ''as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade,'' after ''transfer of commodity,'' and '', including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon'' after ''entered into''.

Par. (25). Pub. L. 101–647, §2522(e)(3), redesignated par. (24) as (25). Former par. (25) redesignated (26).

Pub. L. 101–311, §201(2), substituted ''a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade'' for ''commodities''.

Pars. (26) to (32). Pub. L. 101–647, §2522(e)(3), redesignated pars. (25) to (31) as (26) to (32), respectively. Former par. (32) redesignated (36).

Par. (33). Pub. L. 101–647, §2522(e)(2), added par. (33). Former par. (33) redesignated (37).

Par. (34). Pub. L. 101–647, §2522(e)(2), added par. (34). Former par. (34) redesignated (38).

Pub. L. 101–311, §201(4), added par. (34). Former par. (34) redesignated (36).

Par. (35). Pub. L. 101–647, §2522(e)(2), added par. (35). Former par. (35) redesignated (39).

Pub. L. 101–311, §201(4), added par. (35). Former par. (35) redesignated (37).

Par. (36). Pub. L. 101–647, §2522(e)(1), redesignated par. (32) as (36). Former par. (36) redesignated (40).

Pub. L. 101–311, §201(3), redesignated par. (34) as (36). Former par. (36) redesignated (38).

Pars. (37) to (48). Pub. L. 101–647, §2522(e)(1), redesignated pars. (33) to (44) as (37) to (48), respectively. Former pars. (45) to (48) redesignated (49) to (52), respectively.

Pub. L. 101–311, §201(3), redesignated pars. (35) to (46) as (37) to (48), respectively. Former pars. (47) and (48) redesignated (49) and (50), respectively.

Pars. (49), (50). Pub. L. 101–647, §2522(e)(1), redesignated pars. (45) and (46) as (49) and (50), respectively. Former pars. (49) and (50) redesignated (53) and (54) defining ''stockbroker'', respectively.

Pub. L. 101–311, §201(3), redesignated pars. (47) and (48) as (49) and (50), respectively. Former pars. (49) and (50) redesignated (51) and (52), respectively.

Pub. L. 101–311, §101(2), added pars. (49) and (50). Former pars. (49) and (50) redesignated (51) and (52), respectively.

Par. (51). Pub. L. 101–647, §2522(e)(1), redesignated par. (47) as (51). Former par. (51) redesignated (55) defining ''swap agreement''.

Pub. L. 101–311, §201(3), redesignated par. (49) as (51). Former par. (51) redesignated (53).

Pub. L. 101–311, §101(1), redesignated par. (49) as (51). Former par. (51) redesignated (53).

Par. (52). Pub. L. 101–647, §2522(e)(1), redesignated par. (48) as (52). Former par. (52) redesignated (56) defining ''swap participant''.

Pub. L. 101–311, §201(3), redesignated par. (50) as (52). Former par. (52) redesignated (54) defining ''transfer''.

Pub. L. 101–311, §101(1), redesignated par. (50) as (52). Former par. (52) redesignated (54).

Par. (53). Pub. L. 101–647, §2522(e)(1), redesignated par. (49) as (53). Former par. (53) redesignated (57) defining ''timeshare plan''.

Pub. L. 101–311, §201(3), redesignated par. (51) as (53). Former par. (53) redesignated (55) defining ''United States''.

Pub. L. 101–311, §101(1), redesignated par. (51) as (53). Former par. (53) redesignated (55).

Par. (54). Pub. L. 101–647, §2522(e)(1), redesignated par. (50) as (54) defining ''stockbroker''.

Pub. L. 101–311, §201(3), redesignated par. (52) as (54) defining ''transfer''. Former par. (54) redesignated (56) defining ''intellectual property''.

Pub. L. 101–311, §101(1), redesignated par. (52) as (54).

Par. (55). Pub. L. 101–647, §2522(e)(1), redesignated par. (51) as (55) defining ''swap agreement''.

Pub. L. 101–311, §201(3), redesignated par. (53) as (55) defining ''United States''. Former par. (55) redesignated (57) defining ''mask work''.

Pub. L. 101–311, §101(1), redesignated par. (53) as (55).

Par. (56). Pub. L. 101–647, §2522(e)(1), redesignated par. (52) as (56) defining ''swap participant''.

Pub. L. 101–311, §201(3), redesignated par. (54) as (56) defining ''intellectual property''.

Par. (57). Pub. L. 101–647, §2522(e)(1), redesignated par. (53) as (57) defining ''timeshare plan''.

Pub. L. 101–311, §201(3), redesignated par. (55) as (57) defining ''mask work''.

1988—Par. (31). Pub. L. 100–597 inserted ''and a municipality'' after ''partnership'' in subpar. (A) and added subpar. (C).

Pars. (52), (53). Pub. L. 100–506 added pars. (52) and (53).

1986—Par. (14). Pub. L. 99–554, §201(1), substituted ''governmental unit, and United States trustee'' for ''and governmental unit''.

Pars. (17), (18). Pub. L. 99–554, §251(2), (3), added pars. (17) and (18) and redesignated former pars. (17) and (18) as (19) and (20), respectively.

Par. (19). Pub. L. 99–554, § 251(1), (2), redesignated former par. (17) as (19) and inserted ''(except when such term appears in the term 'family farmer')''. Former par. (19) redesignated (21).

Pars. (20) to (25). Pub. L. 99–554, § 251(2), redesignated former pars. (18) to (23) as (20) to (25), respectively. Former pars. (24) and (25) redesignated (26) and (27), respectively.

Par. (26). Pub. L. 99–554, § 201(2), inserted ''(but not a United States trustee while serving as a trustee in a case under this title)''.

Pub. L. 99–554, § 251(2), redesignated former par. (24) as (26). Former par. (26) redesignated (28).

Pars. (27) to (42). Pub. L. 99–554, § 251(2), redesignated former pars. (25) to (40) as (27) to (42), respectively. Former pars. (41) and (42) redesignated (43) and (44), respectively.

Par. (43). Pub. L. 99–554, § 251(2), redesignated former par. (41) as (43). Former par. (43) redesignated (45).

Par. (43)(A)(xv). Pub. L. 99–554, § 283(a)(1), substituted ''security'' for ''secuity''.

Pars. (44) to (50). Pub. L. 99–554, § 251(2), redesignated former pars. (42) to (48) as (44) to (50), respectively. Former par. (49) redesignated (51).

Par. (51). Pub. L. 99–554, § 283(a)(2), substituted a period for the semicolon at the end thereof.

Pub. L. 99–554, § 251(2), redesignated former par. (49) as (51).

1984—Par. (2)(D). Pub. L. 98–353, § 421(a), struck out ''or all'' after ''business''.

Par. (8)(B). Pub. L. 98–353, § 421(b), substituted a semicolon for the colon at end of subpar. (B).

Par. (9)(B). Pub. L. 98–353, § 421(c), inserted reference to section 348(d).

Par. (14). Pub. L. 98–353, § 421(d), inserted ''and'' after ''trust,''.

Pars. (19) to (21). Pub. L. 98–353, § 421(j)(3), (4), added par. (19) and redesignated former pars. (19), (20), and (21) as (20), (21), and (24), respectively.

Pars. (22), (23). Pub. L. 98–353, § 421(j)(2), (5), added pars. (22) and (23) and redesignated former pars. (22) and (23) as (25) and (26), respectively.

Pars. (24) to (26). Pub. L. 98–353, § 421(j)(2), redesignated former pars. (21) to (23) as (24) to (26), respectively. Former pars. (24) to (26) redesignated (27) to (29), respectively.

Par. (27). Pub. L. 98–353, § 421(e), (j)(2), redesignated former par. (24) as (27) and substituted ''stockbroker'' for ''stock broker''. Former par. (27) redesignated (30).

Par. (28). Pub. L. 98–353, § 421(j)(2), redesignated former par. (25) as (28). Former par. (28) redesignated (31).

Par. (29). Pub. L. 98–353, § 421(f), (j)(2), redesignated former par. (26) as (29) and, in subpar. (B)(ii), substituted ''nonpartnership'' and ''(A)'' for ''separate'' and ''(A)(ii)'', respectively, wherever appearing. Former par. (29) redesignated (32).

Pars. (30) to (32). Pub. L. 98–353, § 421(j)(2), redesignated former pars. (27) to (29) as (30) to (32), respectively. Former pars. (30) to (32) redesignated (33) to (35), respectively.

Par. (33). Pub. L. 98–353, § 421(g), (j)(2), redesignated former par. (30) as (33) and amended definition of ''person'' generally, thereby inserting proviso relating to consideration of certain governmental units as persons for purposes of section 1102 of this title. Former par. (33) redesignated (36).

Par. (34). Pub. L. 98–353, § 421(j)(2), redesignated former par. (31) as (34). Former par. (34) redesignated (37).

Pars. (35), (36). Pub. L. 98–353, § 421(j)(2), redesignated former pars. (32) and (33) as (35) and (36), respectively. Former pars. (35) and (36), as added by Pub. L. 98–353, § 391(2), redesignated (38) and (39), respectively.

Pub. L. 98–353, § 391, added pars. (35) and (36), and redesignated former pars. (35) and (36) as (37) and (38) which were again redesignated as (40) and (41), respectively.

Par. (37). Pub. L. 98–353, § 421(j)(2), redesignated former par. (34) as (37). Former par. (37) redesignated successively as (39) and again as (42).

Par. (38). Pub. L. 98–353, §§ 391(2), 421(j)(2), added par. (35) and redesignated such par. (35) as (38). Former par. (38) redesignated successively as (40) and again as (43).

Par. (39). Pub. L. 98–353, §§ 391(2), 421(j)(2), added par. (36) and redesignated such par. (36) as (39). Former par. (39) redesignated successively as (41) and again as (45).

Par. (40). Pub. L. 98–353, §§ 391(1), 421(j)(2), redesignated successively former par. (35) as (37) and again as (40). Former par. (40) redesignated successively as (42) and again as (46).

Par. (41). Pub. L. 98–353, §§ 391(1), 401(1), 421(h), (j)(2), redesignated successively former par. (36) as (38) and again as (41), and, in subpar. (B)(vi), substituted ''certificate of a kind specified in subparagraph (A)(xii)'' for ''certificate specified in clause (xii) of subparagraph (A)'' and substituted ''required to be the subject of a registration statement'' for ''the subject of such registration statement''. Former par. (41) redesignated successively as (43), again as (44), and again as (48).

Par. (42). Pub. L. 98–353, §§ 391(1), 421(j)(2), redesignated successively former par. (37) as (39) and again as (42).

Par. (43). Pub. L. 98–353, §§ 391(1), 421(j)(2), redesignated successively former par. (38) as (40) and again as (43).

Pub. L. 98–353, § 401, redesignated former par. (43), originally par. (41), as (44), and added another par. (43) which was redesignated (47).

Par. (44). Pub. L. 98–353, § 421(j)(6), added par. (44). Former par. (44) originally was par. (41) and was redesignated successively as (43), again as (44), and again as (48).

Pars. (45), (46). Pub. L. 98–353, §§ 391(1), 421(j)(1), redesignated successively former pars. (39) and (40) as (41) and (42), and again as (45) and (46), respectively.

Par. (47). Pub. L. 98–353, §§ 401(2), 421(j)(1), added par. (43) and redesignated such par. (43) as (47).

Par. (48). Pub. L. 98–353, §§ 391(1), 401(1), 421(i), (j)(1), redesignated successively former par. (41) as (43), again as (44), and again as (48), and substituted ''and foreclosure of the debtor's equity of redemption; and'' for the period at the end.

Par. (49). Pub. L. 98–353, § 421(j)(7), added par. (49).

1982—Par. (35). Pub. L. 97–222, § 1(a)(2), added par. (35). Former par. (35) redesignated (36).

Par. (36). Pub. L. 97–222, § 1(a)(1), (b), (c), redesignated par. (35) as (36) and substituted ''is required to be the subject of a registration statement'' for ''is the subject of a registration statement'' in subpar. (A)(xii) and substituted ''forward contract'' for ''forward commodity contract'' in subpar. (B)(iii). Former par. (36) redesignated (37).

Pars. (37) to (39). Pub. L. 97–222, § 1(a)(1), redesignated pars. (36) to (38) as (37) to (39), respectively. Former par. (39) redesignated (40).

Pars. (40), (41). Pub. L. 97–222, § 1(a)(1), (d), redesignated former par. (39) as (40) and restructured its provisions by dividing the former introductory provisions into subpars. (A) and (B) and by redesignating former subpars. (A) and (B) as cls. (i) and (ii), respectively, of subpar. (B). Former par. (40) redesignated (41).

EFFECTIVE DATE OF 1994 AMENDMENT

Section 702 of Pub. L. 103–394 provided that:

''(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act [see Tables for classification] shall take effect on the date of the enactment of this Act [Oct. 22, 1994].

''(b) APPLICATION OF AMENDMENTS.—(1) Except as provided in paragraph (2), the amendments made by this Act shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.

''(2)(A) Paragraph (1) shall not apply with respect to the amendment made by section 111 [amending section 524 of this title].

''(B) The amendments made by sections 113 and 117 [amending sections 106 and 330 of this title] shall apply with respect to cases commenced under title 11 of the United States Code before, on, and after the date of the enactment of this Act.

''(C) Section 1110 of title 11, United States Code, as amended by section 201 of this Act, shall apply with respect to any lease, as defined in such section 1110(c) as so amended, entered into in connection with a settlement of any proceeding in any case pending under title 11 of the United States Code on the date of the enactment of this Act.

''(D) The amendments made by section 305 [amending sections 1123, 1222, and 1322 of this title] shall apply only to agreements entered into after the date of enactment of this Act.''

EFFECTIVE DATE OF 1992 AMENDMENT

Section 3017(c) of Pub. L. 102–486 provided that:

''(1) Except as provided in paragraph (2), the amendments made by this section [amending this section and section 541 of this title] shall take effect on the date of the enactment of this Act [Oct. 24, 1992].

''(2) The amendments made by this section shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.''

EFFECTIVE DATE OF 1988 AMENDMENTS

Section 12 of Pub. L. 100–597 provided that:

''(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act [enacting sections 927 to 929 of this title, amending this section and sections 109, 901, 902, 922, 926, and 943 of this title, and renumbering section 927 of this title as 930] shall take effect on the date of the enactment of this Act [Nov. 3, 1988].

''(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act [Nov. 3, 1988].''

Section 2 of Pub. L. 100–506 provided that:

''(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act [amending this section and section 365 of this title] shall take effect on the date of the enactment of this Act [Oct. 18, 1988].

''(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act shall not apply with respect to any case commenced under title 11 of the United States Code before the date of the enactment of this Act [Oct. 18, 1988].''

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 201 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 251 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Section 552, formerly §553, of title III (§§301–553) of Pub. L. 98–353, as renumbered by Pub. L. 98–531, §1(2), Oct. 19, 1984, 98 Stat. 2704, provided that:

''(a) Except as otherwise provided in this section the amendments made by this title [see Tables for classification] shall become effective to cases filed 90 days after the date of enactment of this Act [July 10, 1984].

''(b) The amendments made by section 426(b) [amending section 303 of this title] shall become effective upon the date of enactment of this Act.

''(c) The amendments made by subtitle J [enacting section 1113 of this title], shall become effective as provided in section 541(c) [set out as an Effective Date note under section 1113 of this title].''

SHORT TITLE OF 1998 AMENDMENT

Pub. L. 105–183, §1, June 19, 1998, 112 Stat. 517, provided that: ''This Act [amending sections 544, 546, 548, 707, and 1325 of this title and enacting provisions set out as notes under section 544 of this title] may be cited as the 'Religious Liberty and Charitable Donation Protection Act of 1998'.''

SHORT TITLE OF 1994 AMENDMENT

Section 1(a) of Pub. L. 103–394 provided that: ''This Act [see Tables for classification] may be cited as the 'Bankruptcy Reform Act of 1994'.''

SHORT TITLE OF 1990 AMENDMENTS

Pub. L. 101–581, §1, Nov. 15, 1990, 104 Stat. 2865, and section 3101 of title XXXI of Pub. L. 101–647, provided respectively that such Act and such title [amending sections 523 and 1328 of this title and enacting provisions set out as a note under section 523 of this title] may be cited as the ''Criminal Victims Protection Act of 1990''.

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–334, §1, June 16, 1988, 102 Stat. 610, provided that: ''This Act [enacting section 1114 of this title, amending section 1129 of this title, enacting provisions set out as a note under section 1114 of this title, and amending and repealing provisions set out as notes under section 1106 of this title] may be cited as the 'Retiree Benefits Bankruptcy Protection Act of 1988'.''

SHORT TITLE OF 1984 AMENDMENT

Section 361 of subtitle C (§§361–363) of title III of Pub. L. 98–353 provided that: ''This subtitle [amending sections 362, 365, and 541 of this title] may be cited as the 'Leasehold Management Bankruptcy Amendments Act of 1983'.''

SEPARABILITY

Section 701 of Pub. L. 103–394 provided that: ''If any provision of this Act [see Tables for classification] or amendment made by this Act or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remaining provisions of and amendments made by this Act and the application of such other provisions and amendments to any person or circumstance shall not be affected thereby.''

Section 551 of title III (§§301–553) of Pub. L. 98–353 provided that: ''If any provision of this title or any amendment made by this title [see Tables for classification], or the application thereof to any person or circumstance is held invalid, the provisions of every other part, and their application shall not be affected thereby.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 362, 546 of this title; title 7 section 6; title 12 sections 1787, 1821; title 15 sections 78eee, 78fff–1; title 28 section 1930; title 33 section 2716; title 42 section 656.

§ 102. Rules of construction

In this title—

(1) ''after notice and a hearing'', or a similar phrase—

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

(B) authorizes an act without an actual hearing if such notice is given properly and if—

(i) such a hearing is not requested timely by a party in interest; or

(ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act;

(2) ''claim against the debtor'' includes claim against property of the debtor;

(3) ''includes'' and ''including'' are not limiting;

(4) ''may not'' is prohibitive, and not permissive;

(5) ''or'' is not exclusive;

(6) ''order for relief'' means entry of an order for relief;

(7) the singular includes the plural;

(8) a definition, contained in a section of this title that refers to another section of this title, does not, for the purpose of such reference, affect the meaning of a term used in such other section; and

(9) ''United States trustee'' includes a designee of the United States trustee.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2554; Pub. L. 98–353, title III, § 422, July 10, 1984, 98 Stat. 369; Pub. L. 99–554, title II, § 202, Oct. 27, 1986, 100 Stat. 3097.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 102 specifies various rules of construction but is not exclusive. Other rules of construction that are not set out in title 11 are nevertheless intended to be followed in construing the bankruptcy code. For example, the phrase ''on request of a party in interest'' or a similar phrase, is used in connection with an action that the court may take in various sections of the Code. The phrase is intended to restrict the court from acting sua sponte. Rules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question, but the court will not be permitted to act on its own.

Although ''property'' is not construed in this section, it is used consistently throughout the code in its broadest sense, including cash, all interests in property, such as liens, and every kind of consideration including promises to act or forbear to act as in section 548(d).

Section 102(1) expands on a rule of construction contained in H.R. 8200 as passed by the House and in the Senate amendment. The phrase ''after notice and a hearing'', or a similar phrase, is intended to be construed according to the particular proceeding to mean after such notice as is appropriate in the particular circumstances, and such opportunity, if any, for a hearing as is appropriate in the particular circumstances. If a provision of title 11 authorizes an act to be taken ''after notice and a hearing'' this means that if appropriate notice is given and no party to whom such notice is sent timely requests a hearing, then the act sought to be taken may be taken without an actual hearing.

In very limited emergency circumstances, there will be insufficient time for a hearing to be commenced before an action must be taken. The action sought to be taken may be taken if authorized by the court at an ex parte hearing of which a record is made in open court. A full hearing after the fact will be available in such an instance.

In some circumstances, such as under section 1128, the bill requires a hearing and the court may act only after a hearing is held. In those circumstances the judge will receive evidence before ruling. In other circumstances, the court may take action ''after notice and a hearing,'' if no party in interest requests a hearing. In that event a court order authorizing the action to be taken is not necessary as the ultimate action taken by the court implies such an authorization.

Section 102(8) is new. It contains a rule of construction indicating that a definition contained in a section in title 11 that refers to another section of title 11 does not, for the purposes of such reference, take the meaning of a term used in the other section. For example, section 522(a)(2) defines ''value'' for the purposes of section 522. Section 548(d)(2) defines ''value'' for purposes of section 548. When section 548 is incorporated by reference in section 522, this rule of construction makes clear that the definition of ''value'' in section 548 governs its meaning in section 522 notwithstanding a different definition of ''value'' in section 522(a)(2).

SENATE REPORT NO. 95–989

Section 102 provides seven rules of construction. Some are derived from current law; others are derived from 1 U.S.C. 1; a few are new. They apply generally throughout proposed title 11. These are terms that are not appropriate for definition, but that require an explanation.

Paragraph (1) defines the concept of ''after notice and a hearing.'' The concept is central to the bill and to the separation of the administrative and judicial functions of bankruptcy judges. The phrase means after such notice as is appropriate in the particular circumstances (to be prescribed by either the Rules of Bankruptcy Procedure or by the court in individual circumstances that the Rules do not cover. In many cases, the Rules will provide for combined notice of several proceedings), and such opportunity for a hearing as is appropriate in the particular circumstances. Thus, a hearing will not be necessary in every instance. If there is no objection to the proposed action, the action may go ahead without court action. This is a significant change from present law, which requires the affirmative approval of the bankruptcy judge for almost every action. The change will permit the bankruptcy judge to stay removed from the administration of the bankruptcy or reorganization case, and to become involved only when there is a dispute about a proposed action, that is, only when there is an objection. The phrase ''such opportunity for a hearing as is appropriate in the particular circumstances'' is designed to permit the Rules and the courts to expedite or dispense with hearings when speed is essential. The language ''or similar phrase'' is intended to cover the few instances in the bill where ''after notice and a hearing'' is interrupted by another phrase, such as ''after notice to the debtor and a hearing.''

Paragraph (2) specifies that ''claim against the debtor'' includes claim against property of the debtor. This paragraph is intended to cover nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a claim against the debtor personally, for the purposes of the bankruptcy code.

Paragraph (3) is a codification of *American Surety Co. v. Marotta*, 287 U.S. 513 (1933). It specifies that ''includes'' and ''including'' are not limiting.

Paragraph (4) specifies that ''may not'' is prohibitive and not permissive (such as in ''might not'').

Paragraph (5) specifies that ''or'' is not exclusive. Thus, if a party ''may do (a) or (b)'', then the party may do either or both. The party is not limited to a mutually exclusive choice between the two alternatives.

Paragraph (6) makes clear that ''order for relief'' means entry of an order for relief. If the court orally orders relief, but the order is not entered until a later time, then any time measurements in the bill are from entry, not from the oral order. In a voluntary case, the entry of the order for relief is the filing of the petition commencing the voluntary case.

Paragraph (7) specifies that the singular includes the plural. The plural, however, generally does not include the singular. The bill uses only the singular, even when the item in question most often is found in plural quantities, in order to avoid the confusion possible if both rules of construction applied. When an item is specified in the plural, the plural is intended.

AMENDMENTS

1986—Par. (9). Pub. L. 99–554 added par. (9).

1984—Par. (8). Pub. L. 98–353 substituted ''contained'' for ''continued''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 103. Applicability of chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title.

(b) Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.

(c) Subchapter III of chapter 7 of this title applies only in a case under such chapter concerning a stockbroker.

(d) Subchapter IV of chapter 7 of this title applies only in a case under such chapter concerning a commodity broker.

(e) Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.

(f) Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter.

(g) Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad.

(h) Chapter 13 of this title applies only in a case under such chapter.

(i) Chapter 12 of this title applies only in a case under such chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2555; Pub. L. 97–222, § 2, July 27, 1982, 96 Stat. 235; Pub. L. 98–353, title III, § 423, July 10, 1984, 98 Stat. 369; Pub. L. 99–554, title II, § 252, Oct. 27, 1986, 100 Stat. 3104.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 103 prescribes which chapters of the proposed bankruptcy code apply in various cases. All cases, other than cases ancillary to foreign proceedings, are filed under chapter 7, 9, 11, or 13, the operative chapters of the proposed bankruptcy code. The general provisions that apply no matter which chapter a case is filed under are found in chapters 1, 3, and 5. Subsection (a) makes this explicit, with an exception for chapter 9. The other provisions, which are self-explanatory, provide the special rules for Stockbroker Liquidations, Commodity Broker Liquidations, Municipal Debt Adjustments, and Railroad Reorganizations.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–554, § 252(1), inserted reference to chapter 12.

Subsec. (i). Pub. L. 99–554, § 252(2), added subsec. (i).

1984—Subsec. (c). Pub. L. 98–353 substituted ''stockbroker'' for ''stockholder''.

1982—Subsec. (d). Pub. L. 97–222 struck out ''except with respect to section 746(c) which applies to margin payments made by any debtor to a commodity broker or forward contract merchant'' after ''concerning a commodity broker''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 901, 902, 943 of this title.

§ 104. Adjustment of dollar amounts

(a) The Judicial Conference of the United States shall transmit to the Congress and to the President before May 1, 1985, and before May 1 of every sixth year after May 1, 1985, a recommendation for the uniform percentage adjustment of each dollar amount in this title and in section 1930 of title 28.

(b)(1) On April 1, 1998, and at each 3-year interval ending on April 1 thereafter, each dollar amount in effect under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) immediately before such April 1 shall be adjusted—

(A) to reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor, for the most recent 3-year period ending immediately before January 1 preceding such April 1, and

(B) to round to the nearest $25 the dollar amount that represents such change.

(2) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter, the Judicial Conference of the United States shall publish in the Federal Register the dollar amounts that will become effective on such April 1 under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) of this title.

(3) Adjustments made in accordance with paragraph (1) shall not apply with respect to cases commenced before the date of such adjustments.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2555; Pub. L. 103–394, title I, § 108(e), Oct. 22, 1994, 108 Stat. 4112.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 104 represents a compromise between the House bill and the Senate amendment with respect to the adjustment of dollar amounts in title 11. The House amendment authorizes the Judicial Conference of the United States to transmit a recommendation for the uniform percentage of adjustment for each dollar amount in title 11 and in 28 U.S.C. 1930 to the Congress and to the President before May 1, 1985, and before May 1 of every sixth year thereafter. The requirement in the House bill that each such recommendation be based only on any change in the cost-of-living increase during the period immediately preceding the recommendation is deleted.

SENATE REPORT NO. 95–989

This section requires that the Director of the Administrative Office of the U. S. Courts report to Congress and the President before Oct. 1, 1985, and before May 1 every 6 years thereafter a recommendation for adjustment in dollar amounts found in this title. The Committee feels that regular adjustment of the dollar

amounts by the Director will conserve congressional time and yet assure that the relative dollar amounts used in the bill are maintained. Changes in the cost of living should be a significant, but not necessarily the only, factor considered by the Director. The fact that there has been an increase in the cost of living does not necessarily mean that an adjustment of dollar amounts would be needed or warranted.

HOUSE REPORT NO. 95–595

This section requires the Judicial Conference to report to the Congress every four years after the effective date of the bankruptcy code any changes that have occurred in the cost of living during the preceding four years, and the appropriate adjustments to the dollar amounts in the bill. The dollar amounts are found primarily in the exemption section (11 U.S.C. 522), the wage priority (11 U.S.C. 507), and the eligibility for chapter 13 (11 U.S.C. 109). This section requires that the Conference recommend uniform percentage changes in these amounts based solely on cost of living changes. The dollar amounts in the bill would not change on that recommendation, absent Congressional veto. Instead, Congress is required to take affirmative action, by passing a law amending the appropriate section, if it wishes to accomplish the change.

If the Judicial Conference has policy recommendations concerning the appropriate dollar amounts in the bankruptcy code based other than on cost of living considerations there are adequate channels through which it may communicate its views. This section is solely for the housekeeping function of maintaining the dollar amounts in the code at fairly constant real dollar levels.

AMENDMENTS

1994—Pub. L. 103–394 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

ADJUSTMENT OF DOLLAR AMOUNTS

By notice dated Feb. 3, 1998, 63 F.R. 7179, the Judicial Conference of the United States adjusted the dollar amounts in provisions specified in subsec. (b) of this section, effective Apr. 1, 1998, as follows:

11 U.S.C.	Dollar amount to be adjusted	New (adjusted) dollar amount
Section 109(e)—allowable debt limits for filing bankruptcy under Chapter 13.	$250,000 (each time it appears).	$269,250 (each time it appears).
	750,000 (each time it appears).	807,750 (each time it appears).
Section 303(b)—minimum aggregate claims needed for the commencement of an involuntary bankruptcy:		
(1)—in paragraph (1)	10,000	10,775.
(2)—in paragraph (2)	10,000	10,775.
Section 507(a)—priority claims:		
(1)—in paragraph (3)	4,000	4,300.
(2)—in paragraph (4)(B)(i)	4,000	4,300.
(3)—in paragraph (5)	4,000	4,300.
(4)—in paragraph (6)	1,800	1,950.
Section 522(d)—value of property exemptions allowed to the debtor:		
(1)—in paragraph (1)	15,000	16,150.
(2)—in paragraph (2)	2,400	2,575.
(3)—in paragraph (3)	400	425
	8,000	8,625.
(4)—in paragraph (4)	1,000	1,075.
(5)—in paragraph (5)	800	850
	7,500	8,075.
(6)—in paragraph (6)	1,500	1,625.
(7)—in paragraph (8)	8,000	8,625.
(8)—in paragraph (11)(D)	15,000	16,150.
Section 523(a)(2)(C)—''luxury goods and services'' or cash advances obtained by the consumer debtor within 60 days before the filing of a bankruptcy petition, which are considered nondischargeable.	1,000 (each time it appears).	1,075 (each time it appears).

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest, may—

(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2555; Pub. L. 98–353, title I, §118, July 10, 1984, 98 Stat. 344; Pub. L. 99–554, title II, §203, Oct. 27, 1986, 100 Stat. 3097; Pub. L. 103–394, title I, §104(a), Oct. 22, 1994, 108 Stat. 4108.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 105 is derived from section 2a (15) of present law [section 11(a)(15) of former title 11], with two changes. First, the limitation on the power of a bankruptcy judge (the power to enjoin a court being reserved to the district judge) is removed as inconsistent with the increased powers and jurisdiction of the new bankruptcy court. Second, the bankruptcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances. The bankruptcy code has ample provision for the appointment of a trustee when needed. Appointment of a receiver would simply circumvent the established procedures.

This section is also an authorization, as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court. As such, *Toucey v. New York Life Insurance Company*, 314 U.S. 118 (1941), is overruled.

REFERENCES IN TEXT

The Federal Rules of Bankruptcy Procedure, referred to in subsec. (d)(2), are set out in the Appendix to this title.

AMENDMENTS

1994—Subsec. (d). Pub. L. 103–394 added subsec. (d).

1986—Subsec. (a). Pub. L. 99–554 inserted at end ''No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.''

1984—Subsecs. (a), (b). Pub. L. 98–353, §118(1), struck out ''bankruptcy'' before ''court''.

Subsec. (c). Pub. L. 98–353, §118(2), added subsec. (c).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective July 10, 1984, see section 122(a) of Pub. L. 98–353, set out as an Effective Date note under section 151 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2555; Pub. L. 103–394, title I, §113, Oct. 22, 1994, 108 Stat. 4117.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term ''creditor,'' ''entity,'' or ''governmental unit'' in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies *In re Gwilliam*, 519 F.2d 407 (9th Cir., 1975), and *In re Dolard*, 519 F.2d 282 (9th Cir., 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106(a) and (b), subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.

SENATE REPORT NO. 95–989

Section 106 provides for a limited waiver of sovereign immunity in bankruptcy cases. Though Congress has the power to waive sovereign immunity for the Federal government completely in bankruptcy cases, the policy followed here is designed to achieve approximately the same result that would prevail outside of bankruptcy. Congress does not, however, have the power to waive sovereign immunity completely with respect to claims of a bankrupt estate against a State, though it may exercise its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy.

There is, however, a limited change from the result that would prevail in the absence of bankruptcy; the change is two-fold and is within Congress' power vis-a-vis both the Federal Government and the States. First, the filing of a proof of claim against the estate by a governmental unit is a waiver by that governmental unit of sovereign immunity with respect to compulsory counterclaims, as defined in the Federal Rules of Civil Procedure [title 28, appendix], that is, counterclaims arising out of the same transaction or occurrence. The governmental unit cannot receive a distribution from the estate without subjecting itself to any liability it has to the estate within the confines of a compulsory counterclaim rule. Any other result would be one-sided. The counterclaim by the estate against the governmental unit is without limit.

Second, the estate may offset against the allowed claim of a governmental unit, up to the amount of the governmental unit's claim, any claim that the debtor, and thus the estate, has against the governmental unit, without regard to whether the estate's claim arose out of the same transaction or occurrence as the government's claim. Under this provision, the setoff permitted is only to the extent of the governmental unit's claim. No affirmative recovery is permitted. Subsection (a) governs affirmative recovery.

Though this subsection creates a partial waiver of immunity when the governmental unit files a proof of claim, it does not waive immunity if the debtor or trustee, and not the governmental unit, files proof of a governmental unit's claim under proposed 11 U.S.C. 501(c).

This section does not confer sovereign immunity on any governmental unit that does not already have immunity. It simply recognizes any immunity that exists and prescribes the proper treatment of claims by and against that sovereign.

REFERENCES IN TEXT

The Federal Rules of Bankruptcy Procedure, referred to in subsec. (a)(3), (5), are set out in the Appendix to this title.

AMENDMENTS

1994—Pub. L. 103–394 amended section generally. Prior to amendment, section read as follows:

''(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

''(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

''(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

''(1) a provision of this title that contains 'creditor', 'entity', or 'governmental unit' applies to governmental units; and

''(2) a determination by the court of an issue arising under such a provision binds governmental units.''

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and applicable with respect to cases commenced under this title before, on, and after Oct. 22, 1994, see section 702(a), (b)(2)(B) of Pub. L. 103–394, set out as a note under section 101 of this title.

§ 107. Public access to papers

(a) Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

(b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may—

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or

(2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2556.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) of this section makes all papers filed in a bankruptcy case and the dockets of the bankruptcy court public and open to examination at reasonable times without charge. ''Docket'' includes the claims docket, the proceedings docket, and all papers filed in a case.

Subsection (b) permits the court, on its own motion, and requires the court, on the request of a party in interest, to protect trade secrets, confidential research, development, or commercial information, and to protect persons against scandalous or defamatory matter.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 108. Extension of time

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an

agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2556; Pub. L. 98–353, title III, § 424, July 10, 1984, 98 Stat. 369; Pub. L. 99–554, title II, § 257(b), Oct. 27, 1986, 100 Stat. 3114.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Extension of time: The House amendment adopts section 108(c)(1) of the Senate amendment which expressly includes any special suspensions of statutes of limitation periods on collection outside bankruptcy when assets are under the authority of a court. For example, section 6503(b) of the Internal Revenue Code [title 26] suspends collection of tax liabilities while the debtor's assets are in the control or custody of a court, and for 6 months thereafter. By adopting the language of the Senate amendment, the House amendment insures not only that the period for collection of the taxes outside bankruptcy will not expire during the title 11 proceedings, but also that such period will not expire until at least 6 months thereafter, which is the minimum suspension period provided by the Internal Revenue Code [title 26].

SENATE REPORT NO. 95–989

Subsections (a) and (b), derived from Bankruptcy Act section 11 [section 29 of former title 11], permit the trustee, when he steps into the shoes of the debtor, an extension of time for filing an action or doing some other act that is required to preserve the debtor's rights. Subsection (a) extends any statute of limitation for commencing or continuing an action by the debtor for two years after the date of the order for relief, unless it would expire later. Subsection (b) gives the trustee 60 days to take other actions not covered under subsection (a), such as filing a pleading, demand, notice, or proof of claim or loss (such as an insurance claim), unless the period for doing the relevant act expires later than 60 days after the date of the order for relief.

Subsection (c) extends the statute of limitations for creditors. Thus, if a creditor is stayed from commencing or continuing an action against the debtor because of the bankruptcy case, then the creditor is permitted an additional 30 days after notice of the event by which the stay is terminated, whether that event be relief from the automatic stay under proposed 11 U.S.C. 362 or 1301, the closing of the bankruptcy case (which terminates the stay), or the exception from discharge of the debts on which the creditor claims.

In the case of Federal tax liabilities, the Internal Revenue Code [title 26] suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control or custody of a court and for 6 months thereafter (sec. 6503(b) of the Code [title 26]). The amendment applies this rule in a title 11 proceeding. Accordingly, the statute of limitations on collection of a nondischargeable Federal tax liability of a debtor will resume running after 6 months following the end of the period during which the debtor's assets are in the control or custody of the bankruptcy court. This rule will provide the Internal Revenue Service adequate time to collect nondischargeable taxes following the end of the title 11 proceedings.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–554, § 257(b)(1), inserted reference to section 1201 of this title.

Subsec. (c). Pub. L. 99–554, § 257(b)(2)(A), inserted reference to section 1201 of this title in provisions preceding par. (1).

Subsec. (c)(2). Pub. L. 99–554, § 257(b)(2)(B), which directed the amendment of subsec. (c) by inserting ''1201,'' after ''722,'' was executed to par. (2) by inserting ''1201,'' after ''922,'' as the probable intent of Congress.

1984—Subsec. (a). Pub. L. 98–353, § 424(b), inserted ''nonbankruptcy'' after ''applicable'' and ''entered in a'' in provisions preceding par. (1).

Subsec. (a)(1). Pub. L. 98–353, § 424(a), substituted ''or'' for ''and'' after the semicolon.

Subsec. (b). Pub. L. 98–353, § 424(b), inserted ''nonbankruptcy'' after ''applicable'' and ''entered in a'' in provisions preceding par. (1).

Subsec. (b)(1). Pub. L. 98–353, § 424(a), substituted ''or'' for ''and'' after the semicolon.

Subsec. (c). Pub. L. 98–353, § 424(b), inserted ''nonbankruptcy'' after ''applicable'' and ''entered in a'' in provisions preceding par. (1).

Subsec. (c)(1). Pub. L. 98–353, § 424(a), substituted ''or'' for ''and'' after the semicolon.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a small business investment company licensed by the Small Business Administration under subsection (c) or (d)[1] of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act; or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—

[1] See References in Text note below.

(1) is a municipality;

(2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $250,000 and noncontingent, liquidated, secured debts of less than $750,000 may be a debtor under chapter 13 of this title.

(f) Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2557; Pub. L. 97–320, title VII, § 703(d), Oct. 15, 1982, 96 Stat. 1539; Pub. L. 98–353, title III, §§ 301, 425, July 10, 1984, 98 Stat. 352, 369; Pub. L. 99–554, title II, § 253, Oct. 27, 1986, 100 Stat. 3105; Pub. L. 100–597, § 2, Nov. 3, 1988, 102 Stat. 3028; Pub. L. 103–394, title I, § 108(a), title II, § 220, title IV, § 402, title V, § 501(d)(2), Oct. 22, 1994, 108 Stat. 4111, 4129, 4141, 4143.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 109(b) of the House amendment adopts a provision contained in H.R. 8200 as passed by the House. Railroad liquidations will occur under chapter 11, not chapter 7.

Section 109(c) contains a provision which tracks the Senate amendment as to when a municipality may be a debtor under chapter 11 of title 11. As under the Bankruptcy Act [former title 11], State law authorization and prepetition negotiation efforts are required.

Section 109(e) represents a compromise between H.R. 8200 as passed by the House and the Senate amendment relating to the dollar amounts restricting eligibility to be a debtor under chapter 13 of title 11. The House amendment adheres to the limit of $100,000 placed on unsecured debts in H.R. 8200 as passed by the House. It adopts a midpoint of $350,000 as a limit on secured claims, a compromise between the level of $500,000 in H.R. 8200 as passed by the House and $200,000 as contained in the Senate amendment.

SENATE REPORT NO. 95–989

This section specifies eligibility to be a debtor under the bankruptcy laws. The first criterion, found in the current Bankruptcy Act section 2a(1) [section 11(a)(1) of former title 11] requires that the debtor reside or have a domicile, a place of business, or property in the United States.

Subsection (b) defines eligibility for liquidation under chapter 7. All persons are eligible except insurance companies, and certain banking institutions. These exclusions are contained in current law. However, the banking institution exception is expanded in light of changes in various banking laws since the current law was last amended on this point. A change is also made to clarify that the bankruptcy laws cover foreign banks and insurance companies not engaged in the banking or insurance business in the United States but having assets in the United States. Banking institutions and insurance companies engaged in business in this country are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liquidation under various State or Federal regulatory laws. Conversely, when a foreign bank or insurance company is not engaged in the banking or insurance business in the United States, then those regulatory laws do not apply, and the bankruptcy laws are the only ones available for administration of any assets found in United States.

The first clause of subsection (b) provides that a railroad is not a debtor except where the requirements of section 1174 are met.

Subsection (c) [enacted as (d)] provides that only a person who may be a debtor under chapter 7 and a railroad may also be a debtor under chapter 11, but a stockbroker or commodity broker is eligible for relief only under chapter 7. Subsection (d) [enacted as (e)] establishes dollar limitations on the amount of indebtedness that an individual with regular income can incur and yet file under chapter 13.

HOUSE REPORT NO. 95–595

Subsection (c) defines eligibility for chapter 9. Only a municipality that is unable to pay its debts as they mature, and that is not prohibited by State law from proceeding under chapter 9, is permitted to be a chapter 9 debtor. The subsection is derived from Bankruptcy Act § 84 [section 404 of former title 11], with two changes. First, section 84 requires that the municipality be ''generally authorized to file a petition under this chapter by the legislature, or by a governmental officer or organization empowered by State law to authorize the filing of a petition.'' The ''generally authorized'' language is unclear, and has generated a problem for a Colorado Metropolitan District that attempted to use chapter IX [chapter 9 of former title 11] in 1976. The ''not prohibited'' language provides flexibility for both

the States and the municipalities involved, while protecting State sovereignty as required by *Ashton v. Cameron County Water District No. 1*, 298 U.S. 513 (1936) [56 S.Ct. 892, 80 L.Ed. 1309, 31 Am.Bankr.Rep.N.S. 96, rehearing denied 57 S.Ct. 5, 299 U.S. 619, 81 L.Ed. 457] and *Bekins v. United States*, 304 U.S. 27 (1938) [58 S.Ct. 811, 82 L.Ed. 1137, 36 Am.Bankr.Rep.N.S. 187, rehearing denied 58 S.Ct. 1043, 1044, 304 U.S. 589, 82 L.Ed. 1549].

The second change deletes the four prerequisites to filing found in section 84 [section 404 of former title 11]. The prerequisites require the municipality to have worked out a plan in advance, to have attempted to work out a plan without success, to fear that a creditor will attempt to obtain a preference, or to allege that prior negotiation is impracticable. The loopholes in those prerequisites are larger than the requirement itself. It was a compromise from pre-1976 chapter IX [chapter 9 of former title 11] under which a municipality could file only if it had worked out an adjustment plan in advance. In the meantime, chapter IX protection was unavailable. There was some controversy at the time of the enactment of current chapter IX concerning deletion of the pre-negotiation requirement. It was argued that deletion would lead to a rash of municipal bankruptcies. The prerequisites now contained in section 84 were inserted to assuage that fear. They are largely cosmetic and precatory, however, and do not offer any significant deterrent to use of chapter IX. Instead, other factors, such as a general reluctance on the part of any debtor, especially a municipality, to use the bankruptcy laws, operates as a much more effective deterrent against capricious use.

Subsection (d) permits a person that may proceed under chapter 7 to be a debtor under chapter 11, Reorganization, with two exceptions. Railroads, which are excluded from chapter 7, are permitted to proceed under chapter 11. Stockbrokers and commodity brokers, which are permitted to be debtors under chapter 7, are excluded from chapter 11. The special rules for treatment of customer accounts that are the essence of stockbroker and commodity broker liquidations are available only in chapter 7. Customers would be unprotected under chapter 11. The special protective rules are unavailable in chapter 11 because their complexity would make reorganization very difficult at best, and unintelligible at worst. The variety of options available in reorganization cases make it extremely difficult to reorganize and continue to provide the special customer protection necessary in these cases.

Subsection (e) specifies eligibility for chapter 13, Adjustment of Debts of an Individual with Regular Income. An individual with regular income, or an individual with regular income and the individual's spouse, may proceed under chapter 13. As noted in connection with the definition of the term ''individual with regular income'', this represents a significant departure from current law. The change might have been too great, however, without some limitation. Thus, the debtor (or the debtor and spouse) must have unsecured debts that aggregate less than $100,000, and secured debts that aggregate less than $500,000. These figures will permit the small sole proprietor, for whom a chapter 11 reorganization is too cumbersome a procedure, to proceed under chapter 13. It does not create a presumption that any sole proprietor within that range is better off in chapter 13 than chapter 11. The conversion rules found in section 1307 will govern the appropriateness of the two chapters for any particular individual. The figures merely set maximum limits.

Whether a small business operated by a husband and wife, the so-called ''mom and pop grocery store,'' will be a partnership and thus excluded from chapter 13, or a business owned by an individual, will have to be determined on the facts of each case. Even if partnership papers have not been filed, for example, the issue will be whether the assets of the grocery store are for the benefit of all creditors of the debtor or only for business creditors, and whether such assets may be the subject of a chapter 13 proceeding. The intent of the section is to follow current law that a partnership by estoppel may be adjudicated in bankruptcy and therefore would not prevent a chapter 13 debtor from subjecting assets in such a partnership to the reach of all creditors in a chapter 13 case. However, if the partnership is found to be a partnership by agreement, even informal agreement, than a separate entity exists and the assets of that entity would be exempt from a case under chapter 13.

REFERENCES IN TEXT

Section 301 of the Small Business Investment Act of 1958, referred to in subsec. (b)(2), is classified to section 681 of Title 15, Commerce and Trade. Subsec. (d) of section 301 was repealed by Pub. L. 104–208, div. D, title II, §208(b)(3)(A), Sept. 30, 1996, 110 Stat. 3009–742.

Section 3(h) of the Federal Deposit Insurance Act, referred to in subsec. (b)(2), is classified to section 1813(h) of Title 12, Banks and Banking.

AMENDMENTS

1994—Subsec. (b)(2). Pub. L. 103–394, §§220, 501(d)(2), inserted ''a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958,'' after ''homestead association,'' and struck out ''(12 U.S.C. 1813(h))'' after ''Insurance Act''.

Subsec. (c)(2). Pub. L. 103–394, §402, substituted ''specifically authorized, in its capacity as a municipality or by name,'' for ''generally authorized''.

Subsec. (e). Pub. L. 103–394, §108(a), substituted ''$250,000'' and ''$750,000'' for ''$100,000'' and ''$350,000'', respectively, in two places.

1988—Subsec. (c)(3). Pub. L. 100–597 struck out ''or unable to meet such entity's debts as such debts mature'' after ''insolvent''.

1986—Subsec. (f). Pub. L. 99–554, §253(1)(B), (2), added subsec. (f) and redesignated former subsec. (f) as (g).

Subsec. (g). Pub. L. 99–554, §253(1), redesignated former subsec. (f) as (g) and inserted reference to family farmer.

1984—Subsec. (a). Pub. L. 98–353, §425(a), struck out ''in the United States,'' after ''only a person that resides''.

Subsec. (c)(5)(D). Pub. L. 98–353, §425(b), substituted ''transfer that is avoidable under section 547 of this title'' for ''preference''.

Subsec. (d). Pub. L. 98–353, §425(c), substituted ''stockbroker'' for ''stockholder''.

Subsec. (f). Pub. L. 98–353, §301, added subsec. (f).

1982—Subsec. (b)(2). Pub. L. 97–320 inserted reference to industrial banks or similar institutions which are insured banks as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–597 effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

ADJUSTMENT OF DOLLAR AMOUNTS

For adjustment of dollar amounts specified in subsec. (e) of this section by the Judicial Conference of the United States, effective Apr. 1, 1998, see note set out under section 104 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 104, 349, 921 of this title.

§ 110. Penalty for persons who negligently or fraudulently prepare bankruptcy petitions

(a) In this section—

(1) ''bankruptcy petition preparer'' means a person, other than an attorney or an employee of an attorney, who prepares for compensation a document for filing; and

(2) ''document for filing'' means a petition or any other document prepared for filing by a debtor in a United States bankruptcy court or a United States district court in connection with a case under this title.

(b)(1) A bankruptcy petition preparer who prepares a document for filing shall sign the document and print on the document the preparer's name and address.

(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.

(c)(1) A bankruptcy petition preparer who prepares a document for filing shall place on the document, after the preparer's signature, an identifying number that identifies individuals who prepared the document.

(2) For purposes of this section, the identifying number of a bankruptcy petition preparer shall be the Social Security account number of each individual who prepared the document or assisted in its preparation.

(3) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.

(d)(1) A bankruptcy petition preparer shall, not later than the time at which a document for filing is presented for the debtor's signature, furnish to the debtor a copy of the document.

(2) A bankruptcy petition preparer who fails to comply with paragraph (1) may be fined not more than $500 for each such failure unless the failure is due to reasonable cause.

(e)(1) A bankruptcy petition preparer shall not execute any document on behalf of a debtor.

(2) A bankruptcy petition preparer may be fined not more than $500 for each document executed in violation of paragraph (1).

(f)(1) A bankruptcy petition preparer shall not use the word ''legal'' or any similar term in any advertisements, or advertise under any category that includes the word ''legal'' or any similar term.

(2) A bankruptcy petition preparer shall be fined not more than $500 for each violation of paragraph (1).

(g)(1) A bankruptcy petition preparer shall not collect or receive any payment from the debtor or on behalf of the debtor for the court fees in connection with filing the petition.

(2) A bankruptcy petition preparer shall be fined not more than $500 for each violation of paragraph (1).

(h)(1) Within 10 days after the date of the filing of a petition, a bankruptcy petition preparer shall file a declaration under penalty of perjury disclosing any fee received from or on behalf of the debtor within 12 months immediately prior to the filing of the case, and any unpaid fee charged to the debtor.

(2) The court shall disallow and order the immediate turnover to the bankruptcy trustee of any fee referred to in paragraph (1) found to be in excess of the value of services rendered for the documents prepared. An individual debtor may exempt any funds so recovered under section 522(b).

(3) The debtor, the trustee, a creditor, or the United States trustee may file a motion for an order under paragraph (2).

(4) A bankruptcy petition preparer shall be fined not more than $500 for each failure to comply with a court order to turn over funds within 30 days of service of such order.

(i)(1) If a bankruptcy case or related proceeding is dismissed because of the failure to file bankruptcy papers, including papers specified in section 521(1) of this title, the negligence or intentional disregard of this title or the Federal Rules of Bankruptcy Procedure by a bankruptcy petition preparer, or if a bankruptcy petition preparer violates this section or commits any fraudulent, unfair, or deceptive act, the bankruptcy court shall certify that fact to the district court, and the district court, on motion of the debtor, the trustee, or a creditor and after a hearing, shall order the bankruptcy petition preparer to pay to the debtor—

(A) the debtor's actual damages;

(B) the greater of—

(i) $2,000; or

(ii) twice the amount paid by the debtor to the bankruptcy petition preparer for the preparer's services; and

(C) reasonable attorneys' fees and costs in moving for damages under this subsection.

(2) If the trustee or creditor moves for damages on behalf of the debtor under this subsection, the bankruptcy petition preparer shall be ordered to pay the movant the additional amount of $1,000 plus reasonable attorneys' fees and costs incurred.

(j)(1) A debtor for whom a bankruptcy petition preparer has prepared a document for filing, the trustee, a creditor, or the United States trustee in the district in which the bankruptcy petition preparer resides, has conducted business, or the United States trustee in any other district in which the debtor resides may bring a civil action to enjoin a bankruptcy petition preparer from engaging in any conduct in violation of this section or from further acting as a bankruptcy petition preparer.

(2)(A) In an action under paragraph (1), if the court finds that—

(i) a bankruptcy petition preparer has—

(I) engaged in conduct in violation of this section or of any provision of this title a violation of which subjects a person to criminal penalty;

(II) misrepresented the preparer's experience or education as a bankruptcy petition preparer; or

(III) engaged in any other fraudulent, unfair, or deceptive conduct; and

(ii) injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin the bankruptcy petition preparer from engaging in such conduct.

(B) If the court finds that a bankruptcy petition preparer has continually engaged in conduct described in subclause (I), (II), or (III) of clause (i) and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, or has not paid a penalty imposed under this section, the court may enjoin the person from acting as a bankruptcy petition preparer.

(3) The court shall award to a debtor, trustee, or creditor that brings a successful action under this subsection reasonable attorney's[1] fees and costs of the action, to be paid by the bankruptcy petition preparer.

(k) Nothing in this section shall be construed to permit activities that are otherwise prohibited by law, including rules and laws that prohibit the unauthorized practice of law.

(Added Pub. L. 103–394, title III, § 308(a), Oct. 22, 1994, 108 Stat. 4135.)

REFERENCES IN TEXT

The Federal Rules of Bankruptcy Procedure, referred to in subsec. (i)(1), are set out in the Appendix to this title.

EFFECTIVE DATE

Section effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as an Effective Date of 1994 Amendment note under section 101 of this title.

CHAPTER 3—CASE ADMINISTRATION

SUBCHAPTER I—COMMENCEMENT OF A CASE

SUBCHAPTER II—OFFICERS

SUBCHAPTER III—ADMINISTRATION

SUBCHAPTER IV—ADMINISTRATIVE POWERS

AMENDMENTS

1986—Pub. L. 99–554, title II, § 205(b), Oct. 27, 1986, 100 Stat. 3098, added item 307.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 103 of this title; title 15 section 78fff.

SUBCHAPTER I—COMMENCEMENT OF A CASE

§ 301. Voluntary cases

A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2558.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Sections 301, 302, 303, and 304 are all modified in the House amendment to adopt an idea contained in sections 301 and 303 of the Senate amendment requiring a petition commencing a case to be filed with the bankruptcy court. The exception contained in section 301 of the Senate bill relating to cases filed under chapter 9 is deleted. Chapter 9 cases will be handled by a bankruptcy court as are other title 11 cases.

SENATE REPORT NO. 95–989

Section 301 specifies the manner in which a voluntary bankruptcy case is commenced. The debtor files a petition under this section under the particular operative chapter of the bankruptcy code under which he wishes to proceed. The filing of the petition constitutes an order for relief in the case under that chapter. The section contains no change from current law, except for the use of the phrase ''order for relief'' instead of ''adjudication.'' The term adjudication is replaced by a less pejorative phrase in light of the clear power of Congress to permit voluntary bankruptcy without the necessity for an adjudication, as under the 1898 act [former title 11], which was adopted when voluntary bankruptcy was a concept not thoroughly tested.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 362, 365, 522, 541, 901, 921 of this title.

§ 302. Joint cases

(a) A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The com-

[1] So in original. Probably should be ''attorneys' ''.

mencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.

(b) After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2558.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

A joint case is a voluntary bankruptcy case concerning a wife and husband. Under current law, there is no explicit provision for joint cases. Very often, however, in the consumer debtor context, a husband and wife are jointly liable on their debts, and jointly hold most of their property. A joint case will facilitate consolidation of their estates, to the benefit of both the debtors and their creditors, because the cost of administration will be reduced, and there will be only one filing fee.

Section 302 specifies that a joint case is commenced by the filing of a petition under an appropriate chapter by an individual and that individual's spouse. Thus, one spouse cannot take the other into bankruptcy without the other's knowledge or consent. The filing of the petition constitutes an order for relief under the chapter selected.

Subsection (b) requires the court to determine the extent, if any, to which the estates of the two debtors will be consolidated; that is, assets and liabilities combined in a single pool to pay creditors. Factors that will be relevant in the court's determination include the extent of jointly held property and the amount of jointly-owned debts. The section, of course, is not license to consolidate in order to avoid other provisions of the title to the detriment of either the debtors or their creditors. It is designed mainly for ease of administration.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 362, 365, 522, 541 of this title.

§ 303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $10,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $10,000 of such claims;

(3) if such person is a partnership—

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the

purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

(1) against the petitioners and in favor of the debtor for—

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section—

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2559; Pub. L. 98–353, title III, §§426, 427, July 10, 1984, 98 Stat. 369; Pub. L. 99–554, title II, §§204, 254, 283(b), Oct. 27, 1986, 100 Stat. 3097, 3105, 3116; Pub. L. 103–394, title I, §108(b), Oct. 22, 1994, 108 Stat. 4112.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 303(b)(1) is modified to make clear that unsecured claims against the debtor must be determined by taking into account liens securing property held by third parties.

Section 303(b)(3) adopts a provision contained in the Senate amendment indicating that an involuntary petition may be commenced against a partnership by fewer than all of the general partners in such partnership. Such action may be taken by fewer than all of the general partners notwithstanding a contrary agreement between the partners or State or local law.

Section 303(h)(1) in the House amendment is a compromise of standards found in H.R. 8200 as passed by the House and the Senate amendment pertaining to the standards that must be met in order to obtain an order for relief in an involuntary case under title 11. The language specifies that the court will order such relief only if the debtor is generally not paying debtor's debts as they become due.

Section 303(h)(2) reflects a compromise pertaining to section 543 of title 11 relating to turnover of property by a custodian. It provides an alternative test to support an order for relief in an involuntary case. If a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession within 120 days before the date of the filing of the petition, then the court may order relief in the involuntary case. The test under section 303(h)(2) differs from section 3a(5) of the Bankruptcy Act [section 21(a)(5) of former title 11], which requires an involuntary case to be commenced before the earlier of time such custodian was appointed or took possession. The test in section 303(h)(2) authorizes an order for relief to be entered in an involuntary case from the later date on which the custodian was appointed or took possession.

SENATE REPORT NO. 95–989

Section 303 governs the commencement of involuntary cases under title 11. An involuntary case may be commenced only under chapter 7, Liquidation, or chapter 11, Reorganization. Involuntary cases are not permitted for municipalities, because to do so may constitute an invasion of State sovereignty contrary to the 10th amendment, and would constitute bad policy, by permitting the fate of a municipality, governed by officials elected by the people of the municipality, to be determined by a small number of creditors of the municipality. Involuntary chapter 13 cases are not permitted either. To do so would constitute bad policy, because chapter 13 only works when there is a willing debtor that wants to repay his creditors. Short of involuntary servitude, it is difficult to keep a debtor working for his creditors when he does not want to pay them back. See chapter 3, supra.

The exceptions contained in current law that prohibit involuntary cases against farmers, ranchers and eleemosynary institutions are continued. Farmers and ranchers are excepted because of the cyclical nature of their business. One drought year or one year of low prices, as a result of which a farmer is temporarily unable to pay his creditors, should not subject him to involuntary bankruptcy. Eleemosynary institutions, such as churches, schools, and charitable organizations and foundations, likewise are exempt from involuntary bankruptcy.

The provisions for involuntary chapter 11 cases is a slight change from present law, based on the proposed consolidation of the reorganization chapters. Currently, involuntary cases are permitted under chapters X and XII [chapters 10 and 12 of former title 11] but not under chapter XI [chapter 11 of former title 11]. The consolidation requires a single rule for all kinds of reorganization proceedings. Because the assets of an insolvent debtor belong equitably to his creditors, the bill permits involuntary cases in order that creditors may realize on their assets through reorganization as well as through liquidation.

Subsection (b) of the section specifies who may file an involuntary petition. As under current law, if the debtor has more than 12 creditors, three creditors must join in the involuntary petition. The dollar amount limitation is changed from current law to $5,000. The new amount applies both to liquidation and reorganization cases in order that there not be an artificial difference between the two chapters that would provide an incentive for one or the other. Subsection (b)(1) makes explicit the right of an indenture trustee to be one of the three petitioning creditors on behalf of the creditors the trustee represents under the indenture. If all of the general partners in a partnership are in bankruptcy, then the trustee of a single general partner may file an involuntary petition against the partnership. Finally, a foreign representative may file an involuntary case concerning the debtor in the foreign proceeding, in order to administer assets in this country. This subsection is not intended to overrule Bankruptcy Rule 104(d), which places certain restrictions on the transfer of claims for the purpose of commencing an involuntary case. That Rule will be continued under section 405(d) of this bill.

Subsection (c) permits creditors other than the original petitioning creditors to join in the petition with the same effect as if the joining creditor had been one of the original petitioning creditors. Thus, if the claim of one of the original petitioning creditors is disallowed, the case will not be dismissed for want of three creditors or want of $5,000 in petitioning claims if the joining creditor suffices to fulfill the statutory requirements.

Subsection (d) permits the debtor to file an answer to an involuntary petition. The subsection also permits a general partner in a partnership debtor to answer an

involuntary petition against the partnership if he did not join in the petition. Thus, a partnership petition by less than all of the general partners is treated as an involuntary, not a voluntary, petition.

The court may, under subsection (e), require the petitioners to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i). Subsection (i) provides for costs, attorneys fees, and damages in certain circumstances. The bonding requirement will discourage frivolous petitions as well as spiteful petitions based on a desire to embarrass the debtor (who may be a competitor of a petitioning creditor) or to put the debtor out of business without good cause. An involuntary petition may put a debtor out of business even if it is without foundation and is later dismissed.

Subsection (f) is both a clarification and a change from existing law. It permits the debtor to continue to operate any business of the debtor and to dispose of property as if the case had not been commenced. The court is permitted, however, to control the debtor's powers under this subsection by appropriate orders, such as where there is a fear that the debtor may attempt to abscond with assets, dispose of them at less than their fair value, or dismantle his business, all to the detriment of the debtor's creditors.

The court may also, under subsection (g), appoint an interim trustee to take possession of the debtor's property and to operate any business of the debtor, pending trial on the involuntary petition. The court may make such an order only on the request of a party in interest, and after notice to the debtor and a hearing. There must be a showing that a trustee is necessary to preserve the property of the estate or to prevent loss to the estate. The debtor may regain possession by posting a sufficient bond.

Subsection (h) provides the standard for an order for relief on an involuntary petition. If the petition is not timely controverted (the Rules of Bankruptcy Procedure will fix time limits), the court orders relief after a trial, only if the debtor is generally unable to pay its debts as they mature, or if the debtor has failed to pay a major portion of his debts as they become due, or if a custodian was appointed during the 90-day period preceding the filing of the petition. The first two tests are variations of the equity insolvency test. They represent the most significant departure from present law concerning the grounds for involuntary bankruptcy, which requires an act of bankruptcy. Proof of the commission of an act of bankruptcy has frequently required a showing that the debtor was insolvent on a ''balance-sheet'' test when the act was committed. This bill abolishes the concept of acts of bankruptcy.

The equity insolvency test has been in equity jurisprudence for hundreds of years, and though it is new in the bankruptcy context (except in chapter X [chapter 10 of former title 11]), the bankruptcy courts should have no difficulty in applying it. The third test, appointment of a custodian within ninety days before the petition, is provided for simplicity. It is not a partial re-enactment of acts of bankruptcy. If a custodian of all or substantially all of the property of the debtor has been appointed, this paragraph creates an irrebuttable presumption that the debtor is unable to pay its debts as they mature. Moreover, once a proceeding to liquidate assets has been commenced, the debtor's creditors have an absolute right to have the liquidation (or reorganization) proceed in the bankruptcy court and under the bankruptcy laws with all of the appropriate creditor and debtor protections that those laws provide. Ninety days gives creditors ample time in which to seek bankruptcy liquidation after the appointment of a custodian. If they wait beyond the ninety day period, they are not precluded from filing an involuntary petition. They are simply required to prove equity insolvency rather than the more easily provable custodian test.

Subsection (i) permits the court to award costs, reasonable attorney's fees, or damages if an involuntary petition is dismissed other than by consent of all petitioning creditors and the debtor. The damages that the court may award are those that may be caused by the taking of possession of the debtor's property under subsection (g) or section 1104 of the bankruptcy code. In addition, if a petitioning creditor filed the petition in bad faith, the court may award the debtor any damages proximately caused by the filing of the petition. These damages may include such items as loss of business during and after the pendency of the case, and so on. ''Or'' is not exclusive in this paragraph. The court may grant any or all of the damages provided for under the provision. Dismissal in the best interests of credits under section 305(a)(1) would not give rise to a damages claim.

Under subsection (j), the court may dismiss the petition by consent only after giving notice to all creditors. The purpose of the subsection is to prevent collusive settlements among the debtor and the petitioning creditors while other creditors, that wish to see relief ordered with respect to the debtor but that did not participate in the case, are left without sufficient protection.

Subsection (k) governs involuntary cases against foreign banks that are not engaged in business in the United States but that have assets located here. The subsection prevents a foreign bank from being placed into bankruptcy in this country unless a foreign proceeding against the bank is pending. The special protection afforded by this section is needed to prevent creditors from effectively closing down a foreign bank by the commencement of an involuntary bankruptcy case in this country unless that bank is involved in a proceeding under foreign law. An involuntary case commenced under this subsection gives the foreign representative an alternative to commencing a case ancillary to a foreign proceeding under section 304.

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394 substituted ''$10,000'' for ''$5,000'' in pars. (1) and (2).

1986—Subsec. (a). Pub. L. 99–554, § 254, inserted reference to family farmer.

Subsec. (b). Pub. L. 99–554, § 283(b)(1), substituted ''subject of'' for ''subject on''.

Subsec. (g). Pub. L. 99–554, § 204(1), substituted ''may order the United States trustee to appoint'' for ''may appoint''.

Subsec. (h)(1). Pub. L. 99–554, § 283(b)(2), substituted ''are the'' for ''that are the''.

Subsec. (i)(1). Pub. L. 99–554, § 204(2), inserted ''or'' at end of subpar. (A) and struck out subpar. (C) which read as follows: ''any damages proximately caused by the taking of possession of the debtor's property by a trustee appointed under subsection (g) of this section or section 1104 of this title; or''.

1984—Subsec. (b). Pub. L. 98–353, § 426(a), inserted ''against a person'' after ''involuntary case''.

Subsec. (b)(1). Pub. L. 98–353, § 426(b)(1), inserted ''or the subject on a bona fide dispute,''.

Subsec. (h)(1). Pub. L. 98–353, § 426(b)(2), inserted ''unless such debts that are the subject of a bona fide dispute''.

Subsec. (j)(2). Pub. L. 98–353, § 427, substituted ''debtor'' for ''debtors''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 204 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 254 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases

commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by sections 426(a) and 427 of Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, and amendment by section 426(b) of Pub. L. 98–353 effective July 10, 1984, see section 552(a), (b) of Pub. L. 98–353, set out as a note under section 101 of this title.

ADJUSTMENT OF DOLLAR AMOUNTS

For adjustment of dollar amounts specified in subsec. (b)(1), (2) of this section by the Judicial Conference of the United States, effective Apr. 1, 1998, see note set out under section 104 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 104, 106, 306, 362, 503, 504, 522, 541, 549 of this title; title 28 sections 1411, 1480.

§ 304. Cases ancillary to foreign proceedings

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2560.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 304(b) adopts a provision contained in the Senate amendment with modifications. The provision indicates that if a party in interest does not timely controvert the petition in a case ancillary to a foreign proceeding, or after trial on the merits, the court may take various actions, including enjoining the commencement or continuation of any action against the debtor with respect to property involved in the proceeding, or against the property itself; enjoining the enforcement of any judgment against the debtor or the debtor's property; or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of the debtor or the estate.

Section 304(c) is modified to indicate that the court shall be guided by considerations of comity in addition to the other factors specified therein.

SENATE REPORT NO. 95–989

This section governs cases filed in the bankruptcy courts that are ancillary to foreign proceedings. That is, where a foreign bankruptcy case is pending concerning a particular debtor and that debtor has assets in this country, the foreign representative may file a petition under this section, which does not commence a full bankruptcy case, in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief. The debtor is given the opportunity to controvert the petition.

Subsection (c) requires the court to consider several factors in determining what relief, if any, to grant. The court is to be guided by what will best assure an economical and expeditious administration of the estate, consistent with just treatment of all creditors and equity security holders; protection of local creditors and equity security holders against prejudice and inconvenience in processing claims and interests in the foreign proceeding; prevention of preferential or fraudulent disposition of property of the estate; distribution of the proceeds of the estate substantially in conformity with the distribution provisions of the bankruptcy code; and, if the debtor is an individual, the provision of an opportunity for a fresh start. These guidelines are designed to give the court the maximum flexibility in handling ancillary cases. Principles of international comity and respect for the judgments and laws of other nations suggest that the court be permitted to make the appropriate orders under all of the circumstances of each case, rather than being provided with inflexible rules.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 305, 306 of this title; title 28 section 1410.

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)(A) there is pending a foreign proceeding; and

(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceed-

ings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2561; Pub. L. 101–650, title III, § 309(a), Dec. 1, 1990, 104 Stat. 5113; Pub. L. 102–198, § 5, Dec. 9, 1991, 105 Stat. 1623.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

A principle of the common law requires a court with jurisdiction over a particular matter to take jurisdiction. This section recognizes that there are cases in which it would be appropriate for the court to decline jurisdiction. Abstention under this section, however, is of jurisdiction over the entire case. Abstention from jurisdiction over a particular proceeding in a case is governed by proposed 28 U.S.C. 1471(c). Thus, the court is permitted, if the interests of creditors and the debtor would be better served by dismissal of the case or suspension of all proceedings in the case, to so order. The court may dismiss or suspend under the first paragraph, for example, if an arrangement is being worked out by creditors and the debtor out of court, there is no prejudice to the results of creditors in that arrangement, and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment. The less expensive out-of-court workout may better serve the interests in the case. Likewise, if there is pending a foreign proceeding concerning the debtor and the factors specified in proposed 11 U.S.C. 304(c) warrant dismissal or suspension, the court may so act.

Subsection (b) gives a foreign representative authority to appear in the bankruptcy court to request dismissal or suspension. Subsection (c) makes the dismissal or suspension order nonreviewable by appeal or otherwise. The bankruptcy court, based on its experience and discretion is vested with the power of decision.

AMENDMENTS

1991—Subsec. (c). Pub. L. 102–198 substituted ''title 28'' for ''this title'' in two places.

1990—Subsec. (c). Pub. L. 101–650 inserted before period at end ''by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title''.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 306 of this title.

§ 306. Limited appearance

An appearance in a bankruptcy court by a foreign representative in connection with a petition or request under section 303, 304, or 305 of this title does not submit such foreign representative to the jurisdiction of any court in the United States for any other purpose, but the bankruptcy court may condition any order under section 303, 304, or 305 of this title on compliance by such foreign representative with the orders of such bankruptcy court.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2561.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 306 permits a foreign representative that is seeking dismissal or suspension under section 305 of an ancillary case or that is appearing in connection with a petition under section 303 or 304 to appear without subjecting himself to the jurisdiction of any other court in the United States, including State courts. The protection is necessary to allow the foreign representative to present his case and the case of the foreign estate, without waiving the normal jurisdictional rules of the foreign country. That is, creditors in this country will still have to seek redress against the foreign estate according to the host country's jurisdictional rules. Any other result would permit local creditors to obtain unfair advantage by filing an involuntary case, thus requiring the foreign representative to appear, and then obtaining local jurisdiction over the representative in connection with his appearance in this country. That kind of bankruptcy law would legalize an ambush technique that has frequently been rejected by the common law in other contexts.

However, the bankruptcy court is permitted under section 306 to condition any relief under section 303, 304, or 305 on the compliance by the foreign representative with the orders of the bankruptcy court. The last provision is not carte blanche to the bankruptcy court to require the foreign representative to submit to jurisdiction in other courts contrary to the general policy of the section. It is designed to enable the bankruptcy court to enforce its own orders that are necessary to the appropriate relief granted under section 303, 304, or 305.

§ 307. United States trustee

The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.

(Added Pub. L. 99–554, title II, § 205(a), Oct. 27, 1986, 100 Stat. 3098.)

EFFECTIVE DATE

Effective date and applicability of section dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

STANDING AND AUTHORITY OF BANKRUPTCY ADMINISTRATOR

Pub. L. 101–650, title III, § 317(b), Dec. 1, 1990, 104 Stat. 5115, provided that: ''A bankruptcy administrator may raise and may appear and be heard on any issue in any case under title 11, United States Code, but may not file a plan pursuant to section 1121(c) of such title.''

SUBCHAPTER II—OFFICERS

§ 321. Eligibility to serve as trustee

(a) A person may serve as trustee in a case under this title only if such person is—

(1) an individual that is competent to perform the duties of trustee and, in a case under chapter 7, 12, or 13 of this title, resides or has an office in the judicial district within which the case is pending, or in any judicial district adjacent to such district; or

(2) a corporation authorized by such corporation's charter or bylaws to act as trustee, and, in a case under chapter 7, 12, or 13 of this title, having an office in at least one of such districts.

(b) A person that has served as an examiner in the case may not serve as trustee in the case.

(c) The United States trustee for the judicial district in which the case is pending is eligible to serve as trustee in the case if necessary.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2561; Pub. L. 98–353, title III, § 428, July 10, 1984, 98 Stat. 369;

Pub. L. 99–554, title II, §§206, 257(c), Oct. 27, 1986, 100 Stat. 3098, 3114.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 321 indicates that an examiner may not serve as a trustee in the case.

SENATE REPORT NO. 95–989

Section 321 is adapted from current Bankruptcy Act §45 [section 73 of former title 11] and Bankruptcy Rule 209. Subsection (a) specifies that an individual may serve as trustee in a bankruptcy case only if he is competent to perform the duties of trustee and resides or has an office in the judicial district within which the case is pending, or in an adjacent judicial district. A corporation must be authorized by its charter or by-laws to act as trustee, and, for chapter 7 or 13 cases, must have an office in any of the above mentioned judicial districts.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–554, §257(c), inserted reference to chapter 12 in two places.

Subsec. (c). Pub. L. 99–554, §206, added subsec. (c).

1984—Subsec. (b). Pub. L. 98–353 substituted ''the case'' for ''a case'' after ''an examiner in''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 206 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 322. Qualification of trustee

(a) Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.

(b)(1) The United States trustee qualifies wherever such trustee serves as trustee in a case under this title.

(2) The United States trustee shall determine—

(A) the amount of a bond required to be filed under subsection (a) of this section; and

(B) the sufficiency of the surety on such bond.

(c) A trustee is not liable personally or on such trustee's bond in favor of the United States for any penalty or forfeiture incurred by the debtor.

(d) A proceeding on a trustee's bond may not be commenced after two years after the date on which such trustee was discharged.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2562; Pub. L. 98–353, title III, §429, July 10, 1984, 98 Stat. 369; Pub. L. 99–554, title II, §§207, 257(d), Oct. 27, 1986, 100 Stat. 3098, 3114; Pub. L. 103–394, title V, §501(d)(3), Oct. 22, 1994, 108 Stat. 4143.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 322(a) is modified to include a trustee serving in a railroad reorganization under subchapter IV of chapter 11.

SENATE REPORT NO. 95–989

A trustee qualifies in a case by filing, within five days after selection, a bond in favor of the United States, conditioned on the faithful performance of his official duties. This section is derived from the Bankruptcy Act section 50b [section 78(b) of former title 11]. The court is required to determine the amount of the bond and the sufficiency of the surety on the bond. Subsection (c), derived from Bankruptcy Act section 50i [section 78(i) of former title 11], relieves the trustee from personal liability and from liability on his bond for any penalty or forfeiture incurred by the debtor. Subsection (d), derived from section 50m [section 78(m) of former title 11], fixes a two-year statute of limitations on any action on a trustee's bond. Finally, subsection (e) dispenses with the bonding requirement for the United States trustee.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394 substituted ''1202, or 1302'' for ''1302, or 1202''.

1986—Subsec. (a). Pub. L. 99–554, §257(d), inserted reference to section 1202 of this title.

Pub. L. 99–554, §207(1), substituted ''Except as provided in subsection (b)(1), a person'' for ''A person''.

Subsec. (b). Pub. L. 99–554, §207(2), amended subsec. (b) generally, adding par. (1), designating existing provisions as par. (2), substituting ''The United States trustee'' for ''The court'', ''(A) the amount'' for ''(1) the amount'', and ''(B) the sufficiency'' for ''(2) the sufficiency''.

1984—Subsec. (b)(1). Pub. L. 98–353 inserted ''required to be''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 207 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 701, 703, 746, 1101, 1104, 1202, 1302 of this title; title 15 section 78eee.

§ 323. Role and capacity of trustee

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2562.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) of this section makes the trustee the representative of the estate. Subsection (b) grants the trustee the capacity to sue and to be sued. If the debtor remains in possession in a chapter 11 case, section 1107 gives the debtor in possession these rights of the trustee: the debtor in possession becomes the representative of the estate, and may sue and be sued. The same applies in a chapter 13 case.

§ 324. Removal of trustee or examiner

(a) The court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause.

(b) Whenever the court removes a trustee or examiner under subsection (a) in a case under this title, such trustee or examiner shall thereby be removed in all other cases under this title in which such trustee or examiner is then serving unless the court orders otherwise.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2562; Pub. L. 99–554, title II, § 208, Oct. 27, 1986, 100 Stat. 3098.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section permits the court, after notice and a hearing, to remove a trustee for cause.

AMENDMENTS

1986—Pub. L. 99–554 amended section generally, designating existing provisions as subsec. (a), substituting ''a trustee, other than the United States trustee, or an examiner'' for ''a trustee or an examiner'', and adding subsec. (b).

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 703, 1104 of this title.

§ 325. Effect of vacancy

A vacancy in the office of trustee during a case does not abate any pending action or proceeding, and the successor trustee shall be substituted as a party in such action or proceeding.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2562.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 325, derived from Bankruptcy Act section 46 [section 74 of former title 11] and Bankruptcy Rule 221(b), specifies that a vacancy in the office of trustee during a case does not abate any pending action or proceeding. The successor trustee, when selected and qualified, is substituted as a party in any pending action or proceeding.

§ 326. Limitation on compensation of trustee

(a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

(b) In a case under chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

(c) If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be.

(d) The court may deny allowance of compensation for services or reimbursement of expenses of the trustee if the trustee failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c) of this title or, with knowledge of such facts, employed a professional person under section 327 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2562; Pub. L. 98–353, title III, § 430(a), (b), July 10, 1984, 98 Stat. 369; Pub. L. 99–554, title II, § 209, Oct. 27, 1986, 100 Stat. 3098; Pub. L. 103–394, title I, § 107, Oct. 22, 1994, 108 Stat. 4111.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 326(a) of the House amendment modifies a provision as contained in H.R. 8200 as passed by the House. The percentage limitation on the fees of a trustee contained in the House bill is retained, but no additional percentage is specified for cases in which a trustee operates the business of the debtor. Section 326(b) of the Senate amendment is deleted as an unnecessary restatement of the limitation contained in section 326(a) as modified. The provision contained in section 326(a) of the Senate amendment authorizing a trustee to receive a maximum fee of $150 regardless of the availability of assets in the estate is deleted. It will not be necessary in view of the increase in section 326(a) and the doubling of the minimum fee as provided in section 330(b).

Section 326(b) of the House amendment derives from section 326(c) of H.R. 8200 as passed by the House. It is a conforming amendment to indicate a change with respect to the selection of a trustee in a chapter 13 case under section 1302(a) of title 11.

SENATE REPORT NO. 95–989

This section is derived in part from section 48c of the Bankruptcy Act [section 76(c) of former title 11]. It must be emphasized that this section does not authorize compensation of trustees. This section simply fixes the maximum compensation of a trustee. Proposed 11 U.S.C. 330 authorizes and fixes the standard of compensation. Under section 48c of current law, the maximum limits have tended to become minimums in many

cases. This section is not intended to be so interpreted. The limits in this section, together with the limitations found in section 330, are to be applied as outer limits, and not as grants or entitlements to the maximum fees specified.

The maximum fee schedule is derived from section 48c(1) of the present act [section 76(c)(1) of former title 11], but with a change relating to the bases on which the percentage maxima are computed. The maximum fee schedule is based on decreasing percentages of increasing amounts. The amounts are the amounts of money distributed by the trustee to parties in interest, excluding the debtor, but including secured creditors. These amounts were last amended in 1952. Since then, the cost of living has approximately doubled. Thus, the bases were doubled.

It should be noted that the bases on which the maximum fee is computed includes moneys turned over to secured creditors, to cover the situation where the trustee liquidates property subject to a lien and distributes the proceeds. It does not cover cases in which the trustee simply turns over the property to the secured creditor, nor where the trustee abandons the property and the secured creditor is permitted to foreclose. The provision is also subject to the rights of the secured creditor generally under proposed section 506, especially 506(c). The $150 discretionary fee provision of current law is retained.

Subsection (b) of this section entitles an operating trustee to a reasonable fee, without any limitation based on the maximum provided for a liquidating trustee as in current law, Bankruptcy Act § 48c(2) [section 76(c)(2) of former title 11].

Subsection (c) [enacted as (b)] permits a maximum fee of five percent on all payments to creditors under a chapter 13 plan to the trustee appointed in the case.

Subsection (d) [enacted as (c)] provides a limitation not found in current law. Even if more than one trustee serves in the case, the maximum fee payable to all trustees does not change. For example, if an interim trustee is appointed and an elected trustee replaces him, the combined total of the fees payable to the interim trustee and the permanent trustee may not exceed the amount specified in this section. Under current law, very often a receiver receives a full fee and a subsequent trustee also receives a full fee. The resultant ''double-dipping'', especially in cases in which the receiver and the trustee are the same individual, is detrimental to the interests of creditors, by needlessly increasing the cost of administering bankruptcy estates.

Subsection (e) [enacted as (d)] permits the court to deny compensation to a trustee if the trustee has been derelict in his duty by employing counsel, who is not disinterested.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394 substituted ''25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, 5 percent on any amount in excess of $50,000 but not in excess of $1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of $1,000,000'' for ''fifteen percent on the first $1,000 or less, six percent on any amount in excess of $1,000 but not in excess of $3,000, and three percent on any amount in excess of $3,000''.

1986—Subsec. (b). Pub. L. 99–554 amended subsec. (b) generally, substituting ''under chapter 12 or 13 of this title'' for ''under chapter 13 of this title'', ''expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28'' for ''expenses of a standing trustee appointed under section 1302(d) of this title'', and ''under section 1202(a) or 1302(a) of this title'' for ''under section 1302(a) of this title''.

1984—Subsec. (a). Pub. L. 98–353, § 430(a), substituted ''and three percent on any amount in excess of $3000'' for ''three percent on any amount in excess of $3,000 but not in excess of $20,000, two percent on any amount in excess of $20,000 but not in excess of $50,000, and one percent on any amount in excess of $50,000''.

Subsec. (d). Pub. L. 98–353, § 430(b), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: ''The court may deny allowance of compensation for services and reimbursement of expenses of the trustee if the trustee—

''(1) failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c) of this title; or

''(2) with knowledge of such facts, employed a professional person under section 327 of this title.''

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

REFERENCES IN SUBSECTION (b) TEMPORARILY DEEMED TO INCLUDE ADDITIONAL REFERENCES

Until the amendments made by subtitle A (§§ 201 to 231) of title II of Pub. L. 99–554 become effective in a district and apply to a case, for purposes of such case any reference in subsec. (b) of this section—

(1) to chapter 13 of this title is deemed to be a reference to chapter 12 or 13 of this title,

(2) to section 1302(d) of this title is deemed to be a reference to section 1302(d) of this title or section 586(b) of Title 28, Judiciary and Judicial Procedure, and

(3) to section 1302(a) of this title is deemed to be a reference to section 1202(a) or 1302(a) of this title,

see section 302(c)(3)(A), (d), (e) of Pub. L. 99–554, set out as an Effective Date note under section 581 of Title 28.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 330, 557 of this title.

§ 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2563; Pub. L. 98–353, title III, § 430(c), July 10, 1984, 98 Stat. 370; Pub. L. 99–554, title II, §§ 210, 257(e), Oct. 27, 1986, 100 Stat. 3099, 3114.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 327(a) of the House amendment contains a technical amendment indicating that attorneys, and perhaps other officers enumerated therein, represent, rather than assist, the trustee in carrying out the trustee's duties.

Section 327(c) represents a compromise between H.R. 8200 as passed by the House and the Senate amendment. The provision states that former representation of a creditor, whether secured or unsecured, will not automatically disqualify a person from being employed by a trustee, but if such person is employed by the trustee, the person may no longer represent the creditor in connection with the case.

Section 327(f) prevents an examiner from being employed by the trustee.

SENATE REPORT NO. 95–989

This section authorizes the trustee, subject to the court's approval, to employ professional persons, such as attorneys, accountants, appraisers, and auctioneers, to represent or perform services for the estate. The trustee may employ only disinterested persons that do not hold or represent an interest adverse to the estate.

Subsection (b) is an exception, and authorizes the trustee to retain or replace professional persons that the debtor has employed if necessary in the operation of the debtor's business.

Subsection (c) provides a professional person is not disqualified for employment solely because of the person's prior employment by or representation of a secured or unsecured creditor.

Subsection (d) permits the court to authorize the trustee, if qualified to act as his own counsel or accountant.

Subsection (e) permits the trustee, subject to the court's approval, to employ for a specified special purpose an attorney that has represented the debtor, if such employment is in the best interest of the estate and if the attorney does not hold or represent an interest adverse to the debtor of the estate with respect to the matter on which he is to be employed. This subsection does not authorize the employment of the debtor's attorney to represent the estate generally or to represent the trustee in the conduct of the bankruptcy case. The subsection will most likely be used when the debtor is involved in complex litigation, and changing attorneys in the middle of the case after the bankruptcy case has commenced would be detrimental to the progress of that other litigation.

HOUSE REPORT NO. 95–595

Subsection (c) is an additional exception. The trustee may employ as his counsel a nondisinterested person if the only reason that the attorney is not disinterested is because of his representation of an unsecured creditor.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–554, § 257(e)(1), which directed the insertion of '', 1202,'' after ''section 721,'' was executed by making the insertion after ''section 721'' to reflect the probable intent of Congress.

Subsec. (c). Pub. L. 99–554, § 257(e)(2), which directed the insertion of '', 12,'' after ''section 7,'' was executed by making the insertion after ''chapter 7'' to reflect the probable intent of Congress.

Pub. L. 99–554, § 210, inserted ''or the United States trustee'' after ''another creditor''.

1984—Subsec. (c). Pub. L. 98–353 substituted ''In a case under chapter 7 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor, in which case the court shall disapprove such employment if there is an actual conflict of interest.'' for ''In a case under chapter 7 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, but may not, while employed by the trustee, represent, in connection with the case, a creditor.''

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 210 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 326, 328, 330, 331, 1107 of this title; title 28 section 586.

§ 328. Limitation on compensation of professional persons

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for

performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2563; Pub. L. 98–353, title III, § 431, July 10, 1984, 98 Stat. 370.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 328(c) adopts a technical amendment contained in the Senate amendment indicating that an attorney for the debtor in possession is not disqualified for compensation for services and reimbursement of expenses simply because of prior representation of the debtor.

SENATE REPORT NO. 95–989

This section, which is parallel to section 326, fixes the maximum compensation allowable to a professional person employed under section 327. It authorizes the trustee, with the court's approval, to employ professional persons on any reasonable terms, including on a retainer, on an hourly or on a contingent fee basis. Subsection (a) further permits the court to allow compensation different from the compensation provided under the trustee's agreement if the prior agreement proves to have been improvident in light of development unanticipatable at the time of the agreement. The court's power includes the power to increase as well as decrease the agreed upon compensation. This provision is permissive, not mandatory, and should not be used by the court if to do so would violate the code of ethics of the professional involved.

Subsection (b) limits a trustee that has been authorized to serve as his own counsel to only one fee for each service. The purpose of permitting the trustee to serve as his own counsel is to reduce costs. It is not included to provide the trustee with a bonus by permitting him to receive two fees for the same service or to avoid the maxima fixed in section 326. Thus, this subsection requires the court to differentiate between the trustee's services as trustee, and his services as trustee's counsel, and to fix compensation accordingly. Services that a trustee normally performs for an estate without assistance of counsel are to be compensated under the limits fixed in section 326. Only services that he performs that are normally performed by trustee's counsel may be compensated under the maxima imposed by this section.

Subsection (c) permits the court to deny compensation for services and reimbursement of expenses if the professional person is not disinterested or if he represents or holds an interest adverse to the estate on the matter on which he is employed. The subsection provides a penalty for conflicts of interest.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 substituted ''not capable of being anticipated'' for ''unanticipatable''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 326, 330 of this title.

§ 329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

(1) the estate, if the property transferred—

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2564; Pub. L. 98–353, title III, § 432, July 10, 1984, 98 Stat. 370; Pub. L. 99–554, title II, § 257(c), Oct. 27, 1986, 100 Stat. 3114.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section, derived in large part from current Bankruptcy Act section 60d [section 96(d) of former title 11], requires the debtor's attorney to file with the court a statement of the compensation paid or agreed to be paid to the attorney for services in contemplation of and in connection with the case, and the source of the compensation. Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny.

Subsection (b) permits the court to deny compensation to the attorney, to cancel an agreement to pay compensation, or to order the return of compensation paid, if the compensation exceeds the reasonable value of the services provided. The return of payments already made are generally to the trustee for the benefit of the estate. However, if the property would not have come into the estate in any event, the court will order it returned to the entity that made the payment.

The Bankruptcy Commission recommended a provision similar to this that would have also permitted an examination of the debtor's transactions with insiders. S. 236, 94th Cong., 1st sess, sec. 4–311(b) (1975). Its exclusion here is to permit it to be dealt with by the Rules of Bankruptcy Procedure. It is not intended that the provision be deleted entirely, only that the flexibility of the rules is more appropriate for such evidentiary matters.

AMENDMENTS

1986—Subsec. (b)(1)(B). Pub. L. 99–554 inserted reference to chapter 12.

1984—Subsec. (a). Pub. L. 98–353, § 432(a), substituted ''or'' for ''and'' after ''in contemplation of''.

Subsec. (b)(1). Pub. L. 98–353, § 432(b), substituted ''estate'' for ''trustee''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 330, 541 of this title.

§ 330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(b)(1) There shall be paid from the filing fee in a case under chapter 7 of this title $45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States—

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title;

to pay $15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such $15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than $5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the United States Trustee System Fund established by section 589a of title 28.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2564; Pub. L. 98–353, title III, §§ 433, 434, July 10, 1984, 98 Stat. 370; Pub. L. 99–554, title II, §§ 211, 257(f), Oct. 27, 1986, 100 Stat. 3099, 3114; Pub. L. 103–394, title I, § 117, title II, § 224(b), Oct. 22, 1994, 108 Stat. 4119, 4130.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 330(a) contains the standard of compensation adopted in H.R. 8200 as passed by the House rather than the contrary standard contained in the Senate amendment. Attorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However bankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11. Contrary language in the Senate report accompanying S. 2266 is rejected, and *Massachusetts Mutual Life Insurance Company v. Brock*, 405 F.2d 429, 432 (5th Cir. 1968) is overruled. Notions of economy of the estate in fixing

fees are outdated and have no place in a bankruptcy code.

Section 330(a)(2) of the Senate amendment is deleted although the Securities and Exchange Commission retains a right to file an advisory report under section 1109.

Section 330(b) of the Senate amendment is deleted as unnecessary, as the limitations contained therein are covered by section 328(c) of H.R. 8200 as passed by the House and contained in the House amendment.

Section 330(c) of the Senate amendment providing for a trustee to receive a fee of $20 for each estate from the filing fee paid to the clerk is retained as section 330(b) of the House amendment. The section will encourage private trustees to serve in cases under title 11 and in pilot districts will place less of a burden on the U.S. trustee to serve in no-asset cases.

Section 330(b) of H.R. 8200 as passed by the House is retained by the House amendment as section 330(c) [section 15330].

SENATE REPORT NO. 95–989

Section 330 authorizes the court to award compensation for services and reimbursement of expenses of officers of the estate, and other professionals. The compensation is to be reasonable, for economy in administration is the basic objective. Compensation is to be for actual necessary services, based on the time spent, the nature, the extent and the value of the services rendered, and the cost of comparable services in nonbankruptcy cases. There are the criteria that have been applied by the courts as analytic aids in defining ''reasonable'' compensation.

The reference to ''the cost of comparable services'' in a nonbankruptcy case is not intended as a change of existing law. In a bankruptcy case fees are not a matter for private agreement. There is inherent a ''public interest'' that ''must be considered in awarding fees,'' *Massachusetts Mutual Life Insurance Co. v. Brock*, 405 F.2d 429, 432 (C.A.5, 1968), cert. denied, 395 U.S. 906 (1969). An allowance is the result of a balance struck between moderation in the interest of the estate and its security holders and the need to be ''generous enough to encourage'' lawyers and others to render the necessary and exacting services that bankruptcy cases often require. *In re Yale Express System, Inc.*, 366 F.Supp. 1376, 1381 (S.D.N.Y. 1973). The rates for similar kinds of services in private employment is one element, among others, in that balance. Compensation in private employment noted in subsection (a) is a point of reference, not a controlling determinant of what shall be allowed in bankruptcy cases.

One of the major reforms in 1938, especially for reorganization cases, was centralized control over fees in the bankruptcy courts. See *Brown v. Gerdes*, 321 U.S. 178, 182–184 (1944); *Leiman v. Guttman*, 336 U.S. 1, 4–9 (1949). It was intended to guard against a recurrence of ''the many sordid chapters'' in ''the history of fees in corporate reorganizations.'' *Dickinson Industrial Site, Inc. v. Cowan*, 309 U.S. 382, 388 (1940). In the years since then the bankruptcy bar has flourished and prospered, and persons of merit and quality have not eschewed public service in bankruptcy cases merely because bankruptcy courts, in the interest of economy in administration, have not allowed them compensation that may be earned in the private economy of business or the professions. There is no reason to believe that, in generations to come, their successors will be less persuaded by the need to serve in the public interest because of stronger allures of private gain elsewhere.

Subsection (a) provides for compensation of paraprofessionals in order to reduce the cost of administering bankruptcy cases. Paraprofessionals can be employed to perform duties which do not require the full range of skills of a qualified professional. Some courts have not hesitated to recognize paraprofessional services as compensable under existing law. An explicit provision to that effect is useful and constructive.

The last sentence of subsection (a) provides that in the case of a public company—defined in section 1101(3)—the court shall refer, after a hearing, all applications to the Securities and Exchange Commission for a report, which shall be advisory only. In Chapter X cases in which the Commission has appeared, it generally filed reports on fee applications. Usually, courts have accorded the SEC's views substantial weight, as representing the opinion of a disinterested agency skilled and experienced in reorganization affairs. The last sentence intends for the advisory assistance of the Commission to be sought only in case of a public company in reorganization under chapter 11.

Subsection (b) reenacts section 249 of Chapter X of the Bankruptcy Act ([former] 11 U.S.C. 649). It is a codification of equitable principles designed to prevent fiduciaries in the case from engaging in the specified transactions since they are in a position to gain inside information or to shape or influence the course of the reorganization. *Wolf v. Weinstein*, 372 U.S. 633 (1963). The statutory bar of compensation and reimbursement is based on the principle that such transactions involve conflicts of interest. Private gain undoubtedly prompts the purchase or sale of claims or stock interests, while the fiduciary's obligation is to render loyal and disinterested service which his position of trust has imposed upon him. Subsection (b) extends to a trustee, his attorney, committees and their attorneys, or any other persons ''acting in the case in a representative or fiduciary capacity.'' It bars compensation to any of the foregoing, who after assuming to act in such capacity has purchased or sold, directly or indirectly, claims against, or stock in the debtor. The bar is absolute. It makes no difference whether the transaction brought a gain or loss, or neither, and the court is not authorized to approve a purchase or sale, before or after the transaction. The exception is for an acquisition or transfer ''otherwise'' than by a voluntary purchase or sale, such as an acquisition by bequest. See *Otis & Co. v. Insurance Bldg. Corp.*, 110 F.2d 333, 335 (C.A.1, 1940).

Subsection (c) [enacted as (b)] is intended for no asset liquidation cases where minimal compensation for trustees is needed. The sum of $20 will be allowed in each case, which is double the amount provided under current law.

HOUSE REPORT NO. 95–595

Section 330 authorizes compensation for services and reimbursement of expenses of officers of the estate. It also prescribes the standards on which the amount of compensation is to be determined. As noted above, the compensation allowable under this section is subject to the maxima set out in sections 326, 328, and 329. The compensation is to be reasonable, for actual necessary services rendered, based on the time, the nature, the extent, and the value of the services rendered, and on the cost of comparable services other than in a case under the bankruptcy code. The effect of the last provision is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976, as amended 1977), which set an arbitrary limit on fees payable based on the amount of a district judge's salary, and other, similar cases that require fees to be determined based on notions of conservation of the estate and economy of administration. If that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. Bankruptcy fees that are lower than fees in other areas of the legal profession may operate properly when the attorneys appearing in bankruptcy cases do so intermittently, because a low fee in a small segment of a practice can be absorbed by other work. Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.

This subsection provides for reimbursement of actual, necessary expenses. It further provides for com-

pensation of paraprofessionals employed by professional persons employed by the estate of the debtor. The provision is included to reduce the cost of administering bankruptcy cases. In nonbankruptcy areas, attorneys are able to charge for a paraprofessional's time on an hourly basis, and not include it in overhead. If a similar practice does not pertain in bankruptcy cases then the attorney will be less inclined to use paraprofessionals even where the work involved could easily be handled by an attorney's assistant, at much lower cost to the estate. This provision is designed to encourage attorneys to use paraprofessional assistance where possible, and to insure that the estate, not the attorney, will bear the cost, to the benefit of both the estate and the attorneys involved.

REFERENCES IN TEXT

The date of the enactment of the Bankruptcy Reform Act of 1994, referred to in subsec. (b)(2), is the date of enactment of Pub. L. 103–394, which was approved Oct. 22, 1994.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394, § 224(b), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney—

''(1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and

''(2) reimbursement for actual, necessary expenses.''

Subsec. (b). Pub. L. 103–394, § 117, designated existing provisions as par. (1) and added par. (2).

1986—Subsec. (a). Pub. L. 99–554, § 211(1), inserted ''to any parties in interest and to the United States trustee'' after ''notice''.

Subsec. (c). Pub. L. 99–554, § 257(f), inserted reference to chapter 12.

Subsec. (d). Pub. L. 99–554, § 211(2), added subsec. (d).

1984—Subsec. (a). Pub. L. 98–353, § 433(1), struck out ''to any parties in interest and to the United States trustee'' after ''After notice''.

Subsec. (a)(1). Pub. L. 98–353, § 433(2), substituted ''nature, the extent, and the value of such services, the time spent on such services'' for ''time, the nature, the extent, and the value of such services''.

Subsec. (b). Pub. L. 98–353, § 434(a), substituted ''$45'' for ''$20''.

Subsec. (c). Pub. L. 98–353, § 434(b), added subsec. (c).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by section 117 of Pub. L. 103–394 effective Oct. 22, 1994, and applicable with respect to cases commenced under this title before, on, and after Oct. 22, 1994, and amendment by section 224(b) of Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 211 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 326, 331, 503, 1107, 1203 of this title; title 28 sections 586, 589a.

§ 331. Interim compensation

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2564.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 331 permits trustees and professional persons to apply to the court not more than once every 120 days for interim compensation and reimbursement payments. The court may permit more frequent applications if the circumstances warrant, such as in very large cases where the legal work is extensive and merits more frequent payments. The court is authorized to allow and order disbursement to the applicant of compensation and reimbursement that is otherwise allowable under section 330. The only effect of this section is to remove any doubt that officers of the estate may apply for, and the court may approve, compensation and reimbursement during the case, instead of being required to wait until the end of the case, which in some instances, may be years. The practice of interim compensation is followed in some courts today, but has been subject to some question. This section explicitly authorizes it.

This section will apply to professionals such as auctioneers and appraisers only if they are not paid on a per job basis.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 330 of this title.

SUBCHAPTER III—ADMINISTRATION

§ 341. Meetings of creditors and equity security holders

(a) Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.

(b) The United States trustee may convene a meeting of any equity security holders.

(c) The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.

(d) Prior to the conclusion of the meeting of creditors or equity security holders, the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 of this title is aware of—

(1) the potential consequences of seeking a discharge in bankruptcy, including the effects on credit history;

(2) the debtor's ability to file a petition under a different chapter of this title;

(3) the effect of receiving a discharge of debts under this title; and

(4) the effect of reaffirming a debt, including the debtor's knowledge of the provisions of section 524(d) of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2564; Pub. L. 99–554, title II, §212, Oct. 27, 1986, 100 Stat. 3099; Pub. L. 103–394, title I, §115, Oct. 22, 1994, 108 Stat. 4118.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 341(c) of the Senate amendment is deleted and a contrary provision is added indicating that the bankruptcy judge will not preside at or attend the first meeting of creditors or equity security holders but a discharge hearing for all individuals will be held at which the judge will preside.

SENATE REPORT NO. 95–989

Section [Subsection] (a) of this section requires that there be a meeting of creditors within a reasonable time after the order for relief in the case. The Bankruptcy Act [former title 11] and the current Rules of Bankruptcy Procedure provide for a meeting of creditors, and specify the time and manner of the meeting, and the business to be conducted. This bill leaves those matters to the rules. Under section 405(d) of the bill, the present rules will continue to govern until new rules are promulgated. Thus, pending the adoption of different rules, the present procedure for the meeting will continue.

Subsection (b) authorizes the court to order a meeting of equity security holders in cases where such a meeting would be beneficial or useful, for example, in a chapter 11 reorganization case where it may be necessary for the equity security holders to organize in order to be able to participate in the negotiation of a plan of reorganization.

Subsection (c) makes clear that the bankruptcy judge is to preside at the meeting of creditors.

AMENDMENTS

1994—Subsec. (d). Pub. L. 103–394 added subsec. (d).

1986—Subsec. (a). Pub. L. 99–554, §212(1), substituted ''the United States trustee shall convene and preside at a meeting of creditors'' for ''there shall be a meeting of creditors''.

Subsec. (b). Pub. L. 99–554, §212(2), substituted ''United States trustee may convene'' for ''court may order''.

Subsec. (c). Pub. L. 99–554, §212(3), inserted ''including any final meeting of creditors''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

PARTICIPATION BY BANKRUPTCY ADMINISTRATOR AT MEETINGS OF CREDITORS AND EQUITY SECURITY HOLDERS

Section 105 of Pub. L. 103–394 provided that:

''(a) PRESIDING OFFICER.—A bankruptcy administrator appointed under section 302(d)(3)(I) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (28 U.S.C. 581 note; Public Law 99–554; 100 Stat. 3123), as amended by section 317(a) of the Federal Courts Study Committee Implementation Act of 1990 (Public Law 101–650; 104 Stat. 5115), or the bankruptcy administrator's designee may preside at the meeting of creditors convened under section 341(a) of title 11, United States Code. The bankruptcy administrator or the bankruptcy administrator's designee may preside at any meeting of equity security holders convened under section 341(b) of title 11, United States Code.

''(b) EXAMINATION OF THE DEBTOR.—The bankruptcy administrator or the bankruptcy administrator's designee may examine the debtor at the meeting of creditors and may administer the oath required under section 343 of title 11, United States Code.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 343, 702, 705, 1161 of this title.

§ 342. Notice

(a) There shall be given such notice as is appropriate, including notice to any holder of a community claim, of an order for relief in a case under this title.

(b) Prior to the commencement of a case under this title by an individual whose debts are primarily consumer debts, the clerk shall give written notice to such individual that indicates each chapter of this title under which such individual may proceed.

(c) If notice is required to be given by the debtor to a creditor under this title, any rule, any applicable law, or any order of the court, such notice shall contain the name, address, and taxpayer identification number of the debtor, but the failure of such notice to contain such information shall not invalidate the legal effect of such notice.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2565; Pub. L. 98–353, title III, §§302, 435, July 10, 1984, 98 Stat. 352, 370; Pub. L. 103–394, title II, §225, Oct. 22, 1994, 108 Stat. 4131.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 342(b) and (c) of the Senate amendment are adopted in principle but moved to section 549(c), in lieu of section 342(b) of H.R. 8200 as passed by the House.

Section 342(c) of H.R. 8200 as passed by the House is deleted as a matter to be left to the Rules of Bankruptcy Procedure.

SENATE REPORT NO. 95–989

Subsection (a) of section 342 requires the clerk of the bankruptcy court to give notice of the order for relief. The rules will prescribe to whom the notice should be sent and in what manner notice will be given. The rules already prescribe such things, and they will continue to govern unless changed as provided in section 404(a) of the bill. Due process will certainly require notice to all creditors and equity security holders. State and Federal governmental representatives responsible for collecting taxes will also receive notice. In cases where the debtor is subject to regulation, the regulatory agency with jurisdiction will receive notice. In order to insure maximum notice to all parties in interest, the Rules will include notice by publication in appropriate cases and for appropriate issues. Other notices will be given as appropriate.

Subsections (b) and (c) [enacted as section 549(c)] are derived from section 21g of the Bankruptcy Act [section

44(g) of former title 11]. They specify that the trustee may file notice of the commencement of the case in land recording offices in order to give notice of the pendency of the case to potential transferees of the debtor's real property. Such filing is unnecessary in the county in which the bankruptcy case is commenced. If notice is properly filed, a subsequent purchaser of the property will not be a bona fide purchaser. Otherwise, a purchaser, including a purchaser at a judicial sale, that has no knowledge of the case, is not prevented from obtaining the status of a bona fide purchaser by the mere commencement of the case. ''County'' is defined in title 1 of the United States Code to include other political subdivisions where counties are not used.

AMENDMENTS

1994—Subsec. (c). Pub. L. 103–394 added subsec. (c).

1984—Subsec. (a). Pub. L. 98–353, § 435, amended subsec. (a) generally, inserting requirement respecting notice to any holder of a community claim.

Pub. L. 98–353, § 302(1), designated existing provisions as subsec. (a).

Subsec. (b). Pub. L. 98–353, § 302(2), added subsec. (b).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 741, 743, 762, 765 of this title.

§ 343. Examination of the debtor

The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, any trustee or examiner in the case, or the United States trustee may examine the debtor. The United States trustee may administer the oath required under this section.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2565; Pub. L. 98–353, title III, § 436, July 10, 1984, 98 Stat. 370; Pub. L. 99–554, title II, § 213, Oct. 27, 1986, 100 Stat. 3099.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section, derived from section 21a of the Bankruptcy Act [section 44(a) of former title 11], requires the debtor to appear at the meeting of creditors and submit to examination under oath. The purpose of the examination is to enable creditors and the trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge. The scope of the examination under this section will be governed by the Rules of Bankruptcy Procedure, as it is today. See rules 205(d), 10–213(c), and 11–26. It is expected that the scope prescribed by these rules for liquidation cases, that is, ''only the debtor's acts, conduct, or property, or any matter that may affect the administration of the estate, or the debtor's right to discharge'' will remain substantially unchanged. In reorganization cases, the examination would be broader, including inquiry into the liabilities and financial condition of the debtor, the operation of his business, and the desirability of the continuance thereof, and other matters relevant to the case and to the formulation of the plan. Examination of other persons in connection with the bankruptcy case is left completely to the rules, just as examination of witnesses in civil cases is governed by the Federal Rules of Civil Procedure.

AMENDMENTS

1986—Pub. L. 99–554 amended section generally. Prior to amendment, section read as follows: ''The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, or any trustee or examiner in the case may examine the debtor.''

1984—Pub. L. 98–353 substituted ''examine'' for ''examiner''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

PARTICIPATION BY BANKRUPTCY ADMINISTRATOR AT MEETINGS OF CREDITORS AND EQUITY SECURITY HOLDERS

A bankruptcy administrator or the bankruptcy administrator's designee may examine debtor at meeting of creditors and may administer oath required by this section, see section 105 of Pub. L. 103–394, set out as a note under section 341 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1161 of this title.

§ 344. Self-incrimination; immunity

Immunity for persons required to submit to examination, to testify, or to provide information in a case under this title may be granted under part V of title 18.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2565.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Part V [§ 6001 et seq.] of title 18 of the United States Code governs the granting of immunity to witnesses before Federal tribunals. The immunity provided under part V is only use immunity, not transactional immunity. Part V applies to all proceedings before Federal courts, before Federal grand juries, before administrative agencies, and before Congressional committees. It requires the Attorney General or the U. S. attorney to request or to approve any grant of immunity, whether before a court, grand jury, agency, or congressional committee.

This section carries part V over into bankruptcy cases. Thus, for a witness to be ordered to testify before a bankruptcy court in spite of a claim of privilege, the U. S. attorney for the district in which the court sits would have to request from the district court for that district the immunity order. The rule would apply to both debtors, creditors, and any other witnesses in a bankruptcy case. If the immunity were granted, the witness would be required to testify. If not, he could claim the privilege against self-incrimination.

Part V is a significant departure from current law. Under section 7a(10) of the Bankruptcy Act [section

25(a)(10) of former title 11], a debtor is required to testify in all circumstances, but any testimony he gives may not be used against him in any criminal proceeding, except testimony given in any hearing on objections to discharge. With that exception, section 7a(10) amounts to a blanket grant of use immunity to all debtors. Immunity for other witnesses in bankruptcy courts today is governed by part V of title 18.

The consequences of a claim of privileges by a debtor under proposed law and under current law differ as well. Under section 14c(6) of current law [section 32(c)(6) of former title 11], any refusal to answer a material question approved by the court will result in the denial of a discharge, even if the refusal is based on the privilege against self incrimination. Thus, the debtor is confronted with the choice between losing his discharge and opening himself up to possible criminal prosecution.

Under section 727(a)(6) of the proposed title 11, a debtor is only denied a discharge if he refuses to testify after having been granted immunity. If the debtor claims the privilege and the U. S. attorney does not request immunity from the district courts, then the debtor may refuse to testify and still retain his right to a discharge. It removes the Scylla and Charibdis choice for debtors that exists under the Bankruptcy Act [former title 11].

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 521, 901 of this title.

§ 345. Money of estates

(a) A trustee in a case under this title may make such deposit or investment of the money of the estate for which such trustee serves as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment.

(b) Except with respect to a deposit or investment that is insured or guaranteed by the United States or by a department, agency, or instrumentality of the United States or backed by the full faith and credit of the United States, the trustee shall require from an entity with which such money is deposited or invested—

(1) a bond—

(A) in favor of the United States;

(B) secured by the undertaking of a corporate surety approved by the United States trustee for the district in which the case is pending; and

(C) conditioned on—

(i) a proper accounting for all money so deposited or invested and for any return on such money;

(ii) prompt repayment of such money and return; and

(iii) faithful performance of duties as a depository; or

(2) the deposit of securities of the kind specified in section 9303 of title 31;

unless the court for cause orders otherwise.

(c) An entity with which such moneys are deposited or invested is authorized to deposit or invest such moneys as may be required under this section.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2565; Pub. L. 97–258, § 3(c), Sept. 13, 1982, 96 Stat. 1064; Pub. L. 98–353, title III, § 437, July 10, 1984, 98 Stat. 370; Pub. L. 99–554, title II, § 214, Oct. 27, 1986, 100 Stat. 3099; Pub. L. 103–394, title II, § 210, Oct. 22, 1994, 108 Stat. 4125.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment moves section 345(c) of the House bill to chapter 15 as part of the pilot program for the U.S. trustees. The bond required by section 345(b) may be a blanket bond posted by the financial depository sufficient to cover deposits by trustees in several cases, as is done under current law.

SENATE REPORT NO. 95–989

This section is a significant departure from section 61 of the Bankruptcy Act [section 101 of former title 11]. It permits a trustee in a bankruptcy case to make such deposit of investment of the money of the estate for which he serves as will yield the maximum reasonable net return on the money, taking into account the safety of such deposit or investment. Under current law, the trustee is permitted to deposit money only with banking institutions. Thus, the trustee is generally unable to secure a high rate of return on money of estates pending distribution, to the detriment of creditors. Under this section, the trustee may make deposits in savings and loans, may purchase government bonds, or make such other deposit or investment as is appropriate. Under proposed 11 U.S.C. 541(a)(6), and except as provided in subsection (c) of this section, any interest or gain realized on the deposit or investment of funds under this section will become property of the estate, and will thus enhance the recovery of creditors.

In order to protect the creditors, subsection (b) requires certain precautions against loss of the money so deposited or invested. The trustee must require from a person with which he deposits or invests money of an estate a bond in favor of the United States secured by approved corporate surety and conditioned on a proper accounting for all money deposited or invested and for any return on such money. Alternately, the trustee may require the deposit of securities of the kind specified in section 15 of title 6 of the United States Code [31 U.S.C. 9303], which governs the posting of security by banks that receive public moneys on deposit. These bonding requirements do not apply to deposits or investments that are insured or guaranteed the United States or a department, agency, or instrumentality of the United States, or that are backed by the full faith and credit of the United States.

These provisions do not address the question of aggregation of funds by a private chapter 13 trustee and are not to be construed as excluding such possibility. The Rules of Bankruptcy Procedure may provide for aggregation under appropriate circumstances and adequate safeguards in cases where there is a significant need, such as in districts in which there is a standing chapter 13 trustee. In such case, the interest or return on the funds would help defray the cost of administering the cases in which the standing trustee serves.

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394 substituted semicolon for period at end of par. (2) and inserted concluding provisions after par. (2).

1986—Subsec. (b). Pub. L. 99–554 amended subsec. (b) generally, substituting ''approved by the United States trustee for the district'' for ''approved by the court for the district'' in par. (1)(B).

1984—Subsec. (c). Pub. L. 98–353 added subsec. (c).

1982—Subsec. (b)(2). Pub. L. 97–258 substituted ''section 9303 of title 31'' for ''section 15 of title 6''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district in-

volved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 28 section 586.

§ 346. Special tax provisions

(a) Except to the extent otherwise provided in this section, subsections (b), (c), (d), (e), (g), (h), (i), and (j) of this section apply notwithstanding any State or local law imposing a tax, but subject to the Internal Revenue Code of 1986.

(b)(1) In a case under chapter 7, 12, or 11 of this title concerning an individual, any income of the estate may be taxed under a State or local law imposing a tax on or measured by income only to the estate, and may not be taxed to such individual. Except as provided in section 728 of this title, if such individual is a partner in a partnership, any gain or loss resulting from a distribution of property from such partnership, or any distributive share of income, gain, loss, deduction, or credit of such individual that is distributed, or considered distributed, from such partnership, after the commencement of the case is gain, loss, income, deduction, or credit, as the case may be, of the estate.

(2) Except as otherwise provided in this section and in section 728 of this title, any income of the estate in such a case, and any State or local tax on or measured by such income, shall be computed in the same manner as the income and the tax of an estate.

(3) The estate in such a case shall use the same accounting method as the debtor used immediately before the commencement of the case.

(c)(1) The commencement of a case under this title concerning a corporation or a partnership does not effect a change in the status of such corporation or partnership for the purposes of any State or local law imposing a tax on or measured by income. Except as otherwise provided in this section and in section 728 of this title, any income of the estate in such case may be taxed only as though such case had not been commenced.

(2) In such a case, except as provided in section 728 of this title, the trustee shall make any tax return otherwise required by State or local law to be filed by or on behalf of such corporation or partnership in the same manner and form as such corporation or partnership, as the case may be, is required to make such return.

(d) In a case under chapter 13 of this title, any income of the estate or the debtor may be taxed under a State or local law imposing a tax on or measured by income only to the debtor, and may not be taxed to the estate.

(e) A claim allowed under section 502(f) or 503 of this title, other than a claim for a tax that is not otherwise deductible or a capital expenditure that is not otherwise deductible, is deductible by the entity to which income of the estate is taxed unless such claim was deducted by another entity, and a deduction for such a claim is deemed to be a deduction attributable to a business.

(f) The trustee shall withhold from any payment of claims for wages, salaries, commissions, dividends, interest, or other payments, or collect, any amount required to be withheld or collected under applicable State or local tax law, and shall pay such withheld or collected amount to the appropriate governmental unit at the time and in the manner required by such tax law, and with the same priority as the claim from which such amount was withheld was paid.

(g)(1) Neither gain nor loss shall be recognized on a transfer—

(A) by operation of law, of property to the estate;

(B) other than a sale, of property from the estate to the debtor; or

(C) in a case under chapter 11 or 12 of this title concerning a corporation, of property from the estate to a corporation that is an affiliate participating in a joint plan with the debtor, or that is a successor to the debtor under the plan, except that gain or loss may be recognized to the same extent that such transfer results in the recognition of gain or loss under section 371[1] of the Internal Revenue Code of 1986.

(2) The transferee of a transfer of a kind specified in this subsection shall take the property transferred with the same character, and with the transferor's basis, as adjusted under subsection (j)(5) of this section, and holding period.

(h) Notwithstanding sections 728(a) and 1146(a) of this title, for the purpose of determining the number of taxable periods during which the debtor or the estate may use a loss carryover or a loss carryback, the taxable period of the debtor during which the case is commenced is deemed not to have been terminated by such commencement.

(i)(1) In a case under chapter 7, 12, or 11 of this title concerning an individual, the estate shall succeed to the debtor's tax attributes, including—

(A) any investment credit carryover;
(B) any recovery exclusion;
(C) any loss carryover;
(D) any foreign tax credit carryover;
(E) any capital loss carryover; and
(F) any claim of right.

(2) After such a case is closed or dismissed, the debtor shall succeed to any tax attribute to which the estate succeeded under paragraph (1) of this subsection but that was not utilized by the estate. The debtor may utilize such tax attributes as though any applicable time limitations on such utilization by the debtor were suspended during the time during which the case was pending.

(3) In such a case, the estate may carry back any loss of the estate to a taxable period of the debtor that ended before the order for relief under such chapter the same as the debtor could have carried back such loss had the debtor incurred such loss and the case under this title had not been commenced, but the debtor may not carry back any loss of the debtor from a tax-

[1] See References in Text note below.

able period that ends after such order to any taxable period of the debtor that ended before such order until after the case is closed.

(j)(1) Except as otherwise provided in this subsection, income is not realized by the estate, the debtor, or a successor to the debtor by reason of forgiveness or discharge of indebtedness in a case under this title.

(2) For the purposes of any State or local law imposing a tax on or measured by income, a deduction with respect to a liability may not be allowed for any taxable period during or after which such liability is forgiven or discharged under this title. In this paragraph, ''a deduction with respect to a liability'' includes a capital loss incurred on the disposition of a capital asset with respect to a liability that was incurred in connection with the acquisition of such asset.

(3) Except as provided in paragraph (4) of this subsection, for the purpose of any State or local law imposing a tax on or measured by income, any net operating loss of an individual or corporate debtor, including a net operating loss carryover to such debtor, shall be reduced by the amount of indebtedness forgiven or discharged in a case under this title, except to the extent that such forgiveness or discharge resulted in a disallowance under paragraph (2) of this subsection.

(4) A reduction of a net operating loss or a net operating loss carryover under paragraph (3) of this subsection or of basis under paragraph (5) of this subsection is not required to the extent that the indebtedness of an individual or corporate debtor forgiven or discharged—

(A) consisted of items of a deductible nature that were not deducted by such debtor; or

(B) resulted in an expired net operating loss carryover or other deduction that—

(i) did not offset income for any taxable period; and

(ii) did not contribute to a net operating loss in or a net operating loss carryover to the taxable period during or after which such indebtedness was discharged.

(5) For the purposes of a State or local law imposing a tax on or measured by income, the basis of the debtor's property or of property transferred to an entity required to use the debtor's basis in whole or in part shall be reduced by the lesser of—

(A)(i) the amount by which the indebtedness of the debtor has been forgiven or discharged in a case under this title; minus

(ii) the total amount of adjustments made under paragraphs (2) and (3) of this subsection; and

(B) the amount by which the total basis of the debtor's assets that were property of the estate before such forgiveness or discharge exceeds the debtor's total liabilities that were liabilities both before and after such forgiveness or discharge.

(6) Notwithstanding paragraph (5) of this subsection, basis is not required to be reduced to the extent that the debtor elects to treat as taxable income, of the taxable period in which indebtedness is forgiven or discharged, the amount of indebtedness forgiven or discharged that otherwise would be applied in reduction of basis under paragraph (5) of this subsection.

(7) For the purposes of this subsection, indebtedness with respect to which an equity security, other than an interest of a limited partner in a limited partnership, is issued to the creditor to whom such indebtedness was owed, or that is forgiven as a contribution to capital by an equity security holder other than a limited partner in the debtor, is not forgiven or discharged in a case under this title—

(A) to any extent that such indebtedness did not consist of items of a deductible nature; or

(B) if the issuance of such equity security has the same consequences under a law imposing a tax on or measured by income to such creditor as a payment in cash to such creditor in an amount equal to the fair market value of such equity security, then to the lesser of—

(i) the extent that such issuance has the same such consequences; and

(ii) the extent of such fair market value.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2565; Pub. L. 98–353, title III, § 438, July 10, 1984, 98 Stat. 370; Pub. L. 99–554, title II, §§ 257(g), 283(c), Oct. 27, 1986, 100 Stat. 3114, 3116; Pub. L. 103–394, title V, § 501(d)(4), Oct. 22, 1994, 108 Stat. 4143.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 346 of the House amendment, together with sections 728 and 1146, represent special tax provisions applicable in bankruptcy. The policy contained in those sections reflects the policy that should be applied in Federal, State, and local taxes in the view of the House Committee on the Judiciary. The House Ways and Means Committee and the Senate Finance Committee did not have time to process a bankruptcy tax bill during the 95th Congress. It is anticipated that early in the 96th Congress, and before the effective date of the bankruptcy code [Oct. 1, 1979], the tax committees of Congress will have an opportunity to consider action with respect to amendments to the Internal Revenue Code [title 26] and the special tax provisions in title 11. Since the special tax provisions are likely to be amended during the first part of the 96th Congress, it is anticipated that the bench and bar will also study and comment on these special tax provisions prior to their revision.

Special tax provisions: State and local rules. This section provides special tax provisions dealing with the treatment, under State or local, but not Federal, tax law, of the method of taxing bankruptcy estates of individuals, partnerships, and corporations; survival and allocation of tax attributes between the bankrupt and the estate; return filing requirements; and the tax treatment of income from discharge of indebtedness. The Senate bill removed these rules pending adoption of Federal rules on these issues in the next Congress. The House amendment returns the State and local tax rules to section 346 so that they may be studied by the bankruptcy and tax bars who may wish to submit comments to Congress.

Withholding rules: Both the House bill and Senate amendment provide that the trustee is required to comply with the normal withholding rules applicable to the payment of wages and other payments. The House amendment retains this rule for State and local taxes only. The treatment of withholding of Federal taxes will be considered in the next Congress.

Section 726 of the Senate amendment provides that the rule requiring pro rata payment of all expenses within a priority category does not apply to the payment of amounts withheld by a bankruptcy trustee. The purpose of this rule was to insure that the trustee

pay the full amount of the withheld taxes to the appropriate governmental tax authority. The House amendment deletes this rule as unnecessary because the existing practice conforms essentially to that rule. If the trustee fails to pay over in full amounts that he withheld, it is a violation of his trustee's duties which would permit the taxing authority to sue the trustee on his bond.

When taxes considered ''incurred'': The Senate amendment contained rules of general application dealing with when a tax is ''incurred'' for purposes of the various tax collection rules affecting the debtor and the estate. The House amendment adopts the substance of these rules and transfers them to section 507 of title 11.

Penalty for failure to pay tax: The Senate amendment contains a rule which relieves the debtor and the trustee from certain tax penalties for failure to make timely payment of a tax to the extent that the bankruptcy rules prevent the trustee or the debtor from paying the tax on time. Since most of these penalties relate to Federal taxes, the House amendment deletes these rules pending consideration of Federal tax rules affecting bankruptcy in the next Congress.

SENATE REPORT NO. 95–989

Subsection (a) indicates that subsections (b), (c), (d), (e), (g), (h), (i), and (j) apply notwithstanding any State or local tax law, but are subject to Federal tax law.

Subsection (b)(1) provides that in a case concerning an individual under chapter 7 or 11 of title 11, income of the estate is taxable only to the estate and not to the debtor. The second sentence of the paragraph provides that if such individual is a partner, the tax attributes of the partnership are distributable to the partner's estate rather than to the partner, except to the extent that section 728 of title 11 provides otherwise.

Subsection (b)(2) states a general rule that the estate of an individual is to be taxed as an estate. The paragraph is made subject to the remainder of section 346 and section 728 of title 11.

Subsection (b)(3) requires the accounting method, but not necessarily the accounting period, of the estate to be the same as the method used by the individual debtor.

Subsection (c)(1) states a general rule that the estate of a partnership or a corporated debtor is not a separate entity for tax purposes. The income of the debtor is to be taxed as if the case were not commenced, except as provided in the remainder of section 346 and section 728.

Subsection (c)(2) requires the trustee, except as provided in section 728 of title 11, to file all tax returns on behalf of the partnership or corporation during the case.

Subsection (d) indicates that the estate in a chapter 13 case is not a separate taxable entity and that all income of the estate is to be taxed to the debtor.

Subsection (e) establishes a business deduction consisting of allowed expenses of administration except for tax or capital expenses that are not otherwise deductible. The deduction may be used by the estate when it is a separate taxable entity or by the entity to which the income of the estate is taxed when it is not.

Subsection (f) imposes a duty on the trustee to comply with any Federal, State, or local tax law requiring withholding or collection of taxes from any payment of wages, salaries, commissions, dividends, interest, or other payments. Any amount withheld is to be paid to the taxing authority at the same time and with the same priority as the claim from which such amount withheld was paid.

Subsection (g)(1)(A) indicates that neither gain nor loss is recognized on the transfer by law of property from the debtor or a creditor to the estate. Subparagraph (B) provides a similar policy if the property of the estate is returned from the estate to the debtor other than by a sale of property to debtor. Subparagraph (C) also provides for nonrecognition of gain or loss in a case under chapter 11 if a corporate debtor transfers property to a successor corporation or to an affiliate under a joint plan. An exception is made to enable a taxing authority to cause recognition of gain or loss to the extent provided in IRC [title 26] section 371 (as amended by section 109 of this bill).

Subsection (g)(2) provides that any of the three kinds of transferees specified in paragraph (1) take the property with the same character, holding period, and basis in the hands of the transferor at the time of such transfer. The transferor's basis may be adjusted under section 346(j)(5) even if the discharge of indebtedness occurs after the transfer of property. Of course, no adjustment will occur if the transfer is from the debtor to the estate or if the transfer is from an entity that is not discharged.

Subsection (h) provides that the creation of the estate of an individual under chapter 7 or 11 of title 11 as a separate taxable entity does not affect the number of taxable years for purposes of computing loss carryovers or carrybacks. The section applies with respect to carryovers or carrybacks of the debtor transferred into the estate under section 346(i)(1) of title 11 or back to the debtor under section 346(i)(2) of title 11.

Subsection (i)(1) states a general rule that an estate that is a separate taxable entity nevertheless succeeds to all tax attributes of the debtor. The six enumerated attributes are illustrative and not exhaustive.

Subsection (i)(2) indicates that attributes passing from the debtor into an estate that is a separate taxable entity will return to the debtor if unused by the estate. The debtor is permitted to use any such attribute as though the case had not been commenced.

Subsection (i)(3) permits an estate that is a separate taxable entity to carryback losses of the estate to a taxable period of the debtor that ended before the case was filed. The estate is treated as if it were the debtor with respect to time limitations and other restrictions. The section makes clear that the debtor may not carryback any loss of his own from a tax year during the pendency of the case to such a period until the case is closed. No tolling of any period of limitation is provided with respect to carrybacks by the debtor of postpetition losses.

Subsection (j) sets forth seven special rules treating with the tax effects of forgiveness or discharge of indebtedness. The terms ''forgiveness'' and ''discharge'' are redundant, but are used to clarify that ''discharge'' in the context of a special tax provision in title 11 includes forgiveness of indebtedness whether or not such indebtedness is ''discharged'' in the bankruptcy sense.

Paragraph (1) states the general rule that forgiveness of indebtedness is not taxable except as otherwise provided in paragraphs (2)–(7). The paragraph is patterned after sections 268, 395, and 520 of the Bankruptcy Act [sections 668, 795, and 920 of former title 11].

Paragraph (2) disallows deductions for liabilities of a deductible nature in any year during or after the year of cancellation of such liabilities. For the purposes of this paragraph, ''a deduction with respect to a liability'' includes a capital loss incurred on the disposition of a capital asset with respect to a liability that was incurred in connection with the acquisition of such asset.

Paragraph (3) causes any net operating loss of a debtor that is an individual or corporation to be reduced by any discharge of indebtedness except as provided in paragraphs (2) or (4). If a deduction is disallowed under paragraph (2), then no double counting occurs. Thus, paragraph (3) will reflect the reduction of losses by liabilities that have been forgiven, including deductible liabilities or nondeductible liabilities such as repayment of principal on borrowed funds.

Paragraph (4) specifically excludes two kinds of indebtedness from reduction of net operating losses under paragraph (3) or from reduction of basis under paragraph (5). Subparagraph (A) excludes items of a deductible nature that were not deducted or that could not be deducted such as gambling losses or liabilities for interest owed to a relative of the debtor. Subparagraph

(B) excludes indebtedness of a debtor that is an individual or corporation that resulted in deductions which did not offset income and that did not contribute to an unexpired net operating loss or loss carryover. In these situations, the debtor has derived no tax benefit so there is no need to incur an offsetting reduction.

Paragraph (5) provides a two-point test for reduction of basis. The paragraph replaces sections 270, 396, and 522 of the Bankruptcy Act [sections 670, 796, and 922 of former title 11]. Subparagraph (A) sets out the maximum amount by which basis may be reduced—the total indebtedness forgiven less adjustments made under paragraphs (2) and (3). This avoids double counting. If a deduction is disallowed under paragraph (2) or a carryover is reduced under paragraph (3) then the tax benefit is neutralized, and there is no need to reduce basis. Subparagraph (B) reduces basis to the extent the debtor's total basis of assets before the discharge exceeds total preexisting liabilities still remaining after discharge of indebtedness. This is a ''basis solvency'' limitation which differs from the usual test of solvency because it measures against the remaining liabilities the benefit aspect of assets, their basis, rather than their value. Paragraph (5) applies so that any transferee of the debtor's property who is required to use the debtor's basis takes the debtor's basis reduced by the lesser of (A) and (B). Thus, basis will be reduced, but never below a level equal to undischarged liabilities.

Paragraph (6) specifies that basis need not be reduced under paragraph (5) to the extent the debtor treats discharged indebtedness as taxable income. This permits the debtor to elect whether to recognize income, which may be advantageous if the debtor anticipates subsequent net operating losses, rather than to reduce basis.

Paragraph (7) establishes two rules excluding from the category of discharged indebtedness certain indebtedness that is exchanged for an equity security issued under a plan or that is forgiven as a contribution to capital by an equity security holder. Subparagraph (A) creates the first exclusion to the extent indebtedness consisting of items not of a deductible nature is exchanged for an equity security, other than the interests of a limited partner in a limited partnership, issued by the debtor or is forgiven as a contribution to capital by an equity security holder. Subparagraph (B) excludes indebtedness consisting of items of a deductible nature, if the exchange of stock for debts has the same effect as a cash payment equal to the value of the equity security, in the amount of the fair market value of the equity security or, if less, the extent to which such exchange has such effect. The two provisions treat the debtor as if it had originally issued stock instead of debt. Subparagraph (B) rectifies the inequity under current law between a cash basis and accrual basis debtor concerning the issuance of stock in exchange for previous services rendered that were of a greater value than the stock. Subparagraph (B) also changes current law by taxing forgiveness of indebtedness to the extent that stock is exchanged for the accrued interest component of a security, because the recipient of such stock would not be regarded as having received money under the *Carman* doctrine.

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (a), is classified generally to Title 26, Internal Revenue Code.

Section 371 of the Internal Revenue Code of 1986, referred to in subsec. (g)(1)(C), was repealed by Pub. L. 101–508, title XI, §11801(a)(19), Nov. 5, 1990, 104 Stat. 1388–521.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394, §504(d)(4)(A), substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.)''.

Subsec. (g)(1)(C). Pub. L. 103–394, §501(d)(4)(B), substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954 (26 U.S.C. 371)''.

1986—Subsec. (b)(1). Pub. L. 99–554, §257(g)(1), inserted reference to chapter 12.

Subsec. (g)(1)(C). Pub. L. 99–554, §257(g)(2), inserted reference to chapter 12.

Subsec. (i)(1). Pub. L. 99–554, §257(g)(3), inserted reference to chapter 12.

Subsec. (j)(7). Pub. L. 99–554, §283(c), substituted ''owed'' for ''owned''.

1984—Subsec. (c)(2). Pub. L. 98–353 substituted ''corporation'' for ''operation''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 1146, 1231 of this title.

§ 347. Unclaimed property

(a) Ninety days after the final distribution under section 726, 1226, or 1326 of this title in a case under chapter 7, 12, or 13 of this title, as the case may be, the trustee shall stop payment on any check remaining unpaid, and any remaining property of the estate shall be paid into the court and disposed of under chapter 129 of title 28.

(b) Any security, money, or other property remaining unclaimed at the expiration of the time allowed in a case under chapter 9, 11, or 12 of this title for the presentation of a security or the performance of any other act as a condition to participation in the distribution under any plan confirmed under section 943(b), 1129, 1173, or 1225 of this title, as the case may be, becomes the property of the debtor or of the entity acquiring the assets of the debtor under the plan, as the case may be.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2568; Pub. L. 99–554, title II, §257(h), Oct. 27, 1986, 100 Stat. 3114.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 347(a) of the House amendment adopts a comparable provision contained in the Senate amendment instructing the trustee to stop payment on any check remaining unpaid more than 90 days after the final distribution in a case under Chapter 7 or 13. Technical changes are made in section 347(b) to cover distributions in a railroad reorganization.

SENATE REPORT NO. 95–989

Section 347 is derived from Bankruptcy Act §66 [section 106 of former title 11]. Subsection (a) requires the

trustee to stop payment on any distribution check that is unpaid 90 days after the final distribution in a case under chapter 7 or 13. The unclaimed funds, and any other property of the estate are paid into the court and disposed of under chapter 129 [§ 2041 et seq.] of title 28, which requires the clerk of court to hold the funds for their owner for 5 years, after which they escheat to the Treasury.

Subsection (b) specifies that any property remaining unclaimed at the expiration of the time allowed in a chapter 9 or 11 case for presentation (exchange) of securities or the performance of any other act as a condition to participation in the plan reverts to the debtor or the entity acquiring the assets of the debtor under the plan. Conditions to participation under a plan include such acts as cashing a check, surrendering securities for cancellation, and so on. Similar provisions are found in sections 96(d) and 205 of current law [sections 416(d) and 605 of former title 11].

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–554, § 257(h)(1), inserted references to section 1226 and chapter 12 of this title.

Subsec. (b). Pub. L. 99–554, § 257(h)(2), inserted references to chapter 12 and section 1225 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 901 of this title.

§ 348. Effect of conversion

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

(b) Unless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 728(a), 728(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1146(a), 1146(b), 1201(a), 1221, 1228(a), 1301(a), and 1305(a) of this title, ''the order for relief under this chapter'' in a chapter to which a case has been converted under section 706, 1112, 1208, or 1307 of this title means the conversion of such case to such chapter.

(c) Sections 342 and 365(d) of this title apply in a case that has been converted under section 706, 1112, 1208, or 1307 of this title, as if the conversion order were the order for relief.

(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

(e) Conversion of a case under section 706, 1112, 1208, or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion.

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

(2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2568; Pub. L. 99–554, title II, § 257(i), Oct. 27, 1986, 100 Stat. 3115; Pub. L. 103–394, title III, § 311, title V, § 501(d)(5), Oct. 22, 1994, 108 Stat. 4138, 4144.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts section 348(b) of the Senate amendment with slight modifications, as more accurately reflecting sections to which this particular effect of conversion should apply.

Section 348(e) of the House amendment is a stylistic revision of similar provisions contained in H.R. 8200 as passed by the House and in the Senate amendment. Termination of services is expanded to cover any examiner serving in the case before conversion, as done in H.R. 8200 as passed by the House.

SENATE REPORT NO. 95–989

This section governs the effect of the conversion of a case from one chapter of the bankruptcy code to another chapter. Subsection (a) specifies that the date of the filing of the petition, the commencement of the case, or the order for relief are unaffected by conversion, with some exceptions specified in subsections (b) and (c).

Subsection (b) lists certain sections in the operative chapters of the bankruptcy code in which there is a reference to ''the order for relief under this chapter.'' In those sections, the reference is to be read as a reference to the conversion order if the case has been converted into the particular chapter. Subsection (c) specifies that notice is to be given of the conversion order the same as notice was given of the order for relief, and that the time the trustee (or debtor in possession) has for assuming or rejecting executory contracts recommences, thus giving an opportunity for a newly appointed trustee to familiarize himself with the case.

Subsection (d) provides for special treatment of claims that arise during chapter 11 or 13 cases before the case is converted to a liquidation case. With the exception of claims specified in proposed 11 U.S.C. 503(b) (administrative expenses), preconversion claims are treated the same as prepetition claims.

Subsection (e) provides that conversion of a case terminates the service of any trustee serving in the case prior to conversion.

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394, § 501(d)(5), substituted ''1201(a), 1221, 1228(a), 1301(a), and 1305(a)'' for ''1301(a), 1305(a), 1201(a), 1221, and 1228(a)'' and ''1208, or 1307'' for ''1307, or 1208''.

Subsecs. (c) to (e). Pub. L. 103–394, § 501(d)(5)(B), substituted ''1208, or 1307'' for ''1307, or 1208''.

Subsec. (f). Pub. L. 103–394, § 311, added subsec. (f).

1986—Subsec. (b). Pub. L. 99–554, § 257(i)(1), substituted references to sections 1201(a), 1221, and 1228(a) of this

title for reference to section 1328(a) of this title, and inserted reference to section 1208 of this title.

Subsecs. (c) to (e). Pub. L. 99–554, § 257(i)(2), (3), inserted reference to section 1208 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 101 of this title.

§ 349. Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2569; Pub. L. 98–353, title III, § 303, July 10, 1984, 98 Stat. 352; Pub. L. 103–394, title V, § 501(d)(6), Oct. 22, 1994, 108 Stat. 4144.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 349(b)(2) of the House amendment adds a cross reference to section 553 to reflect the new right of recovery of setoffs created under that section. Corresponding changes are made throughout the House amendment.

SENATE REPORT NO. 95–989

Subsection (a) specifies that unless the court for cause orders otherwise, the dismissal of a case is without prejudice. The debtor is not barred from receiving a discharge in a later case of debts that were dischargeable in the case dismissed. Of course, this subsection refers only to pre-discharge dismissals. If the debtor has already received a discharge and it is not revoked, then the debtor would be barred under section 727(a) from receiving a discharge in a subsequent liquidation case for six years. Dismissal of an involuntary on the merits will generally not give rise to adequate cause so as to bar the debtor from further relief.

Subsection (b) specifies that the dismissal reinstates proceedings or custodianships that were superseded by the bankruptcy case, reinstates avoided transfers, reinstates voided liens, vacates any order, judgment, or transfer ordered as a result of the avoidance of a transfer, and revests the property of the estate in the entity in which the property was vested at the commencement of the case. The court is permitted to order a different result for cause. The basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case. This does not necessarily encompass undoing sales of property from the estate to a good faith purchaser. Where there is a question over the scope of the subsection, the court will make the appropriate orders to protect rights acquired in reliance on the bankruptcy case.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394 substituted ''109(g)'' for ''109(f)''.

1984—Subsec. (a). Pub. L. 98–353 inserted ''; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) of this title''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 901 of this title.

§ 350. Closing and reopening cases

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2569; Pub. L. 98–353, title III, § 439, July 10, 1984, 98 Stat. 370.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) requires the court to close a bankruptcy case after the estate is fully administered and the trustee discharged. The Rules of Bankruptcy Procedure will provide the procedure for case closing. Subsection (b) permits reopening of the case to administer assets, to accord relief to the debtor, or for other cause. Though the court may permit reopening of a case so that the trustee may exercise an avoiding power, laches may constitute a bar to an action that has been delayed too long. The case may be reopened in the court in which it was closed. The rules will prescribe the procedure by which a case is reopened and how it will be conducted after reopening.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353 substituted ''A'' for ''a''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 554, 703, 901 of this title.

SUBCHAPTER IV—ADMINISTRATIVE POWERS

§ 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2569; Pub. L. 98–353, title III, § 440, July 10, 1984, 98 Stat. 370.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 361 of the House amendment represents a compromise between H.R. 8200 as passed by the House and the Senate amendment regarding the issue of ''adequate protection'' of a secured party. The House amendment deletes the provision found in section 361(3) of H.R. 8200 as passed by the House. It would have permitted adequate protection to be provided by giving the secured party an administrative expense regarding any decrease in the value of such party's collateral. In every case there is the uncertainty that the estate will have sufficient property to pay administrative expenses in full.

Section 361(4) of H.R. 8200 as passed by the House is modified in section 361(3) of the House amendment to indicate that the court may grant other forms of adequate protection, other than an administrative expense, which will result in the realization by the secured creditor of the indubitable equivalent of the creditor's interest in property. In the special instance where there is a reserve fund maintained under the security agreement, such as in the typical bondholder case, indubitable equivalent means that the bondholders would be entitled to be protected as to the reserve fund, in addition to the regular payments needed to service the debt. Adequate protection of an interest of an entity in property is intended to protect a creditor's allowed secured claim. To the extent the protection proves to be inadequate after the fact, the creditor is entitled to a first priority administrative expense under section 503(b).

In the special case of a creditor who has elected application of creditor making an election under section 1111(b)(2), that creditor is entitled to adequate protection of the creditor's interest in property to the extent of the value of the collateral not to the extent of the creditor's allowed secured claim, which is inflated to cover a deficiency as a result of such election.

SENATE REPORT NO. 95–989

Sections 362, 363, and 364 require, in certain circumstances, that the court determine in noticed hearings whether the interest of a secured creditor or co-owner of property with the debtor is adequately protected in connection with the sale or use of property. The interests of which the court may provide protection in the ways described in this section include equitable as well as legal interests. For example, a right to enforce a pledge and a right to recover property delivered to a debtor under a consignment agreement or an agreement of sale or return are interests that may be entitled to protection. This section specifies means by which adequate protection may be provided but, to avoid placing the court in an administrative role, does not require the court to provide it. Instead, the trustee or debtor in possession or the creditor will provide or propose a protection method. If the party that is affected by the proposed action objects, the court will determine whether the protection provided is adequate. The purpose of this section is to illustrate means by which it may be provided and to define the limits of the concept.

The concept of adequate protection is derived from the fifth amendment protection of property interests as enunciated by the Supreme Court. See *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

Subsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case. The commencement or continuation, including the issuance of process, of a judicial, administrative or other proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case is stayed under paragraph (1). The scope of this paragraph is broad. All proceedings are stayed, including arbitration, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions and all proceedings even if they are not before governmental tribunals.

The stay is not permanent. There is adequate provision for relief from the stay elsewhere in the section. However, it is important that the trustee have an opportunity to inventory the debtor's position before proceeding with the administration of the case. Undoubtedly the court will lift the stay for proceedings before specialized or nongovernmental tribunals to allow those proceedings to come to a conclusion. Any party desiring to enforce an order in such a proceeding would thereafter have to come before the bankruptcy court to collect assets. Nevertheless, it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.

Paragraph (2) stays the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the bankruptcy case. Thus, execution and levy against the debtors' prepetition property are stayed, and attempts to collect a judgment from the debtor personally are stayed.

Paragraph (3) stays any act to obtain possession of property of the estate (that is, property of the debtor

as of the date of the filing of the petition) or property from the estate (property over which the estate has control or possession). The purpose of this provision is to prevent dismemberment of the estate. Liquidation must proceed in an orderly fashion. Any distribution of property must be by the trustee after he has had an opportunity to familiarize himself with the various rights and interests involved and with the property available for distribution.

Paragraph (4) stays lien creation against property of the estate. Thus, taking possession to perfect a lien or obtaining court process is prohibited. To permit lien creation after bankruptcy would give certain creditors preferential treatment by making them secured instead of unsecured.

Paragraph (5) stays any act to create or enforce a lien against property of the debtor, that is, most property that is acquired after the date of the filing of the petition, property that is exempted, or property that does not pass to the estate, to the extent that the lien secures a prepetition claim. Again, to permit post-bankruptcy lien creation or enforcement would permit certain creditors to receive preferential treatment. It may also circumvent the debtors' discharge.

Paragraph (6) prevents creditors from attempting in any way to collect a prepetition debt. Creditors in consumer cases occasionally telephone debtors to encourage repayment in spite of bankruptcy. Inexperienced, frightened, or ill-counseled debtors may succumb to suggestions to repay notwithstanding their bankruptcy. This provision prevents evasion of the purpose of the bankruptcy laws by sophisticated creditors.

Paragraph (7) stays setoffs of mutual debts and credits between the debtor and creditors. As with all other paragraphs of subsection (a), this paragraph does not affect the right of creditors. It simply stays its enforcement pending an orderly examination of the debtor's and creditors' rights.

Subsection (b) lists seven exceptions to the automatic stay. The effect of an exception is not to make the action immune from injunction.

The court has ample other powers to stay actions not covered by the automatic stay. Section 105, of proposed title 11, derived from Bankruptcy Act §2a(15) [section 11(a)(15) of former title 11], grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity, 28 U.S.C. §§151 and 164 as proposed in S. 2266, §201, and 28 U.S.C. §1334, as proposed in S. 2266, §216. Stays or injunctions issued under these other sections will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.

With respect to stays issued under other powers, or the application of the automatic stay, to governmental actions, this section and the other sections mentioned are intended to be an express waiver of sovereign immunity of the Federal Government, and an assertion of the bankruptcy power over State governments under the supremacy clause notwithstanding a State's sovereign immunity.

The first exception is of criminal proceedings against the debtor. The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension. Thus, criminal actions and proceedings may proceed in spite of bankruptcy.

Paragraph (2) excepts from the stay the collection of alimony, maintenance or support from property that is not property of the estate. This will include property acquired after the commencement of the case, exempted property, and property that does not pass to the estate. The automatic stay is one means of protecting the debtor's discharge. Alimony, maintenance and support obligations are excepted from discharge. Staying collection of them, when not to the detriment of other creditors (because the collection effort is against property that is not property of the estate) does not further that goal. Moreover, it could lead to hardship on the part of the protected spouse or children.

Paragraph (3) excepts any act to perfect an interest in property to the extent that the trustee's rights and powers are limited under section 546(a) of the bankruptcy code. That section permits postpetition perfection of certain liens to be effective against the trustee. If the act of perfection, such as filing, were stayed, the section would be nullified.

Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

Paragraph (6) excepts the setoff of any mutual debt and claim for commodity transactions.

Paragraph (7) excepts actions by the Secretary of Housing and Urban Development to foreclose or take possession in a case of a loan insured under the National Housing Act [12 U.S.C. 1701 et seq.]. A general exception for such loans is found in current sections 263 and 517 [sections 663 and 917 of former title 11], the exception allowed by this paragraph is much more limited.

Subsection (c) of section 362 specifies the duration of the automatic stay. Paragraph (1) terminates a stay of an act against property of the estate when the property ceases to be property of the estate, such as by sale, abandonment, or exemption. It does not terminate the stay against property of the debtor if the property leaves the estate and goes to the debtor. Paragraph (2) terminates the stay of any other act on the earliest of the time the case is closed, the time the case is dismissed, or the time a discharge is granted or denied (unless the debtor is a corporation or partnership in a chapter 7 case).

Subsection (c) governs automatic termination of the stay. Subsections (d) through (g) govern termination of the stay by the court on the request of a party in interest.

Subsection (d) requires the court, upon motion of a party in interest, to grant relief from the stay for cause, such as by terminating, annulling, modifying, or conditioning the stay. The lack of adequate protection of an interest in property is one cause for relief, but is not the only cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. Generally, proceedings in which the debtor is a fiduciary, or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is protection of the debtor and his estate from his creditors.

Upon the court's finding that the debtor has no equity in the property subject to the stay and that the property is not necessary to an effective reorganization of the debtor, the subsection requires the court grant relief from the stay. To aid in this determination,

guidelines are established where the property subject to the stay is real property. An exception to ''the necessary to an effective reorganization'' requirement is made for real property on which no business is being conducted other than operating the real property and activities incident thereto. The intent of this exception is to reach the single-asset apartment type cases which involve primarily tax-shelter investments and for which the bankruptcy laws have provided a too facile method to relay conditions, but not the operating shopping center and hotel cases where attempts at reorganization should be permitted. Property in which the debtor has equity but which is not necessary to an effective reorganization of the debtor should be sold under section 363. Hearings under this subsection are given calendar priority to ensure that court congestion will not unduly prejudice the rights of creditors who may be obviously entitled to relief from the operation of the automatic stay.

Subsection (e) provides protection that is not always available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided for the secured creditor's interest. If the court does not rule within 30 days from a request by motion for relief from the stay, the stay is automatically terminated with respect to the property in question. To accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing. Because the stay is essentially an injunction, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary injunction, and the final hearing and order are similar to the hearing and issuance or denial of a permanent injunction. The main difference lies in which party must bring the issue before the court. While in the injunction setting, the party seeking the injunction must prosecute the action, in proceeding for relief from the automatic stay, the enjoined party must move. The difference does not, however, shift the burden of proof. Subsection (g) leaves that burden on the party opposing relief from the stay (that is, on the party seeking continuance of the injunction) on the issue of adequate protection and existence of an equity. It is not, however, intended to be confined strictly to the constitutional requirement. This section and the concept of adequate protection are based as much on policy grounds as on constitutional grounds. Secured creditors should not be deprived of the benefit of their bargain. There may be situations in bankruptcy where giving a secured creditor an absolute right to his bargain may be impossible or seriously detrimental to the policy of the bankruptcy laws. Thus, this section recognizes the availability of alternate means of protecting a secured creditor's interest where such steps are a necessary part of the rehabilitative process. Though the creditor might not be able to retain his lien upon the specific collateral held at the time of filing, the purpose of the section is to insure that the secured creditor receives the value for which he bargained.

The section specifies two exclusive means of providing adequate protection, both of which may require an approximate determination of the value of the protected entity's interest in the property involved. The section does not specify how value is to be determined, nor does it specify when it is to be determined. These matters are left to case-by-case interpretation and development. In light of the restrictive approach of the section to the availability of means of providing adequate protection, this flexibility is important to permit the courts to adapt to varying circumstances and changing modes of financing.

Neither is it expected that the courts will construe the term value to mean, in every case, forced sale liquidation value or full going concern value. There is wide latitude between those two extremes although forced sale liquidation value will be a minimum.

In any particular case, especially a reorganization case, the determination of which entity should be entitled to the difference between the going concern value and the liquidation value must be based on equitable considerations arising from the facts of the case. Finally, the determination of value is binding only for the purposes of the specific hearing and is not to have a res judicata effect.

The first method of adequate protection outlined is the making of cash payments to compensate for the expected decrease in value of the opposing entity's interest. This provision is derived from *In re Bermec Corporation*, 445 F.2d 367 (2d Cir. 1971), though in that case it is not clear whether the payments offered were adequate to compensate the secured creditors for their loss. The use of periodic payments may be appropriate where, for example, the property in question is depreciating at a relatively fixed rate. The periodic payments would be to compensate for the depreciation and might, but need not necessarily, be in the same amount as payments due on the secured obligation.

The second method is the fixing of an additional or replacement lien on other property of the debtor to the extent of the decrease in value or actual consumption of the property involved. The purpose of this method is to provide the protected entity with an alternative means of realizing the value of the original property, if it should decline during the case, by granting an interest in additional property from whose value the entity may realize its loss. This is consistent with the view expressed in *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273 (1940), where the Court suggested that it was the value of the secured creditor's collateral, and not necessarily his rights in specific collateral, that was entitled to protection.

The section makes no provision for the granting of an administrative priority as a method of providing adequate protection to an entity as was suggested in *In re Yale Express System, Inc.*, 384 F.2d 990 (2d Cir. 1967), because such protection is too uncertain to be meaningful.

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The section specifies four means of providing adequate protection. They are neither exclusive nor exhaustive. They all rely, however, on the value of the protected entity's interest in the property involved. The section does not specify how value is to be determined, nor does it specify when it is to be determined. These matters are left to case-by-case interpretation and development. It is expected that the courts will apply the concept in light of facts of each case and general equitable principles. It is not intended that the courts will develop a hard and fast rule that will apply in every case. The time and method of valuation is not specified precisely, in order to avoid that result. There are an infinite number of variations possible in dealings between debtors and creditors, the law is continually developing, and new ideas are continually being implemented in this field. The flexibility is important to permit the courts to adapt to varying circumstances and changing modes of financing.

Neither is it expected that the courts will construe the term value to mean, in every case, forced sale liquidation value or full going concern value. There is wide latitude between those two extremes. In any particular case, especially a reorganization case, the determination of which entity should be entitled to the difference between the going concern value and the liquidation value must be based on equitable considerations based on the facts of the case. It will frequently be based on negotiation between the parties. Only if they cannot agree will the court become involved.

The first method of adequate protection specified is periodic cash payments by the estate, to the extent of a decrease in value of the opposing entity's interest in the property involved. This provision is derived from *In*

re Yale Express, Inc., 384 F.2d 990 (2d Cir. 1967) (though in that case it is not clear whether the payments required were adequate to compensate the secured creditors for their loss). The use of periodic payments may be appropriate, where for example, the property in question is depreciating at a relatively fixed rate. The periodic payments would be to compensate for the depreciation.

The second method is the provision of an additional or replacement lien on other property to the extent of the decrease in value of the property involved. The purpose of this method is to provide the protected entity with a means of realizing the value of the original property, if it should decline during the case, by granting an interest in additional property from whose value the entity may realize its loss.

The third method is the granting of an administrative expense priority to the protected entity to the extent of his loss. This method, more than the others, requires a prediction as to whether the unencumbered assets that will remain if the case if converted from reorganization to liquidation will be sufficient to pay the protected entity in full. It is clearly the most risky, from the entity's perspective, and should be used only when there is relative certainty that administrative expenses will be able to be paid in full in the event of liquidation.

The fourth [enacted as third] method gives the parties and the courts flexibility by allowing such other relief as will result in the realization by the protected entity of the value of its interest in the property involved. Under this provision, the courts will be able to adapt to new methods of financing and to formulate protection that is appropriate to the circumstances of the case if none of the other methods would accomplish the desired result. For example, another form of adequate protection might be the guarantee by a third party outside the judicial process of compensation for any loss incurred in the case. Adequate protection might also, in some circumstances, be provided by permitting a secured creditor to bid in his claim at the sale of the property and to offset the claim against the price bid in.

The paragraph also defines, more clearly than the others, the general concept of adequate protection, by requiring such relief as will result in the realization of value. It is the general category, and as such, is defined by the concept involved rather than any particular method of adequate protection.

AMENDMENTS

1984—Par. (1). Pub. L. 98–353 inserted ''a cash payment or'' after ''make''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 901, 1205 of this title.

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section—

(A) of the commencement or continuation of an action or proceeding for—

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105–277, div. I, title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681–866;]

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2570; Pub. L. 97–222, § 3, July 27, 1982, 96 Stat. 235; Pub. L. 98–353, title III, §§ 304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub. L. 99–509, title V, § 5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub. L. 99–554, title II, §§ 257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub. L. 101–311, title I, § 102, title II, § 202, June 25, 1990, 104 Stat. 267, 269; Pub. L. 101–508, title III, § 3007(a)(1), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 103–394, title I, §§ 101, 116, title II, §§ 204(a), 218(b), title III, § 304(b), title IV, § 401, title V, § 501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub. L. 105–277, div. I, title VI, § 603, Oct. 21, 1998, 112 Stat. 2681–886.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 362(a)(1) of the House amendment adopts the provision contained in the Senate amendment enjoining the commencement or continuation of a judicial, administrative, or other proceeding to recover a claim against the debtor that arose before the commencement of the case. The provision is beneficial and interacts with section 362(a)(6), which also covers assessment, to prevent harassment of the debtor with respect to pre-petition claims.

Section 362(a)(7) contains a provision contained in H.R. 8200 as passed by the House. The differing provision in the Senate amendment was rejected. It is not possible that a debt owing to the debtor may be offset against an interest in the debtor.

Section 362(a)(8) is new. The provision stays the commencement or continuation of any proceeding concerning the debtor before the U.S. Tax Court.

Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

Section 362(b)(6) of the House amendment adopts a provision contained in the Senate amendment restricting the exception to the automatic stay with respect to setoffs to permit only the setoff of mutual debts and claims. Traditionally, the right of setoff has been limited to mutual debts and claims and the lack of the clarifying term ''mutual'' in H.R. 8200 as passed by the House created an unintentional ambiguity. Section

362(b)(7) of the House amendment permits the issuance of a notice of tax deficiency. The House amendment rejects section 362(b)(7) in the Senate amendment. It would have permitted a particular governmental unit to obtain a pecuniary advantage without a hearing on the merits contrary to the exceptions contained in sections 362(b)(4) and (5).

Section 362(d) of the House amendment represents a compromise between comparable provisions in the House bill and Senate amendment. Under section 362(d)(1) of the House amendment, the court may terminate, annul, modify, or condition the automatic stay for cause, including lack of adequate protection of an interest in property of a secured party. It is anticipated that the Rules of Bankruptcy Procedure will provide that those hearings will receive priority on the calendar. Under section 362(d)(2) the court may alternatively terminate, annul, modify, or condition the automatic stay for cause including inadequate protection for the creditor. The court shall grant relief from the stay if there is no equity and it is not necessary to an effective reorganization of the debtor.

The latter requirement is contained in section 362(d)(2). This section is intended to solve the problem of real property mortgage foreclosures of property where the bankruptcy petition is filed on the eve of foreclosure. The section is not intended to apply if the business of the debtor is managing or leasing real property, such as a hotel operation, even though the debtor has no equity if the property is necessary to an effective reorganization of the debtor. Similarly, if the debtor does have an equity in the property, there is no requirement that the property be sold under section 363 of title 11 as would have been required by the Senate amendment.

Section 362(e) of the House amendment represents a modification of provisions in H.R. 8200 as passed by the House and the Senate amendment to make clear that a final hearing must be commenced within 30 days after a preliminary hearing is held to determine whether a creditor will be entitled to relief from the automatic stay. In order to insure that those hearings will in fact occur within such 30-day period, it is anticipated that the rules of bankruptcy procedure provide that such final hearings receive priority on the court calendar.

Section 362(g) places the burden of proof on the issue of the debtor's equity in collateral on the party requesting relief from the automatic stay and the burden on other issues on the debtor.

An amendment has been made to section 362(b) to permit the Secretary of the Department of Housing and Urban Development to commence an action to foreclose a mortgage or deed of trust. The commencement of such an action is necessary for tax purposes. The section is not intended to permit the continuation of such an action after it is commenced nor is the section to be construed to entitle the Secretary to take possession in lieu of foreclosure.

Automatic stay: Sections 362(b)(8) and (9) contained in the Senate amendment are largely deleted in the House amendment. Those provisions add to the list of actions not stayed (a) jeopardy assessments, (b) other assessments, and (c) the issuance of deficiency notices. In the House amendment, jeopardy assessments against property which ceases to be property of the estate is already authorized by section 362(c)(1). Other assessments are specifically stayed under section 362(a)(6), while the issuance of a deficiency notice is specifically permitted. Stay of the assessment and the permission to issue a statutory notice of a tax deficiency will permit the debtor to take his personal tax case to the Tax Court, if the bankruptcy judge authorizes him to do so (as explained more fully in the discussion of section 505).

SENATE REPORT NO. 95–989

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

The action commenced by the party seeking relief from the stay is referred to as a motion to make it clear that at the expedited hearing under subsection (e), and at hearings on relief from the stay, the only issue will be the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization of the debtor, or the existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor, which, although relevant to the question of the amount of the debt, concern largely collateral or unrelated matters. This approach is consistent with that taken in cases such as *In re Essex Properties, Ltd.*, 430 F.Supp. 1112 (N.D.Cal.1977), that an action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert counterclaims. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustee to recover property of the estate or to object to the allowance of a claim. However, this would not preclude the party seeking continuance of the stay from presenting evidence on the existence of claims which the court may consider in exercising its discretion. What is precluded is a determination of such collateral claims on the merits at the hearing.

HOUSE REPORT NO. 95–595

Paragraph (7) [of subsec. (a)] stays setoffs of mutual debts and credits between the debtor and creditors. As with all other paragraphs of subsection (a), this paragraph does not affect the right of creditors. It simply stays its enforcement pending an orderly examination of the debtor's and creditors' rights.

Subsection (c) governs automatic termination of the stay. Subsections (d) through (g) govern termination of the stay by the court on the request of a party in interest. Subsection (d) requires the court, on request of a party in interest, to grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, for cause. The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is the executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. Generally, proceedings in which the debtor is a fiduciary, or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors. The facts of each request will determine whether relief is appropriate under the circumstances.

Subsection (e) provides a protection for secured creditors that is not available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided of the secured creditor's interest. If the court does not rule within 30 days from a request for relief from the stay, the stay is automatically terminated with respect to the property in question. In order to accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing. Because the stay

is essentially an injunction, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary injunction, and the final hearing and order is similar to a permanent injunction. The main difference lies in which party must bring the issue before the court. While in the injunction setting, the party seeking the injunction must prosecute the action, in proceedings for relief from the automatic stay, the enjoined party must move. The difference does not, however, shift the burden of proof. Subsection (g) leaves that burden on the party opposing relief from the stay (that is, on the party seeking continuance of the injunction) on the issue of adequate protection.

At the expedited hearing under subsection (e), and at all hearings on relief from the stay, the only issue will be the claim of the creditor and the lack of adequate protection or existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor on largely unrelated matters. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustees to recover property of the estate or to object to the allowance of a claim.

REFERENCES IN TEXT

Section 5(a)(3) of the Securities Investor Protection Act of 1970, referred to in subsecs. (a) and (b), is classified to section 78eee(a)(3) of Title 15, Commerce and Trade.

The National Housing Act, referred in subsec. (b)(8), is act June 27, 1934, ch. 847, 48 Stat. 1246, as amended, which is classified principally to chapter 13 (§1701 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see section 1701 of Title 12 and Tables.

The Merchant Marine Act, 1936, referred to in subsec. (b)(12), (13), is act June 29, 1936, ch. 858, 49 Stat. 1985, as amended. Title XI of the Act is classified generally to subchapter XI (§1271 et seq.) of chapter 27 of Title 46, Appendix, Shipping. Section 207 of the Act is classified to section 1117 of Title 46, Appendix. For complete classification of this Act to the Code, see section 1245 of Title 46, Appendix, and Tables.

The Higher Education Act of 1965, referred to in subsec. (b)(16), is Pub. L. 89–329, Nov. 8, 1965, 79 Stat. 1219, as amended, which is classified principally to chapter 28 (§1001 et seq.) of Title 20, Education. Section 435(j) of the Act is classified to section 1085(j) of Title 20. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 20 and Tables.

AMENDMENTS

1998—Subsec. (b)(4), (5). Pub. L. 105–277 added par. (4) and struck out former pars. (4) and (5) which read as follows:

''(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

''(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;''.

1994—Subsecs. (a), (b). Pub. L. 103–394, §501(d)(7)(A), (B)(i), struck out ''(15 U.S.C. 78eee(a)(3))'' after ''Act of 1970'' in introductory provisions.

Subsec. (b)(2). Pub. L. 103–394, §304(b), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;''.

Subsec. (b)(3). Pub. L. 103–394, §204(a), inserted '', or to maintain or continue the perfection of,'' after ''to perfect''.

Subsec. (b)(6). Pub. L. 103–394, §501(b)(2)(A), substituted ''section 761'' for ''section 761(4)'', ''section 741'' for ''section 741(7)'', ''section 101, 741, or 761'' for ''section 101(34), 741(5), or 761(15)'', and ''section 101 or 741'' for ''section 101(35) or 741(8)''.

Subsec. (b)(7). Pub. L. 103–394, §501(b)(2)(B), substituted ''section 741 or 761'' for ''section 741(5) or 761(15)'' and ''section 741'' for ''section 741(8)''.

Subsec. (b)(9). Pub. L. 103–394, §116, amended par. (9) generally. Prior to amendment, par. (9) read as follows: ''under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;''.

Subsec. (b)(10). Pub. L. 103–394, §501(d)(7)(B)(ii), struck out ''or'' at end.

Subsec. (b)(12). Pub. L. 103–394, §501(d)(7)(B)(iii), substituted ''section 31325 of title 46'' for ''the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)'' and struck out ''(46 App. U.S.C. 1117 and 1271 et seq., respectively)'' after ''Act, 1936''.

Subsec. (b)(13). Pub. L. 103–394, §501(d)(7)(B)(iv), substituted ''section 31325 of title 46'' for ''the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)'' and struck out ''(46 App. U.S.C. 1117 and 1271 et seq., respectively)'' after ''Act, 1936'' and ''or'' at end.

Subsec. (b)(14). Pub. L. 103–394, §501(d)(7)(B)(vii), amended par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement by substituting ''; or'' for period at end, redesignating par. (14) as (17), and inserting it after par. (16).

Subsec. (b)(15). Pub. L. 103–394, §501(d)(7)(B)(v), struck out ''or'' at end.

Subsec. (b)(16). Pub. L. 103–394, §501(d)(7)(B)(vi), struck out ''(20 U.S.C. 1001 et seq.)'' after ''Act of 1965'' and substituted semicolon for period at end.

Subsec. (b)(17). Pub. L. 103–394, §501(d)(7)(B)(vii)(II), (III), redesignated par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement as (17) and inserted it after par. (16).

Subsec. (b)(18). Pub. L. 103–394, §401, added par. (18).

Subsec. (d)(3). Pub. L. 103–394, §218(b), added par. (3).

Subsec. (e). Pub. L. 103–394, §101, in last sentence substituted ''concluded'' for ''commenced'' and inserted before period at end '', unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances''.

1990—Subsec. (b)(6). Pub. L. 101–311, §202, inserted reference to sections 101(34) and 101(35) of this title.

Subsec. (b)(12). Pub. L. 101–508, §3007(a)(1)(A), which directed the striking of ''or'' after ''State law;'', could not be executed because of a prior amendment by Pub. L. 101–311. See below.

Pub. L. 101–311, §102(1), struck out ''or'' after ''State law;''.

Subsec. (b)(13). Pub. L. 101–508, §3007(a)(1)(B), which directed the substitution of a semicolon for period at end, could not be executed because of a prior amendment by Pub. L. 101–311. See below.

Pub. L. 101–311, §102(2), substituted ''; or'' for period at end.

Subsec. (b)(14) to (16). Pub. L. 101–508, §3007(a)(1)(C), added pars. (14) to (16). Notwithstanding directory language adding pars. (14) to (16) immediately following par. (13), pars. (14) to (16) were added after par. (14), as added by Pub. L. 101–311, to reflect the probable intent of Congress.

Pub. L. 101–311, §102(3), added par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement. Notwithstanding directory language adding par. (14) at end of subsec. (b), par. (14) was added after par. (13) to reflect the probable intent of Congress.

1986—Subsec. (b). Pub. L. 99–509 inserted sentence at end.

Subsec. (b)(6). Pub. L. 99–554, §283(d)(1), substituted '', financial institutions'' for ''financial institution,'' in two places.

Subsec. (b)(9). Pub. L. 99–554, §283(d)(2), (3), struck out ''or'' at end of first par. (9) and redesignated as par. (10) the second par. (9) relating to leases of nonresidential property, which was added by section 363(b) of Pub. L. 98–353.

Subsec. (b)(10). Pub. L. 99–554, §283(d)(3), (4), redesignated as par. (10) the second par. (9) relating to leases of nonresidential property, added by section 363(b) of Pub. L. 99–353, and substituted ''property; or'' for ''property.''. Former par. (10) redesignated (11).

Subsec. (b)(11). Pub. L. 99–554, §283(d)(3), redesignated former par. (10) as (11).

Subsec. (b)(12), (13). Pub. L. 99–509 added pars. (12) and (13).

Subsec. (c)(2)(C). Pub. L. 99–554, §257(j), inserted reference to chapter 12 of this title.

1984—Subsec. (a)(1). Pub. L. 98–353, §441(a)(1), inserted ''action or'' after ''other''.

Subsec. (a)(3). Pub. L. 98–353, §441(a)(2), inserted ''or to exercise control over property of the estate''.

Subsec. (b)(3). Pub. L. 98–353, §441(b)(1), inserted ''or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title''.

Subsec. (b)(6). Pub. L. 98–353, §441(b)(2), inserted ''or due from'' after ''held by'' and ''financial institution,'' after ''stockbroker'' in two places, and substituted ''secure, or settle commodity contracts'' for ''or secure commodity contracts''.

Subsec. (b)(7) to (9). Pub. L. 98–353, §441(b)(3), (4), in par. (8) as redesignated by Pub. L. 98–353, §392, substituted ''the'' for ''said'' and struck out ''or'' the last place it appeared which probably meant ''or'' after ''units;'' that was struck out by Pub. L. 98–353, §363(b)(1); and, in par. (9), relating to notices of deficiencies, as redesignated by Pub. L. 98–353, §392, substituted a semicolon for the period.

Pub. L. 98–353, §392, added par. (7) and redesignated former pars. (7) and (8) as (8) and (9), respectively.

Pub. L. 98–353, §363(b), struck out ''or'' at end of par. (7), substituted ''; or'' for the period at end of par. (8), and added par. (9) relating to leases of nonresidential property.

Subsec. (b)(10). Pub. L. 98–353, §441(b)(5), added par. (10).

Subsec. (c)(2)(B). Pub. L. 98–353, §441(c), substituted ''or'' for ''and''.

Subsec. (d)(2). Pub. L. 98–353, §441(d), inserted ''under subsection (a) of this section'' after ''property''.

Subsec. (e). Pub. L. 98–353, §441(e), inserted ''the conclusion of'' after ''pending'' and substituted ''The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.'' for ''If the hearing under this subsection is a preliminary hearing—

''(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

''(2) such final hearing shall be commenced within thirty days after such preliminary hearing.''

Subsec. (f). Pub. L. 98–353, §441(f), substituted ''Upon request of a party in interest, the court, with or'' for ''The court,''.

Subsec. (h). Pub. L. 98–353, §304, added subsec. (h).

1982—Subsec. (a). Pub. L. 97–222, §3(a), inserted '', or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)),'' after ''this title'' in provisions preceding par. (1).

Subsec. (b). Pub. L. 97–222, §3(b), inserted '', or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)),'' after ''this title'' in provisions preceding par. (1).

Subsec. (b)(6). Pub. L. 97–222, §3(c), substituted provisions that the filing of a bankruptcy petition would not operate as a stay, under subsec. (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, or securities clearing agency of any mutual debt and claim under or in connection with commodity, forward, or securities contracts that constitutes the setoff of a claim against the debtor for a margin or settlement payment arising out of commodity, forward, or securities contracts against cash, securities, or other property held by any of the above agents to margin, guarantee, or secure commodity, forward, or securities contracts, for provisions that such filing would not operate as a stay under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Section 3007(a)(3) of Pub. L. 101–508 provided that: ''The amendments made by this subsection [amending this section and section 541 of this title] shall be effective upon date of enactment of this Act [Nov. 5, 1990].''

Section 3008 of Pub. L. 101–508, provided that the amendments made by subtitle A (§§3001–3008) of title III of Pub. L. 101–508, amending this section, sections 541 and 1328 of this title, and sections 1078, 1078–1, 1078–7, 1085, 1088, and 1091 of Title 20, Education, and provisions set out as a note under section 1078–1 of Title 20, were to cease to be effective Oct. 1, 1996, prior to repeal by Pub. L. 102–325, title XV, §1558, July 23, 1992, 106 Stat. 841.

EFFECTIVE DATE OF 1986 AMENDMENTS

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

Section 5001(b) of Pub. L. 99–509 provided that: ''The amendments made by subsection (a) of this section [amending this section] shall apply only to petitions filed under section 362 of title 11, United States Code, which are made after August 1, 1986.''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

REPORT TO CONGRESSIONAL COMMITTEES

Section 5001(a) of Pub. L. 99–509 directed Secretary of Transportation and Secretary of Commerce, before July 1, 1989, to submit reports to Congress on the effects of amendments to 11 U.S.C. 362 by this subsection.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 108, 109, 361, 363, 365, 505, 507, 542, 553, 557, 742, 901, 922, 1110, 1168, 1205 of this title; title 28 section 1334; title 46 section 31308.

§ 363. Use, sale, or lease of property

(a) In this section, ''cash collateral'' means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the com-

mencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(*o*) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2572; Pub. L. 98–353, title III, § 442, July 10, 1984, 98 Stat. 371; Pub. L. 99–554, title II, § 257(k), Oct. 27, 1986, 100 Stat. 3115; Pub. L. 103–394, title I, § 109, title II, §§ 214(b), 219(c), title V, § 501(d)(8), Oct. 22, 1994, 108 Stat. 4113, 4126, 4129, 4144.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 363(a) of the House amendment defines ''cash collateral'' as defined in the Senate amendment. The broader definition of ''soft collateral'' contained in H.R. 8200 as passed by the House is deleted to remove limitations that were placed on the use, lease, or sale of inventory, accounts, contract rights, general intangibles, and chattel paper by the trustee or debtor in possession.

Section 363(c)(2) of the House amendment is derived from the Senate amendment. Similarly, sections 363(c)(3) and (4) are derived from comparable provisions in the Senate amendment in lieu of the contrary procedure contained in section 363(c) as passed by the House. The policy of the House amendment will generally require the court to schedule a preliminary hearing in accordance with the needs of the debtor to authorize the trustee or debtor in possession to use, sell, or lease cash collateral. The trustee or debtor in possession may use, sell, or lease cash collateral in the ordinary course of business only ''after notice and a hearing.''

Section 363(f) of the House amendment adopts an identical provision contained in the House bill, as opposed to an alternative provision contained in the Senate amendment.

Section 363(h) of the House amendment adopts a new paragraph (4) representing a compromise between the House bill and Senate amendment. The provision adds a limitation indicating that a trustee or debtor in possession sell jointly owned property only if the property is not used in the production, transmission, or distribution for sale, of electric energy or of natural or synthetic gas for heat, light, or power. This limitation is intended to protect public utilities from being deprived of power sources because of the bankruptcy of a joint owner.

Section 363(k) of the House amendment is derived from the third sentence of section 363(e) of the Senate amendment. The provision indicates that a secured creditor may bid in the full amount of the creditor's allowed claim, including the secured portion and any unsecured portion thereof in the event the creditor is undersecured, with respect to property that is subject to a lien that secures the allowed claim of the sale of the property.

SENATE REPORT NO. 95–989

This section defines the right and powers of the trustee with respect to the use, sale or lease of property and the rights of other parties that have interests in the property involved. It applies in both liquidation and reorganization cases.

Subsection (a) defines ''cash collateral'' as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents in which the estate and an entity other than the estate have an interest, such as a lien or a co-ownership interest. The definition is not restricted to property of the estate that is cash collateral on the date of the filing of the petition. Thus, if ''non-cash'' collateral is disposed of and the proceeds come within the definition of ''cash collateral'' as set forth in this subsection, the proceeds would be cash collateral as long as they remain subject to the original lien on the ''non-cash'' collateral under section 552(b). To illustrate, rents received from real property before or after the commencement of the case would be cash collateral to the extent that they are subject to a lien.

Subsection (b) permits the trustees to use, sell, or lease, other than in the ordinary course of business, property of the estate upon notice and opportunity for objections and hearing thereon.

Subsection (c) governs use, sale, or lease in the ordinary course of business. If the business of the debtor is authorized to be operated under § 721, 1108, or 1304 of the bankruptcy code, then the trustee may use, sell, or lease property in the ordinary course of business or

enter into ordinary course transactions without need for notice and hearing. This power is subject to several limitations. First, the court may restrict the trustee's powers in the order authorizing operation of the business. Second, with respect to cash collateral, the trustee may not use, sell, or lease cash collateral except upon court authorization after notice and a hearing, or with the consent of each entity that has an interest in such cash collateral. The same preliminary hearing procedure in the automatic stay section applies to a hearing under this subsection. In addition, the trustee is required to segregate and account for any cash collateral in the trustee's possession, custody, or control.

Under subsections (d) and (e), the use, sale, or lease of property is further limited by the concept of adequate protection. Sale, use, or lease of property in which an entity other than the estate has an interest may be effected only to the extent not inconsistent with any relief from the stay granted to that interest's holder. Moreover, the court may prohibit or condition the use, sale, or lease as is necessary to provide adequate protection of that interest. Again, the trustee has the burden of proof on the issue of adequate protection. Subsection (e) also provides that where a sale of the property is proposed, an entity that has an interest in such property may bid at the sale thereof and set off against the purchase price up to the amount of such entity's claim. No prior valuation under section 506(a) would limit this bidding right, since the bid at the sale would be determinative of value.

Subsection (f) permits sale of property free and clear of any interest in the property of an entity other than the estate. The trustee may sell free and clear if applicable nonbankruptcy law permits it, if the other entity consents, if the interest is a lien and the sale price of the property is greater than the amount secured by the lien, if the interest is in bona fide dispute, or if the other entity could be compelled to accept a money satisfaction of the interest in a legal or equitable proceeding. Sale under this subsection is subject to the adequate protection requirement. Most often, adequate protection in connection with a sale free and clear of other interests will be to have those interests attach to the proceeds of the sale.

At a sale free and clear of other interests, any holder of any interest in the property being sold will be permitted to bid. If that holder is the high bidder, he will be permitted to offset the value of his interest against the purchase price of the property. Thus, in the most common situation, a holder of a lien on property being sold may bid at the sale and, if successful, may offset the amount owed to him that is secured by the lien on the property (but may not offset other amounts owed to him) against the purchase price, and be liable to the trustee for the balance of the sale price, if any.

Subsection (g) permits the trustee to sell free and clear of any vested or contingent right in the nature of dower or curtesy.

Subsection (h) permits sale of a co-owner's interest in property in which the debtor had an undivided ownership interest such as a joint tenancy, a tenancy in common, or a tenancy by the entirety. Such a sale is permissible only if partition is impracticable, if sale of the estate's interest would realize significantly less for the estate that sale of the property free of the interests of the co-owners, and if the benefit to the estate of such a sale outweighs any detriment to the co-owners. This subsection does not apply to a co-owner's interest in a public utility when a disruption of the utilities services could result.

Subsection (i) provides protections for co-owners and spouses with dower, curtesy, or community property rights. It gives a right of first refusal to the co-owner or spouse at the price at which the sale is to be consummated.

Subsection (j) requires the trustee to distribute to the spouse or co-owner the appropriate portion of the proceeds of the sale, less certain administrative expenses.

Subsection (k) [enacted as (*l*)] permits the trustee to use, sell, or lease property notwithstanding certain bankruptcy or ipso facto clauses that terminate the debtor's interest in the property or that work a forfeiture or modification of that interest. This subsection is not as broad as the anti-ipso facto provision in proposed 11 U.S.C. 541(c)(1).

Subsection (*l*) [enacted as (m)] protects good faith purchasers of property sold under this section from a reversal on appeal of the sale authorization, unless the authorization for the sale and the sale itself were stayed pending appeal. The purchaser's knowledge of the appeal is irrelevant to the issue of good faith.

Subsection (m) [enacted as (n)] is directed at collusive bidding on property sold under this section. It permits the trustee to void a sale if the price of the sale was controlled by an agreement among potential bidders. The trustees may also recover the excess of the value of the property over the purchase price, and may recover any costs, attorney's fees, or expenses incurred in voiding the sale or recovering the difference. In addition, the court is authorized to grant judgment in favor of the estate and against the collusive bidder if the agreement controlling the sale price was entered into in willful disregard of this subsection. The subsection does not specify the precise measure of damages, but simply provides for punitive damages, to be fixed in light of the circumstances.

REFERENCES IN TEXT

Section 7A of the Clayton Act, referred to in subsec. (b)(2), is classified to section 18a of Title 15, Commerce and Trade.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394, §214(b), inserted ''and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties'' after ''property''.

Subsec. (b)(2). Pub. L. 103–394, §§109, 501(d)(8)(A), struck out ''(15 U.S.C. 18a)'' after ''Clayton Act'' and amended subpars. (A) and (B) generally. Prior to amendment, subpars. (A) and (B) read as follows:

''(A) notwithstanding subsection (a) of such section, such notification shall be given by the trustee; and

''(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the tenth day after the date of the receipt of such notification, unless the court, after notice and hearing, orders otherwise.''

Subsec. (c)(1). Pub. L. 103–394, §501(d)(8)(B), substituted ''1203, 1204, or 1304'' for ''1304, 1203, or 1204''.

Subsec. (e). Pub. L. 103–394, §219(c), inserted at end ''This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).''

1986—Subsec. (c)(1). Pub. L. 99–554, §257(k)(1), inserted reference to sections 1203 and 1204 of this title.

Subsec. (*l*). Pub. L. 99–554, §257(k)(2), inserted reference to chapter 12.

1984—Subsec. (a). Pub. L. 98–353, §442(a), inserted ''whenever acquired'' after ''equivalents'' and ''and includes the proceeds, products, offspring, rents, or profits of property subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title'' after ''interest''.

Subsec. (b). Pub. L. 98–353, §442(b), designated existing provisions as par. (1) and added par. (2).

Subsec. (e). Pub. L. 98–353, §442(c), inserted '', with or without a hearing,'' after ''court'' and struck out ''In any hearing under this section, the trustee has the burden of proof on the issue of adequate protection''.

Subsec. (f)(3). Pub. L. 98–353, §442(d), substituted ''all liens on such property'' for ''such interest''.

Subsec. (h). Pub. L. 98–353, §442(e), substituted ''at the time of'' for ''immediately before''.

Subsec. (j). Pub. L. 98–353, §442(f), substituted ''compensation'' for ''compenation''.

Subsec. (k). Pub. L. 98–353, §442(g), substituted ''unless the court for cause orders otherwise the holder of

such claim may bid at such sale, and, if the holder'' for ''if the holder''.

Subsec. (*l*). Pub. L. 98–353, § 442(h), substituted ''Subject to the provisions of section 365, the trustee'' for ''The trustee'', ''condition'' for ''conditions'', ''or the taking'' for ''a taking'', and ''interest'' for ''interests''.

Subsec. (n). Pub. L. 98–353, § 442(i), substituted ''avoid'' for ''void'', ''avoiding'' for ''voiding'', and ''In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection'' for ''The court may grant judgment in favor of the estate and against any such party that entered into such agreement in willful disregard of this subsection for punitive damages in addition to any recovery under the preceding sentence''.

Subsec. (*o*). Pub. L. 98–353, § 442(j), added subsec. (*o*).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 303, 361, 507, 541, 542, 552, 553, 557, 1110, 1111, 1129, 1168, 1205, 1206, 1303, 1304 of this title.

§ 364. Obtaining credit

(a) If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

(d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

(e) The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

(f) Except with respect to an entity that is an underwriter as defined in section 1145(b) of this title, section 5 of the Securities Act of 1933, the Trust Indenture Act of 1939, and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security does not apply to the offer or sale under this section of a security that is not an equity security.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2574; Pub. L. 99–554, title II, § 257(*l*), Oct. 27, 1986, 100 Stat. 3115; Pub. L. 103–394, title V, § 501(d)(9), Oct. 22, 1994, 108 Stat. 4144.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 364(f) of the House amendment is new. This provision continues the exemption found in section 3(a)(7) of the Securities Act of 1933 [15 U.S.C. 77c(a)(7)] for certificates of indebtedness issued by a trustee in bankruptcy. The exemption applies to any debt security issued under section 364 of title 11. The section does not intend to change present law which exempts such securities from the Trust Indenture Act, 15 U.S.C. 77aaa, et seq. (1976).

SENATE REPORT NO. 95–989

This section is derived from provisions in current law governing certificates of indebtedness, but is much broader. It governs all obtaining of credit and incurring of debt by the estate.

Subsection (a) authorizes the obtaining of unsecured credit and the incurring of unsecured debt in the ordinary course of business if the business of the debtor is authorized to be operated under section 721, 1108, or 1304. The debts so incurred are allowable as administrative expenses under section 503(b)(1). The court may limit the estate's ability to incur debt under this subsection.

Subsection (b) permits the court to authorize the trustee to obtain unsecured credit and incur unsecured debts other than in the ordinary course of business, such as in order to wind up a liquidation case, or to obtain a substantial loan in an operating case. Debt incurred under this subsection is allowable as an administrative expense under section 503(b)(1).

Subsection (c) is closer to the concept of certificates of indebtedness in current law. It authorizes the obtaining of credit and the incurring of debt with some special priority, if the trustee is unable to obtain unse-

cured credit under subsection (a) or (b). The various priorities are (1) with priority over any or all administrative expenses: (2) secured by a lien on unencumbered property of the estate; or (3) secured by a junior lien on encumbered property. The priorities granted under this subsection do not interfere with existing property rights.

Subsection (d) grants the court the authority to authorize the obtaining of credit and the incurring of debt with a superiority, that is a lien on encumbered property that is senior or equal to the existing lien on the property. The court may authorize such a superpriority only if the trustee is otherwise unable to obtain credit, and if there is adequate protection of the original lien holder's interest. Again, the trustee has the burden of proof on the issue of adequate protection.

Subsection (e) provides the same protection for credit extenders pending an appeal of an authorization to incur debt as is provided under section 363(*l*) for purchasers: the credit is not affected on appeal by reversal of the authorization and the incurring of the debt were stayed pending appeal. The protection runs to a good faith lender, whether or not he knew of the pendency of the appeal.

A claim arising as a result of lending or borrowing under this section will be a priority claim, as defined in proposed section 507(a)(1), even if the claim is granted a super-priority over administrative expenses and is to be paid in advance of other first priority claims.

REFERENCES IN TEXT

Section 5 of the Securities Act of 1933, referred to in subsec. (f), is classified to section 77e of Title 15, Commerce and Trade.

The Trust Indenture Act of 1939, referred to in subsec. (f), is title III of act May 27, 1933, ch. 38, as added Aug. 3, 1939, ch. 411, 53 Stat. 1149, as amended, which is classified generally to subchapter III (§ 77aaa et seq.) of chapter 2A of Title 15. For complete classification of this Act to the Code, see section 77aaa of Title 15 and Tables.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394, § 501(d)(9)(A), substituted ''1203, 1204, or 1304'' for ''1304, 1203, or 1204''.

Subsec. (f). Pub. L. 103–394, § 501(d)(9)(B), struck out ''(15 U.S.C. 77e)'' after ''Act of 1933'' and ''(15 U.S.C. 77aaa et seq.)'' after ''Act of 1939''.

1986—Subsec. (a). Pub. L. 99–554 inserted reference to sections 1203 and 1204 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 361, 507, 901, 921, 922, 1205, 1304 of this title.

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the

debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee may assume or assign less than all of such leases with the airport operator's written consent.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.

(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate—

(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to—

(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and

(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.

(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.

(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and—

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, ''lessee'' includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and—

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(*l*) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary

to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(*o*) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2574; Pub. L. 98–353, title III, §§362, 402–404, July 10, 1984, 98 Stat. 361, 367; Pub. L. 99–554, title II, §§257(j), (m), 283(e), Oct. 27, 1986, 100 Stat. 3115, 3117; Pub. L. 100–506, §1(b), Oct. 18, 1988, 102 Stat. 2538; Pub. L. 101–647, title XXV, §2522(c), Nov. 29, 1990, 104 Stat. 4866; Pub. L. 102–365, §19(b)–(e), Sept. 3, 1992, 106 Stat. 982–984; Pub. L. 103–394, title II, §§205(a), 219(a), (b), title V, §501(d)(10), Oct. 22, 1994, 108 Stat. 4122, 4128, 4145; Pub. L. 103–429, §1, Oct. 31, 1994, 108 Stat. 4377.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 365(b)(3) represents a compromise between H.R. 8200 as passed by the House and the Senate amendment. The provision adopts standards contained in section 365(b)(5) of the Senate amendment to define adequate assurance of future performance of a lease of real property in a shopping center.

Section 365(b)(4) of the House amendment indicates that after default the trustee may not require a lessor to supply services or materials without assumption unless the lessor is compensated as provided in the lease.

Section 365(c)(2) and (3) likewise represent a compromise between H.R. 8200 as passed by the House and the Senate amendment. Section 365(c)(2) is derived from section 365(b)(4) of the Senate amendment but does not apply to a contract to deliver equipment as provided in the Senate amendment. As contained in the House amendment, the provision prohibits a trustee or debtor in possession from assuming or assigning an executory contract of the debtor to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or the issuance of a security of the debtor.

Section 365(e) is a refinement of comparable provisions contained in the House bill and Senate amendment. Sections 365(e)(1) and (2)(A) restate section 365(e) of H.R. 8200 as passed by the House. Sections 365(e)(2)(B) expands the section to permit termination of an executory contract or unexpired lease of the debtor if such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or for the issuance of a security of the debtor.

Characterization of contracts to make a loan, or extend other debt financing or financial accommodations, is limited to the extension of cash or a line of credit and is not intended to embrace ordinary leases or contracts to provide goods or services with payments to be made over time.

Section 365(f) is derived from H.R. 8200 as passed by the House. Deletion of language in section 365(f)(3) of the Senate amendment is done as a matter of style. Restrictions with respect to assignment of an executory contract or unexpired lease are superfluous since the debtor may assign an executory contract or unexpired lease of the debtor only if such contract is first assumed under section 364(f)(2)(A) of the House amendment.

Section 363(h) of the House amendment represents a modification of section 365(h) of the Senate amendment. The House amendment makes clear that in the case of a bankrupt lessor, a lessee may remain in possession for the balance of the term of a lease and any renewal or extension of the term only to the extent that such renewal or extension may be obtained by the lessee without the permission of the landlord or some third party under applicable non-bankruptcy law.

SENATE REPORT NO. 95–989

Subsection (a) of this section authorizes the trustee, subject to the court's approval, to assume or reject an executory contract or unexpired lease. Though there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides. A note is not usually an executory contract if the only performance that remains is repayment. Performance on one side of the contract would have been completed and the contract is no longer executory.

Because of the volatile nature of the commodities markets and the special provisions governing commodity broker liquidations in subchapter IV of chapter 7, the provisions governing distribution in section 765(a) will govern if any conflict between those provisions and the provisions of this section arise.

Subsections (b), (c), and (d) provide limitations on the trustee's powers. Subsection (b) requires the trustee to cure any default in the contract or lease and to provide adequate assurance of future performance if there has been a default, before he may assume. This provision does not apply to defaults under ipso facto or bankruptcy clauses, which is a significant departure from present law.

Subsection (b)(3) permits termination of leases entered into prior to the effective date of this title in liquidation cases if certain other conditions are met.

Subsection (b)(4) [enacted as (c)(2)] prohibits the trustee's assumption of an executory contract requiring the other party to make a loan or deliver equipment to or to issue a security of the debtor. The purpose of this subsection is to make it clear that a party to a transaction which is based upon the financial strength of a debtor should not be required to extend new credit to the debtor whether in the form of loans, lease financing, or the purchase or discount of notes.

Subsection (b)(5) provides that in lease situations common to shopping centers, protections must be provided for the lessor if the trustee assumes the lease, including protection against decline in percentage rents, breach of agreements with other tenants, and preservation of the tenant mix. Protection for tenant mix will not be required in the office building situation.

Subsection (c) prohibits the trustee from assuming or assigning a contract or lease if applicable nonbankruptcy law excuses the other party from performance to someone other than the debtor, unless the other party consents. This prohibition applies only in the situation in which applicable law excuses the other party from performance independent of any restrictive language in the contract or lease itself.

Subsection (d) places time limits on assumption and rejection. In a liquidation case, the trustee must assume within 60 days (or within an additional 60 days, if the court, for cause, extends the time). If not assumed, the contract or lease is deemed rejected. In a rehabilitation case, the time limit is not fixed in the bill. However, if the other party to the contract or lease requests the court to fix a time, the court may specify a time within which the trustee must act. This provision will prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate.

Subsection (e) invalidates ipso facto or bankruptcy clauses. These clauses, protected under present law, automatically terminate the contract or lease, or permit the other contracting party to terminate the contract or lease, in the event of bankruptcy. This frequently hampers rehabilitation efforts. If the trustee may assume or assign the contract under the limitations imposed by the remainder of the section, the contract or lease may be utilized to assist in the debtor's rehabilitation or liquidation.

The unenforcibility [sic] of ipso facto or bankruptcy clauses proposed under this section will require the courts to be sensitive to the rights of the nondebtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or lease, the court will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain.

This subsection does not limit the application of an ipso facto or bankruptcy clause if a new insolvency or receivership occurs after the bankruptcy case is closed. That is, the clause is not invalidated in toto, but merely made inapplicable during the case for the purposes of disposition of the executory contract or unexpired lease.

Subsection (f) partially invalidates restrictions on assignment of contracts or leases by the trustee to a third party. The subsection imposes two restrictions on the trustee: he must first assume the contract or lease, subject to all the restrictions on assumption found in the section, and adequate assurance of future performance must be provided to the other contracting party. Paragraph (3) of the subsection invalidates contractual provisions that permit termination or modification in the event of an assignment, as contrary to the policy of this subsection.

Subsection (g) defines the time as of which a rejection of an executory contract or unexpired lease constitutes a breach of the contract or lease. Generally, the breach is as of the date immediately preceding the date of the petition. The purpose is to treat rejection claims as prepetition claims. The remainder of the subsection specifies different times for cases that are converted from one chapter to another. The provisions of this subsection are not a substantive authorization to breach or reject an assumed contract. Rather, they prescribe the rules for the allowance of claims in case an assumed contract is breached, or if a case under chapter 11 in which a contract has been assumed is converted to a case under chapter 7 in which the contract is rejected.

Subsection (h) protects real property lessees of the debtor if the trustee rejects an unexpired lease under which the debtor is the lessor (or sublessor). The subsection permits the lessee to remain in possession of the leased property or to treat the lease as terminated by the rejection. The balance of the term of the lease referred to in paragraph (1) will include any renewal terms that are enforceable by the tenant, but not renewal terms if the landlord had an option to terminate. Thus, the tenant will not be deprived of his estate for the term for which he bargained. If the lessee remains in possession, he may offset the rent reserved under the lease against damages caused by the rejection, but does not have any affirmative rights against the estate for any damages after the rejection that result from the rejection.

Subsection (i) gives a purchaser of real property under a land installment sales contract similar protection. The purchaser, if the contract is rejected, may remain in possession or may treat the contract as terminated. If the purchaser remains in possession, he is required to continue to make the payments due, but may offset damages that occur after rejection. The trustee is required to deliver title, but is relieved of all other obligations to perform.

A purchaser that treats the contract as terminated is granted a lien on the property to the extent of the purchase price paid. A party with a contract to purchase land from the debtor has a lien on the property to secure the price already paid, if the contract is rejected and the purchaser is not yet in possession.

Subsection (k) relieves the trustee and the estate of liability for a breach of an assigned contract or lease that occurs after the assignment.

HOUSE REPORT NO. 95–595

Subsection (c) prohibits the trustee from assuming or assigning a contract or lease if applicable nonbankruptcy law excuses the other party from performance to someone other than the debtor, unless the other party consents. This prohibition applies only in the situation in which applicable law excuses the other party from performance independent of any restrictive language in the contract or lease itself. The purpose of

this subsection, at least in part, is to prevent the trustee from requiring new advances of money or other property. The section permits the trustee to continue to use and pay for property already advanced, but is not designed to permit the trustee to demand new loans or additional transfers of property under lease commitments.

Thus, under this provision, contracts such as loan commitments and letters of credit are nonassignable, and may not be assumed by the trustee.

Subsection (e) invalidates ipso facto or bankruptcy clauses. These clauses, protected under present law, automatically terminate the contract or lease, or permit the other contracting party to terminate the contract or lease, in the event of bankruptcy. This frequently hampers rehabilitation efforts. If the trustee may assume or assign the contract under the limitations imposed by the remainder of the section, then the contract or lease may be utilized to assist in the debtor's rehabilitation or liquidation.

The unenforceability of ipso facto or bankruptcy clauses proposed under this section will require the courts to be sensitive to the rights of the nondebtor party to executory contracts and unexpired leases. If the trustee is to assume a contract or lease, the courts will have to insure that the trustee's performance under the contract or lease gives the other contracting party the full benefit of his bargain. An example of the complexity that may arise in these situations and the need for a determination of all aspects of a particular executory contract or unexpired lease is the shopping center lease under which the debtor is a tenant in a shopping center.

A shopping center is often a carefully planned enterprise, and though it consists of numerous individual tenants, the center is planned as a single unit, often subject to a master lease or financing agreement. Under these agreements, the tenant mix in a shopping center may be as important to the lessor as the actual promised rental payments, because certain mixes will attract higher patronage of the stores in the center, and thus a higher rental for the landlord from those stores that are subject to a percentage of gross receipts rental agreement. Thus, in order to assure a landlord of his bargained for exchange, the court would have to consider such factors as the nature of the business to be conducted by the trustee or his assignee, whether that business complies with the requirements of any master agreement, whether the kind of business proposed will generate gross sales in an amount such that the percentage rent specified in the lease is substantially the same as what would have been provided by the debtor, and whether the business proposed to be conducted would result in a breach of other clauses in master agreements relating, for example, to tenant mix and location.

This subsection does not limit the application of an ipso facto or bankruptcy clause to a new insolvency or receivership after the bankruptcy case is closed. That is, the clause is not invalidated in toto, but merely made inapplicable during the case for the purpose of disposition of the executory contract or unexpired lease.

AMENDMENTS

1994—Subsec. (b)(2)(D). Pub. L. 103–394, §219(a), added subpar. (D).

Subsec. (d)(6)(C). Pub. L. 103–429, §1(1), substituted ''section 40102(a) of title 49'' for ''section 101 of the Federal Aviation Act of 1958 (49 App. U.S.C. 1301)''.

Pub. L. 103–394, §501(d)(10)(A), which directed the substitution of ''section 40102 of title 49'' for ''the Federal Aviation Act of 1958 (49 U.S.C. 1301)'', could not be executed because the phrase ''(49 U.S.C. 1301)'' did not appear in text.

Subsec. (d)(10). Pub. L. 103–394, §219(b), added par. (10).

Subsec. (g)(2)(A), (B). Pub. L. 103–394, §501(d)(10)(B), substituted ''1208, or 1307'' for ''1307, or 1208''.

Subsec. (h). Pub. L. 103–394, §205(a), amended subsec. (h) generally. Prior to amendment, subsec. (h) read as follows:

''(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, or a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller, the lessee or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee or timeshare interest purchaser to treat such lease or timeshare plan as terminated by virtue of its own terms, applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee or timeshare interest purchaser under applicable nonbankruptcy law.

''(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (1) of this subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or moneys due for such timeshare interest for the balance of the term after the date of the rejection of such lease or timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by the nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.''

Subsec. (n)(1)(B). Pub. L. 103–394, §501(d)(10)(C), substituted ''a right to'' for ''a right to to''.

Subsec. (*o*). Pub. L. 103–394, §501(d)(10)(D), substituted ''a Federal depository institutions regulatory agency (or predecessor to such agency)'' for ''the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or its predecessors or successors,''.

Subsec. (p). Pub. L. 103–429, §1(2), which directed the amendment of subsec. (p) by substituting ''section 40102(a) of title 49'' for ''section 101(3) of the Federal Aviation Act of 1958'', could not be executed because subsec. (p) was repealed by Pub. L. 103–394, §501(d)(10)(E). See below.

Pub. L. 103–394, §501(d)(10)(E), struck out subsec. (p), which read as follows: ''In this section, 'affected air carrier' means an air carrier, as defined in section 101(3) of the Federal Aviation Act of 1958, that holds 65 percent or more in number of the aircraft gates at an airport—

''(1) which is a Large Air Traffic Hub as defined by the Federal Aviation Administration in Report FAA–AP 92–1, February 1992; and

''(2) all of whose remaining aircraft gates are leased or under contract on the date of enactment of this subsection.''

1992—Subsec. (c)(4). Pub. L. 102–365, §19(c), added par. (4).

Subsec. (d)(5) to (9). Pub. L. 102–365, §19(b), added pars. (5) to (9).

Subsec. (f)(1). Pub. L. 102–365, §19(d), substituted for period at end ''; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.''

Subsec. (p). Pub. L. 102–365, §19(e), added subsec. (p).

1990—Subsec. (*o*). Pub. L. 101–647 added subsec. (*o*).

1988—Subsec. (n). Pub. L. 100–506 added subsec. (n).

1986—Subsec. (c)(1)(A). Pub. L. 99–554, §283(e)(1), struck out ''or an assignee of such contract or lease'' after ''debtor in possession''.

Subsec. (c)(3). Pub. L. 99–554, §283(e)(2), inserted ''is'' after ''lease'' and ''and'' after ''property''.

Subsecs. (d)(2), (g)(1). Pub. L. 99–554, § 257(j), (m)(1), inserted reference to chapter 12.

Subsec. (g)(2). Pub. L. 99–554, § 257(m)(2), inserted references to chapter 12 and section 1208 of this title.

Subsec. (h)(1). Pub. L. 99–554, § 283(e)(2), inserted ''or timeshare plan'' after ''to treat such lease''.

Subsec. (m). Pub. L. 99–554, § 283(e)(3), substituted ''362(b)(10)'' for ''362(b)(9)''.

1984—Subsec. (a). Pub. L. 98–353, § 362(a), amended subsec. (a) generally, making minor changes.

Subsec. (b). Pub. L. 98–353, § 362(a), amended subsec. (b) generally, inserting in par. (3) reference to par. (2)(B) of subsec. (f) of this section, in par. (3)(A) inserting provisions relating to financial condition and operating performance in the case of an assignment, and in par. (3)(C) substituting ''that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center'' for ''that assumption or assignment of such lease will not breach substantially any provision, such as a radius, location, use, or exclusivity provision, in any other lease, financing agreement, or master agreement relating to such shopping center''.

Subsec. (c). Pub. L. 98–353, § 362(a), amended subsec. (c) generally, substituting in par. (1)(A) ''applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession or an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties'' for ''applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties'' and adding par. (3).

Subsec. (d). Pub. L. 98–353, § 362(a), amended subsec. (d) generally, inserting in par. (1) reference to residential real property or personal property of the debtor, inserting in par. (2) reference to residential real property or personal property of the debtor, and adding pars. (3) and (4).

Subsec. (h)(1). Pub. L. 98–353, § 402, amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, the lessee under such lease may treat the lease as terminated by such rejection, or, in the alternative, may remain in possession for the balance of the term of such lease and any renewal or extension of such term that is enforceable by such lessee under applicable nonbankruptcy law.''

Subsec. (h)(2). Pub. L. 98–353, § 403, amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''If such lessee remains in possession, such lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease, and any such renewal or extension, any damages occurring after such date caused by the nonperformance of any obligation of the debtor after such date, but such lessee does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.''

Subsec. (i)(1). Pub. L. 98–353, § 404, amended par. (1) generally, inserting provisions relating to timeshare interests under timeshare plans.

Subsecs. (*l*), (m). Pub. L. 98–353, § 362(b), added subsecs. (*l*) and (m).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Section 19(f) of Pub. L. 102–365 provided that: ''The amendments made by this section [amending this section] shall be in effect for the 12-month period that begins on the date of enactment of this Act [Sept. 3, 1992] and shall apply in all proceedings involving an affected air carrier (as defined in section 365(p) of title 11, United States Code, as amended by this section) that are pending during such 12-month period. Not later than 9 months after the date of enactment, the Administrator of the Federal Aviation Administration shall report to the Committee on Commerce, Science, and Transportation and Committee on the Judiciary of the Senate and the Committee on the Judiciary and Committee on Public Works and Transportation of the House of Representatives on whether this section shall apply to proceedings that are commenced after such 12-month period.''

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–506 effective Oct. 18, 1988, but not applicable to any case commenced under this title before such date, see section 2 of Pub. L. 100–506, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

AIRPORT LEASES

Section 19(a) of Pub. L. 102–365 provided that: ''Congress finds that—

''(1) there are major airports served by an air carrier that has leased a substantial majority of the airport's gates;

''(2) the commerce in the region served by such a major airport can be disrupted if the air carrier that leases most of its gates enters bankruptcy and either discontinues or materially reduces service; and

''(3) it is important that such airports be empowered to continue service in the event of such a disruption.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 348, 363, 502, 541, 553, 555, 556, 557, 559, 560, 744, 901, 929, 1110, 1123, 1124, 1167, 1168, 1169, 1222, 1322 of this title.

§ 366. Utility service

(a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party

in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2578; Pub. L. 98–353, title III, § 443, July 10, 1984, 98 Stat. 373.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 366 of the House amendment represents a compromise between comparable provisions contained in H.R. 8200 as passed by the House and the Senate amendment. Subsection (a) is modified so that the applicable date is the date of the order for relief rather than the date of the filing of the petition. Subsection (b) contains a similar change but is otherwise derived from section 366(b) of the Senate amendment, with the exception that a time period for continued service of 20 days rather than 10 days is adopted.

SENATE REPORT NO. 95–989

This section gives debtors protection from a cut-off of service by a utility because of the filing of a bankruptcy case. This section is intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility. The utility may not alter, refuse, or discontinue service because of the nonpayment of a bill that would be discharged in the bankruptcy case. Subsection (b) protects the utility company by requiring the trustee or the debtor to provide, within ten days, adequate assurance of payment for service provided after the date of the petition.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 inserted ''of the commencement of a case under this title or'' after ''basis''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 901 of this title.

CHAPTER 5—CREDITORS, THE DEBTOR, AND THE ESTATE

SUBCHAPTER I—CREDITORS AND CLAIMS

SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

SUBCHAPTER III—THE ESTATE

AMENDMENTS

1990—Pub. L. 101–311, title I, § 106(b), June 25, 1990, 104 Stat. 268, added item 560.

1986—Pub. L. 99–554, title II, § 283(q), Oct. 27, 1986, 100 Stat. 3118, amended items 557 to 559 generally, substituting ''interests in, and abandonment or other disposition of grain assets'' for ''in and disposition of grain'' in item 557.

1984—Pub. L. 98–353, title III, §§ 352(b), 396(b), 470(b), July 10, 1984, 98 Stat. 361, 366, 380, added items 557, 558, and 559.

1982—Pub. L. 97–222, § 6(b), July 27, 1982, 96 Stat. 237, added items 555 and 556.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 103 of this title; title 15 section 78fff.

SUBCHAPTER I—CREDITORS AND CLAIMS

§ 501. Filing of proofs of claims or interests

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

(b) If a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of such claim.

(c) If a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim.

(d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2578; Pub. L. 98–353, title III, § 444, July 10, 1984, 98 Stat. 373.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts section 501(b) of the Senate amendment leaving the Rules of Bankruptcy

[1] So in original. Does not conform to section catchline.

Procedure free to determine where a proof of claim must be filed.

Section 501(c) expands language contained in section 501(c) of the House bill and Senate amendment to permit the debtor to file a proof of claim if a creditor does not timely file a proof of the creditor's claim in a case under title 11.

The House amendment deletes section 501(e) of the Senate amendment as a matter to be left to the rules of bankruptcy procedure. It is anticipated that the rules will enable governmental units, like other creditors, to have a reasonable time to file proofs of claim in bankruptcy cases.

For purposes of section 501, a proof of ''interest'' includes the interest of a general or limited partner in a partnership, the interest of a proprietor in a sole proprietorship, or the interest of a common or preferred stockholder in a corporation.

SENATE REPORT NO. 95–989

This section governs the means by which creditors and equity security holders present their claims or interests to the court. Subsection (a) permits a creditor to file a proof of claim or interest. An indenture trustee representing creditors may file a proof of claim on behalf of the creditors he represents.

This subsection is permissive only, and does not require filing of a proof of claim by any creditor. It permits filing where some purpose would be served, such as where a claim that appears on a list filed under proposed 11 U.S.C. 924 or 1111 was incorrectly stated or listed as disputed, contingent, or unliquidated, where a creditor with a lien is undersecured and asserts a claim for the balance of the debt owed him (his unsecured claim, as determined under proposed 11 U.S.C. 506(a)), or in a liquidation case where there will be a distribution of assets to the holders of allowed claims. In other instances, such as in no-asset liquidation cases, in situations where a secured creditor does not assert any claim against the estate and a determination of his claim is not made under proposed 11 U.S.C. 506, or in situations where the claim asserted would be subordinated and the creditor would not recover from the estate in any event, filing of a proof of claim may simply not be necessary. The Rules of Bankruptcy Procedure and practice under the law will guide creditors as to when filing is necessary and when it may be dispensed with. In general, however, unless a claim is listed in a chapter 9 or chapter 11 case and allowed as a result of the list, a proof of claim will be a prerequisite to allowance for unsecured claims, including priority claims and the unsecured portion of a claim asserted by the holder of a lien.

The Rules of Bankruptcy Procedure will set the time limits, the form, and the procedure for filing, which will determine whether claims are timely or tardily filed. The rules governing time limits for filing proofs of claims will continue to apply under section 405(d) of the bill. These provide a 6-month-bar date for the filing of tax claims.

Subsection (b) permits a codebtor, surety, or guarantor to file a proof of claim on behalf of the creditor to which he is liable if the creditor does not timely file a proof of claim.

In liquidation and individual repayment plan cases, the trustee or the debtor may file a proof of claim under subsection (c) if the creditor does not timely file. The purpose of this subsection is mainly to protect the debtor if the creditor's claim is nondischargeable. If the creditor does not file, there would be no distribution on the claim, and the debtor would have a greater debt to repay after the case is closed than if the claim were paid in part or in full in the case or under the plan.

Subsection (d) governs the filing of claims of the kind specified in subsections (f), (g), (h), (i), or (j) of proposed 11 U.S.C. 502. The separation of this provision from the other claim-filing provisions in this section is intended to indicate that claims of the kind specified, which do not become fixed or do not arise until after the commencement of the case, must be treated differently for filing purposes such as the bar date for filing claims. The rules will provide for later filing of claims of these kinds.

Subsection (e) gives governmental units (including tax authorities) at least six months following the date for the first meeting of creditors in a chapter 7 or chapter 13 case within which to file proof of claims.

AMENDMENTS

1984—Subsec. (d). Pub. L. 98–353 inserted ''502(e)(2),''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

CHILD SUPPORT CREDITORS OR THEIR REPRESENTATIVES; APPEARANCE BEFORE COURT

Pub. L. 103–394, title III, § 304(g), Oct. 22, 1994, 108 Stat. 4134, provided that: ''Child support creditors or their representatives shall be permitted to appear and intervene without charge, and without meeting any special local court rule requirement for attorney appearances, in any bankruptcy case or proceeding in any bankruptcy court or district court of the United States if such creditors or representatives file a form in such court that contains information detailing the child support debt, its status, and other characteristics.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 502, 506, 726, 727, 901, 925, 944, 1111, 1141 of this title.

§ 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(8) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2579; Pub. L. 98–353, title III, § 445, July 10, 1984, 98 Stat. 373;

Pub. L. 99–554, title II, §§257(j), 283(f), Oct. 27, 1986, 100 Stat. 3115, 3117; Pub. L. 103–394, title II, §213(a), title III, §304(h)(1), Oct. 22, 1994, 108 Stat. 4125, 4134.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts a compromise position in section 502(a) between H.R. 8200, as passed by the House, and the Senate amendment. Section 502(a) has been modified to make clear that a party in interest includes a creditor of a partner in a partnership that is a debtor under chapter 7. Since the trustee of the partnership is given an absolute claim against the estate of each general partner under section 723(c), creditors of the partner must have standing to object to claims against the partnership at the partnership level because no opportunity will be afforded at the partner's level for such objection.

The House amendment contains a provision in section 502(b)(1) that requires disallowance of a claim to the extent that such claim is unenforceable against the debtor and unenforceable against property of the debtor. This is intended to result in the disallowance of any claim for deficiency by an undersecured creditor on a non-recourse loan or under a State antideficiency law, special provision for which is made in section 1111, since neither the debtor personally, nor the property of the debtor is liable for such a deficiency. Similarly claims for usurious interest or which could be barred by an agreement between the creditor and the debtor would be disallowed.

Section 502(b)(7)(A) represents a compromise between the House bill and the Senate amendment. The House amendment takes the provision in H.R. 8200 as passed by the House of Representatives but increases the percentage from 10 to 15 percent.

As used in section 502(b)(7), the phrase ''lease of real property'' applies only to a ''true'' or ''bona fide'' lease and does not apply to financing leases of real property or interests therein, or to leases of such property which are intended as security.

Historically, the limitation on allowable claims of lessors of real property was based on two considerations. First, the amount of the lessor's damages on breach of a real estate lease was considered contingent and difficult to prove. Partly for this reason, claims of a lessor of real estate were not provable prior to the 1934 amendments, to the Bankruptcy Act [former title 11]. Second, in a true lease of real property, the lessor retains all risks and benefits as to the value of the real estate at the termination of the lease. Historically, it was, therefore, considered equitable to limit the claims of real estate lessor.

However, these considerations are not present in ''lease financing'' transactions where, in substance, the ''lease'' involves a sale of the real estate and the rental payments are in substance the payment of principal and interest on a secured loan or sale. In a financing lease the lessor is essentially a secured or unsecured creditor (depending upon whether his interest is perfected or not) of the debtor, and the lessor's claim should not be subject to the 502(b)(7) limitation. Financing ''leases'' are in substance installment sales or loans. The ''lessors'' are essentially sellers or lenders and should be treated as such for purposes of the bankruptcy law.

Whether a ''lease'' is true or bona fide lease or, in the alternative a financing ''lease'' or a lease intended as security, depends upon the circumstances of each case. The distinction between a true lease and a financing transaction is based upon the economic substance of the transaction and not, for example, upon the locus of title, the form of the transaction or the fact that the transaction is denominated as a ''lease.'' The fact that the lessee, upon compliance with the terms of the lease, becomes or has the option to become the owner of the leased property for no additional consideration or for nominal consideration indicates that the transaction is a financing lease or lease intended as security. In such cases, the lessor has no substantial interest in the leased property at the expiration of the lease term. In addition, the fact that the lessee assumes and discharges substantially all the risks and obligations ordinarily attributed to the outright ownership of the property is more indicative of a financing transaction than of a true lease. The rental payments in such cases are in substance payments of principal and interest either on a loan secured by the leased real property or on the purchase of the leased real property. See, e.g., Financial Accounting Standards Board Statement No. 13 and SEC Reg. S–X, 17 C.F.R. sec. 210.3–16(q) (1977); *cf. First National Bank of Chicago v. Irving Trust Co.*, 74 F.2d 263 (2nd Cir. 1934); and Albenda and Lief, ''Net Lease Financing Transactions Under the Proposed Bankruptcy Act of 1973,'' 30 Business Lawyer, 713 (1975).

Section 502(c) of the House amendment presents a compromise between similar provisions contained in the House bill and the Senate amendment. The compromise language is consistent with an amendment to the definition of ''claim'' in section 104(4)(B) of the House amendment and requires estimation of any right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. To the extent language in the House and Senate reports indicate otherwise, such language is expressly overruled.

Section 502(e) of the House amendment contains language modifying a similar section in the House bill and Senate amendment. Section 502(e)(1) states the general rule requiring the court to disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on, or that has secured, the claim of a creditor to any extent that the creditor's claim against the estate is disallowed. This adopts a policy that a surety's claim for reimbursement or contribution is entitled to no better status than the claim of the creditor assured by such surety. Section 502(e)(1)(B) alternatively disallows any claim for reimbursement or contribution by a surety to the extent such claim is contingent as of the time of allowance. Section 502(e)(2) is clear that to the extent a claim for reimbursement or contribution becomes fixed after the commencement of the case that it is to be considered a prepetition claim for purposes of allowance. The combined effect of sections 502(e)(1)(B) and 502(e)(2) is that a surety or codebtor is generally permitted a claim for reimbursement or contribution to the extent the surety or codebtor has paid the assured party at the time of allowance. Section 502(e)(1)(C) alternatively indicates that a claim for reimbursement or contribution of a surety or codebtor is disallowed to the extent the surety or codebtor requests subrogation under section 509 with respect to the rights of the assured party. Thus, the surety or codebtor has a choice; to the extent a claim for contribution or reimbursement would be advantageous, such as in the case where such a claim is secured, a surety or codebtor may opt for reimbursement or contribution under section 502(e). On the other hand, to the extent the claim for such surety or codebtor by way of subrogation is more advantageous, such as where such claim is secured, the surety may elect subrogation under section 509.

The section changes current law by making the election identical in all other respects. To the extent a creditor's claim is satisfied by a surety or codebtor, other creditors should not benefit by the surety's inability to file a claim against the estate merely because such surety or codebtor has failed to pay such creditor's claim in full. On the other hand, to the extent the creditor's claim against the estate is otherwise disallowed, the surety or codebtor should not be entitled to increased rights by way of reimbursement or contribution, to the detriment of competing claims of other unsecured creditors, than would be realized by way of subrogation.

While the foregoing scheme is equitable with respect to other unsecured creditors of the debtor, it is desirable to preserve present law to the extent that a surety

or codebtor is not permitted to compete with the creditor he has assured until the assured party's claim has paid in full. Accordingly, section 509(c) of the House amendment subordinates both a claim by way of subrogation or a claim for reimbursement or contribution of a surety or codebtor to the claim of the assured party until the assured party's claim is paid in full.

Section 502(h) of the House amendment expands similar provisions contained in the House bill and the Senate amendment to indicate that any claim arising from the recovery of property under section 522(i), 550, or 553 shall be determined as though it were a prepetition claim.

Section 502(i) of the House amendment adopts a provision contained in section 502(j) of H.R. 8200 as passed by the House but that was not contained in the Senate amendment.

Section 502(i) of H.R. 8200 as passed by the House, but was not included in the Senate amendment, is deleted as a matter to be left to the bankruptcy tax bill next year.

The House amendment deletes section 502(i) of the Senate bill but adopts the policy of that section to a limited extent for confirmation of a plan of reorganization in section 1111(b) of the House amendment.

Section 502(j) of the House amendment is new. The provision codifies section 57k of the Bankruptcy Act [section 93(k) of former title 11].

Allowance of Claims or Interest: The House amendment adopts section 502(b)(9) of the House bill which disallows any tax claim resulting from a reduction of the Federal Unemployment Tax Act (FUTA) credit (sec. 3302 of the Internal Revenue Code [26 U.S.C. 3302]) on account of a tardy contribution to a State unemployment fund if the contribution is attributable to ways or other compensation paid by the debtor before bankruptcy. The Senate amendment allowed this reduction, but would have subordinated it to other claims in the distribution of the estate's assets by treating it as a punitive (nonpecuniary loss) penalty. The House amendment would also not bar reduction of the FUTA credit on account of a trustee's late payment of a contribution to a State unemployment fund if the contribution was attributable to a trustee's payment of compensation earned from the estate.

Section 511 of the Senate amendment is deleted. Its substance is adopted in section 502(b)(9) of the House amendment which reflects an identical provision contained in H.R. 8200 as passed by the House.

SENATE REPORT NO. 95–989

A proof of claim or interest is prima facie evidence of the claim or interest. Thus, it is allowed under subsection (a) unless a party in interest objects. The rules and case law will determine who is a party in interest for purposes of objection to allowance. The case law is well developed on this subject today. As a result of the change in the liability of a general partner's estate for the debts of this partnership, see proposed 11 U.S.C. 723, the category of persons that are parties in interest in the partnership case will be expanded to include a creditor of a partner against whose estate the trustee of the partnership estate may proceed under proposed 11 U.S.C. 723(c).

Subsection (b) prescribes the grounds on which a claim may be disallowed. The court will apply these standards if there is an objection to a proof of claim. The burden of proof on the issue of allowance is left to the Rules of Bankruptcy Procedure. Under the current chapter XIII rules, a creditor is required to prove that his claim is free from usury, rule 13–301. It is expected that the rules will make similar provision for both liquidation and individual repayment plan cases. See Bankruptcy Act § 656(b) [section 1056(b) of former title 11]; H.R. 31, 94th Cong., 1st sess., sec. 6–104(a) (1975).

Paragraph (1) requires disallowance if the claim is unenforceable against the debtor for any reason (such as usury, unconscionability, or failure of consideration) other than because it is contingent or unmatured. All such contingent or unmatured claims are to be liquidated by the bankruptcy court in order to afford the debtor complete bankruptcy relief; these claims are generally not provable under present law.

Paragraph (2) requires disallowance to the extent that the claim is for unmatured interest as of the date of the petition. Whether interest is matured or unmatured on the date of bankruptcy is to be determined without reference to any ipso facto or bankruptcy clause in the agreement creating the claim. Interest disallowed under this paragraph includes postpetition interest that is not yet due and payable, and any portion of prepaid interest that represents an original discounting of the claim, yet that would not have been earned on the date of bankruptcy. For example, a claim on a $1,000 note issued the day before bankruptcy would only be allowed to the extent of the cash actually advanced. If the original discount was 10 percent so that the cash advanced was only $900, then notwithstanding the face amount of note, only $900 would be allowed. If $900 was advanced under the note some time before bankruptcy, the interest component of the note would have to be prorated and disallowed to the extent it was for interest after the commencement of the case.

Section 502(b) thus contains two principles of present law. First, interest stops accruing at the date of the filing of the petition, because any claim for unmatured interest is disallowed under this paragraph. Second, bankruptcy operates as the acceleration of the principal amount of all claims against the debtor. One unarticulated reason for this is that the discounting factor for claims after the commencement of the case is equivalent to contractual interest rate on the claim. Thus, this paragraph does not cause disallowance of claims that have not been discounted to a present value because of the irrebuttable presumption that the discounting rate and the contractual interest rate (even a zero interest rate) are equivalent.

Paragraph (3) requires disallowance of a claim to the extent that the creditor may offset the claim against a debt owing to the debtor. This will prevent double recovery, and permit the claim to be filed only for the balance due. This follows section 68 of the Bankruptcy Act [section 108 of former title 11].

Paragraph (4) requires disallowance of a property tax claim to the extent that the tax due exceeds the value of the property. This too follows current law to the extent the property tax is ad valorem.

Paragraph (5) prevents overreaching by the debtor's attorneys and concealing of assets by debtors. It permits the court to examine the claim of a debtor's attorney independently of any other provision of this subsection, and to disallow it to the extent that it exceeds the reasonable value of the attorneys' services.

Postpetition alimony, maintenance or support claims are disallowed under paragraph (6). They are to be paid from the debtor's postpetition property, because the claims are nondischargeable.

Paragraph (7), derived from current law, limits the damages allowable to a landlord of the debtor. The history of this provision is set out at length in *Oldden v. Tonto Realty Co.*, 143 F.2d 916 (2d Cir. 1944). It is designed to compensate the landlord for his loss while not permitting a claim so large (based on a long-term lease) as to prevent other general unsecured creditors from recovering a dividend from the estate. The damages a landlord may assert from termination of a lease are limited to the rent reserved for the greater of one year or ten percent of the remaining lease term, not to exceed three years, after the earlier of the date of the filing of the petition and the date of surrender or repossession in a chapter 7 case and 3 years lease payments in a chapter 9, 11, or 13 case. The sliding scale formula for chapter 7 cases is new and designed to protect the long-term lessor. This subsection does not apply to limit administrative expense claims for use of the leased premises to which the landlord is otherwise entitled.

This paragraph will not overrule *Oldden*, or the proposition for which it has been read to stand: To the extent that a landlord has a security deposit in excess of

the amount of his claim allowed under this paragraph, the excess comes into the estate. Moreover, his allowed claim is for his total damages, as limited by this paragraph. By virtue of proposed 11 U.S.C. 506(a) and 506(d), the claim will be divided into a secured portion and an unsecured portion in those cases in which the deposit that the landlord holds is less than his damages. As under *Oldden*, he will not be permitted to offset his actual damages against his security deposit and then claim for the balance under this paragraph. Rather, his security deposit will be applied in satisfaction of the claim that is allowed under this paragraph.

As used in section 502(b)(7), the phrase ''lease of real property'' applies only to a ''true'' or ''bona fide'' lease and does not apply to financing leases of real property or interests therein, or to leases of such property which are intended as security.

Historically, the limitation on allowable claims of lessors of real property was based on two considerations. First, the amount of the lessors damages on breach of a real estate lease was considered contingent and difficult to prove. Partly for this reason, claims of a lessor of real estate were not provable prior to the 1934 amendments to the Bankruptcy Act [former title 11]. Second, in a true lease of real property, the lessor retains all risk and benefits as to the value of the real estate at the termination of the lease. Historically, it was, therefore, considered equitable to limit the claims of a real estate lessor.

However, these considerations are not present in ''lease financing'' transactions where, in substance, the ''lease'' involves a sale of the real estate and the rental payments are in substance the payment of principal and interest on a secured loan or sale. In a financing lease the lessor is essentially a secured or unsecured creditor (depending upon whether his interest is perfected or not) of the debtor, and the lessor's claim should not be subject to the 502(b)(7) limitation. Financing ''leases'' are in substance installment sales or loans. The ''lessors'' are essentially sellers or lenders and should be treated as such for purposes of the bankruptcy law.

Whether a ''lease'' is true or bona fide lease or, in the alternative, a financing ''lease'' or a lease intended as security, depends upon the circumstances of each case. The distinction between a true lease and a financing transaction is based upon the economic substance of the transaction and not, for example, upon the locus of title, the form of the transaction or the fact that the transaction is denominated as a ''lease''. The fact that the lessee, upon compliance with the terms of the lease, becomes or has the option to become the owner of the leased property for no additional consideration or for nominal consideration indicates that the transaction is a financing lease or lease intended as security. In such cases, the lessor has no substantial interest in the leased property at the expiration of the lease term. In addition, the fact that the lessee assumes and discharges substantially all the risks and obligations ordinarily attributed to the outright ownership of the property is more indicative of a financing transaction than of a true lease. The rental payments in such cases are in substance payments of principal and interest either on a loan secured by the leased real property or on the purchase of the leased real property. See, e. g., Financial Accounting Standards Board Statement No. 13 and SEC Reg. S–X, 17 C.F.R. sec. 210.3–16(q) (1977); cf. *First National Bank of Chicago v. Irving Trust Co*., 74 F.2d 263 (2nd Cir. 1934); and Albenda and Lief, ''Net Lease Financing Transactions Under the Proposed Bankruptcy Act of 1973,'' 30 Business Lawyer, 713 (1975).

Paragraph (8) is new. It tracks the landlord limitation on damages provision in paragraph (7) for damages resulting from the breach by the debtor of an employment contract, but limits the recovery to the compensation reserved under an employment contract for the year following the earlier of the date of the petition and the termination of employment.

Subsection (c) requires the estimation of any claim liquidation of which would unduly delay the closing of the estate, such as a contingent claim, or any claim for which applicable law provides only an equitable remedy, such as specific performance. This subsection requires that all claims against the debtor be converted into dollar amounts.

Subsection (d) is derived from present law. It requires disallowance of a claim of a transferee of a voidable transfer in toto if the transferee has not paid the amount or turned over the property received as required under the sections under which the transferee's liability arises.

Subsection (e) also derived from present law, requires disallowance of the claim for reimbursement or contribution of a codebtor, surety or guarantor of an obligation of the debtor, unless the claim of the creditor on such obligation has been paid in full. The provision prevents competition between a creditor and his guarantor for the limited proceeds in the estate.

Subsection (f) specifies that ''involuntary gap'' creditors receive the same treatment as prepetition creditors. Under the allowance provisions of this subsection, knowledge of the commencement of the case will be irrelevant. The claim is to be allowed ''the same as if such claim had arisen before the date of the filing of the petition.'' Under voluntary petition, proposed 11 U.S.C. 303(f), creditors must be permitted to deal with the debtor and be assured that their claims will be paid. For purposes of this subsection, ''creditors'' include governmental units holding claims for tax liabilities incurred during the period after the petition is filed and before the earlier of the order for relief or appointment of a trustee.

Subsection (g) gives entities injured by the rejection of an executory contract or unexpired lease, either under section 365 or under a plan or reorganization, a prepetition claim for any resulting damages, and requires that the injured entity be treated as a prepetition creditor with respect to that claim.

Subsection (h) gives a transferee of a setoff that is recovered by one trustee a prepetition claim for the amount recovered.

Subsection (i) answers the nonrecourse loan problem and gives the creditor an unsecured claim for the difference between the value of the collateral and the debt in response to the decision in *Great National Life Ins. Co. v. Pine Gate Associates, Ltd*., Bankruptcy Case No. B75–4345A (N.D.Ga. Sept. 16, 1977).

The bill, as reported, deletes a provision in the bill as originally introduced (former sec. 502(i)) requiring a tax authority to file a proof of claim for recapture of an investment credit where, during title 11 proceedings, the trustee sells or otherwise disposes of property before the title 11 case began. The tax authority should not be required to submit a formal claim for a taxable event (a sale or other disposition of the asset) of whose occurrence the trustee necessarily knows better than the taxing authority. For procedural purposes, the recapture of investment credit is to be treated as an administrative expense, as to which only a request for payment is required.

HOUSE REPORT NO. 95–595

Paragraph (9) [of subsec. (b)] requires disallowance of certain employment tax claims. These relate to a Federal tax credit for State unemployment insurance taxes which is disallowed if the State tax is paid late. This paragraph disallows the Federal claim for the tax the same as if the credit had been allowed in full on the Federal return.

REFERENCES IN TEXT

The Federal Rules of Bankruptcy Procedure, referred to in subsec. (b)(9), are set out in the Appendix to this title.

AMENDMENTS

1994—Subsec. (b)(9). Pub. L. 103–394, § 213(a), added par. (9).

Subsec. (i). Pub. L. 103–394, § 304(h)(1), substituted ''507(a)(8)'' for ''507(a)(7)''.

1986—Subsec. (b)(6)(A)(ii). Pub. L. 99–554, §283(f)(1), substituted ''repossessed'' for ''reposessed''.

Subsec. (g). Pub. L. 99–554, §257(j), inserted reference to chapter 12.

Subsec. (i). Pub. L. 99–554, §283(f)(2), substituted ''507(a)(7)'' for ''507(a)(6)''.

1984—Subsec. (a). Pub. L. 98–353, §445(a), inserted ''general'' before ''partner''.

Subsec. (b). Pub. L. 98–353, §445(b)(1), (2), in provisions preceding par. (1), inserted ''(e)(2),'' after ''subsections'' and ''in lawful currency of the United States'' after ''claim''.

Subsec. (b)(1). Pub. L. 98–353, §445(b)(3), substituted ''and'' for '', and unenforceable against''.

Subsec. (b)(3). Pub. L. 98–353, §445(b)(5), inserted ''the'' after ''exceeds''.

Pub. L. 98–353, §445(b)(4), struck out par. (3) ''such claim may be offset under section 553 of this title against a debt owing to the debtor;'', and redesignated par. (4) as (3).

Subsec. (b)(4). Pub. L. 98–353, §445(b)(4), redesignated par. (5) as (4). Former par. (4) redesignated (3).

Subsec. (b)(5). Pub. L. 98–353, §445(b)(6), substituted ''such claim'' for ''the claim'' and struck out the comma after ''petition''.

Pub. L. 98–353, §445(b)(4), redesignated par. (6) as (5). Former par. (5) redesignated (4).

Subsec. (b)(6). Pub. L. 98–353, §445(b)(4), redesignated par. (7) as (6). Former par. (6) redesignated (5).

Subsec. (b)(7). Pub. L. 98–353, §445(b)(7)(A), inserted ''the claim of an employee'' before ''for damages''.

Pub. L. 98–353, §445(b)(4), redesignated par. (8) as (7). Former par. (7) redesignated (6).

Subsec. (b)(7)(A)(i). Pub. L. 98–353, §445(b)(7)(B), substituted ''or'' for ''and''.

Subsec. (b)(7)(B). Pub. L. 98–353, §445(b)(7)(C), (D), substituted ''any'' for ''the'' and inserted a comma after ''such contract''.

Subsec. (b)(8), (9). Pub. L. 98–353, §445(b)(4), redesignated par. (9) as (8). Former par. (8) redesignated (7).

Subsec. (c)(1). Pub. L. 98–353, §445(c)(1), inserted ''the'' before ''fixing'' and substituted ''administration'' for ''closing''.

Subsec. (c)(2). Pub. L. 98–353, §445(c)(2), inserted ''right to payment arising from a'' after ''any'' and struck out ''if such breach gives rise to a right to payment'' after ''breach of performance''.

Subsec. (e)(1). Pub. L. 98–353, §445(d)(1), (2), in provisions preceding subpar. (A) substituted '', (b), and (c)'' for ''and (b)'' and substituted ''or has secured'' for '', or has secured,''.

Subsec. (e)(1)(B). Pub. L. 98–353, §445(d)(3), inserted ''or disallowance'' after ''allowance''.

Subsec. (e)(1)(C). Pub. L. 98–353, §445(d)(4), substituted ''asserts a right of subrogation to the rights of such creditor'' for ''requests subrogation'' and struck out ''to the rights of such creditor'' after ''of this title''.

Subsec. (h). Pub. L. 98–353, §445(e), substituted ''522'' for ''522(i)''.

Subsec. (j). Pub. L. 98–353, §445(f), amended subsec. (j) generally, inserting provisions relating to reconsideration of a disallowed claim, and provisions relating to reconsideration of a claim under this subsection.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 106, 346, 501, 503, 506, 507, 509, 510, 522, 544, 723, 727, 901, 929, 944, 1111, 1114, 1126, 1141, 1228, 1305, 1328 of this title.

§ 503. Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including—

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax—

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allow-

able under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2581; Pub. L. 98–353, title III, § 446, July 10, 1984, 98 Stat. 374; Pub. L. 99–554, title II, § 283(g), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 103–394, title I, § 110, title II, § 213(c), title III, § 304(h)(2), Oct. 22, 1994, 108 Stat. 4113, 4126, 4134.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 503(a) of the House amendment represents a compromise between similar provisions in the House bill and the Senate amendment by leaving to the Rules of Bankruptcy Procedure the determination of the location at which a request for payment of an administrative expense may be filed. The preamble to section 503(b) of the House bill makes a similar change with respect to the allowance of administrative expenses.

Section 503(b)(1) adopts the approach taken in the House bill as modified by some provisions contained in the Senate amendment. The preamble to section 503(b) makes clear that none of the paragraphs of section 503(b) apply to claims or expenses of the kind specified in section 502(f) that arise in the ordinary course of the debtor's business or financial affairs and that arise during the gap between the commencement of an involuntary case and the appointment of a trustee or the order for relief, whichever first occurs. The remainder of section 503(b) represents a compromise between H.R. 8200 as passed by the House and the Senate amendments. Section 503(b)(3)(E) codifies present law in cases such as *Randolph v. Scruggs*, 190 U.S. 533, which accords administrative expense status to services rendered by a prepetition custodian or other party to the extent such services actually benefit the estate. Section 503(b)(4) of the House amendment conforms to the provision contained in H.R. 8200 as passed by the House and deletes language contained in the Senate amendment providing a different standard of compensation under section 330 of that amendment.

SENATE REPORT NO. 95–989

Subsection (a) of this section permits administrative expense claimants to file with the court a request for payment of an administrative expense. The Rules of Bankruptcy Procedure will specify the time, the form, and the method of such a filing.

Subsection (b) specifies the kinds of administrative expenses that are allowable in a case under the bankruptcy code. The subsection is derived mainly from section 64a(1) of the Bankruptcy Act [section 104(a)(1) of former title 11], with some changes. The actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the order for relief, and any taxes on, measured by, or withheld from such wages, salaries, or commissions, are allowable as administrative expenses.

In general, administrative expenses include taxes which the trustee incurs in administering the debtor's estate, including taxes on capital gains from sales of property by the trustee and taxes on income earned by the estate during the case. Interest on tax liabilities and certain tax penalties incurred by the trustee are also included in this first priority.

Taxes which the Internal Revenue Service may find due after giving the trustee a so-called ''quickie'' tax refund and later doing an audit of the refund are also payable as administrative expenses. The tax code [title 26] permits the trustee of an estate which suffers a net operating loss to carry back the loss against an earlier profit year of the estate or of the debtor and to obtain a tentative refund for the earlier year, subject, however, to a later full audit of the loss which led to the refund. The bill, in effect, requires the Internal Revenue Service to issue a tentative refund to the trustee (whether the refund was applied for by the debtor or by the trustee), but if the refund later proves to have been erroneous in amount, the Service can request that the tax attributable to the erroneous refund be payable by the estate as an administrative expense.

Postpetition payments to an individual debtor for services rendered to the estate are administrative expenses, and are not property of the estate when received by the debtor. This situation would most likely arise when the individual was a sole proprietor and was employed by the estate to run the business after the commencement of the case. An individual debtor in possession would be so employed, for example. See *Local Loan v. Hunt*, 292 U.S. 234, 243 (1943).

Compensation and reimbursement awarded officers of the estate under section 330 are allowable as administrative expenses. Actual, necessary expenses, other than compensation of a professional person, incurred by a creditor that files an involuntary petition, by a creditor that recovers property for the benefit of the estate, by a creditor that acts in connection with the prosecution of a criminal offense relating to the case, by a creditor, indenture, trustee, equity security holder, or committee of creditors or equity security holders (other than official committees) that makes a substantial contribution to a reorganization or municipal debt adjustment case, or by a superseded custodian, are all allowable administrative expenses. The phrase ''substantial contribution in the case'' is derived from Bankruptcy Act §§ 242 and 243 [sections 642 and 643 of former title 11]. It does not require a contribution that leads to confirmation of a plan, for in many cases, it will be a substantial contribution if the person involved uncovers facts that would lead to a denial of confirmation, such as fraud in connection with the case.

Paragraph (4) permits reasonable compensation for professional services rendered by an attorney or an accountant of an equity whose expense is compensable under the previous paragraph. Paragraph (5) permits reasonable compensation for an indenture trustee in making a substantial contribution in a reorganization or municipal debt adjustment case. Finally, paragraph (6) permits witness fees and mileage as prescribed under chapter 119 [§ 2041 et seq.] of title 28.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394, § 213(c), inserted ''timely'' after ''may'' and '', or may tardily file such request if permitted by the court for cause'' before period at end.

Subsec. (b)(1)(B)(i). Pub. L. 103–394, § 304(h)(2), substituted ''507(a)(8)'' for ''507(a)(7)''.

Subsec. (b)(3)(F). Pub. L. 103–394, § 110, added subpar. (F).

1986—Subsec. (b)(1)(B)(i). Pub. L. 99–554, § 283(g)(1), substituted ''507(a)(7)'' for ''507(a)(6)''.

Subsec. (b)(5). Pub. L. 99–554, § 283(g)(2), inserted ''and'' after ''title;''.

Subsec. (b)(6). Pub. L. 99–554, § 283(g)(3), substituted a period for ''; and''.

1984—Subsec. (b). Pub. L. 98–353, § 446(1), struck out the comma after ''be allowed'' in provisions preceding par. (1).

Subsec. (b)(1)(C). Pub. L. 98–353, § 446(2), struck out the comma after ''credit''.

Subsec. (b)(2). Pub. L. 98–353, § 446(3), inserted ''(a)'' after ''330''.
Subsec. (b)(3). Pub. L. 98–353, § 446(4), inserted a comma after ''paragraph (4) of this subsection''.
Subsec. (b)(3)(C). Pub. L. 98–353, § 446(5), struck out the comma after ''case''.
Subsec. (b)(5). Pub. L. 98–353, § 446(6), struck out ''and'' after ''title;''.
Subsec. (b)(6). Pub. L. 98–353, § 446(7), substituted ''; and'' for period at end.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 346, 348, 361, 364, 365, 504, 507, 557, 726, 901, 922, 1114, 1205, 1226, 1228, 1326 of this title; title 26 section 1398.

§ 504. Sharing of compensation

(a) Except as provided in subsection (b) of this section, a person receiving compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title may not share or agree to share—

(1) any such compensation or reimbursement with another person; or

(2) any compensation or reimbursement received by another person under such sections.

(b)(1) A member, partner, or regular associate in a professional association, corporation, or partnership may share compensation or reimbursement received under section 503(b)(2) or 503(b)(4) of this title with another member, partner, or regular associate in such association, corporation, or partnership, and may share in any compensation or reimbursement received under such sections by another member, partner, or regular associate in such association, corporation, or partnership.

(2) An attorney for a creditor that files a petition under section 303 of this title may share compensation and reimbursement received under section 503(b)(4) of this title with any other attorney contributing to the services rendered or expenses incurred by such creditor's attorney.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2582.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 504 prohibits the sharing of compensation, or fee splitting, among attorneys, other professionals, or trustees. The section provides only two exceptions: partners or associates in the same professional association, partnership, or corporation may share compensation inter se; and attorneys for petitioning creditors that join in a petition commencing an involuntary case may share compensation.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 901 of this title; title 15 section 78fff.

§ 505. Determination of tax liability

(a)(1) Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.

(2) The court may not so determine—

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title; or

(B) any right of the estate to a tax refund, before the earlier of—

(i) 120 days after the trustee properly requests such refund from the governmental unit from which such refund is claimed; or

(ii) a determination by such governmental unit of such request.

(b) A trustee may request a determination of any unpaid liability of the estate for any tax incurred during the administration of the case by submitting a tax return for such tax and a request for such a determination to the governmental unit charged with responsibility for collection or determination of such tax. Unless such return is fraudulent, or contains a material misrepresentation, the trustee, the debtor, and any successor to the debtor are discharged from any liability for such tax—

(1) upon payment of the tax shown on such return, if—

(A) such governmental unit does not notify the trustee, within 60 days after such request, that such return has been selected for examination; or

(B) such governmental unit does not complete such an examination and notify the trustee of any tax due, within 180 days after such request or within such additional time as the court, for cause, permits;

(2) upon payment of the tax determined by the court, after notice and a hearing, after completion by such governmental unit of such examination; or

(3) upon payment of the tax determined by such governmental unit to be due.

(c) Notwithstanding section 362 of this title, after determination by the court of a tax under this section, the governmental unit charged with responsibility for collection of such tax may assess such tax against the estate, the debtor, or a successor to the debtor, as the case may be, subject to any otherwise applicable law.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2582; Pub. L. 98–353, title III, § 447, July 10, 1984, 98 Stat. 374.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 505 of the House amendment adopts a compromise position with respect to the determination of

tax liability from the position taken in H.R. 8200 as passed by the House and in the Senate amendment.

Determinations of tax liability: Authority of bankruptcy court to rule on merits of tax claims.—The House amendment authorizes the bankruptcy court to rule on the merits of any tax claim involving an unpaid tax, fine, or penalty relating to a tax, or any addition to a tax, of the debtor or the estate. This authority applies, in general, whether or not the tax, penalty, fine, or addition to tax had been previously assessed or paid. However, the bankruptcy court will not have jurisdiction to rule on the merits of any tax claim which has been previously adjudicated, in a contested proceeding, before a court of competent jurisdiction. For this purpose, a proceeding in the U.S. Tax Court is to be considered ''contested'' if the debtor filed a petition in the Tax Court by the commencement of the case and the Internal Revenue Service had filed an answer to the petition. Therefore, if a petition and answer were filed in the Tax Court before the title II petition was filed, and if the debtor later defaults in the Tax Court, then, under res judicata principles, the bankruptcy court could not then rule on the debtor's or the estate's liability for the same taxes.

The House amendment adopts the rule of the Senate bill that the bankruptcy court can, under certain conditions, determine the amount of tax refund claim by the trustee. Under the House amendment, if the refund results from an offset or counterclaim to a claim or request for payment by the Internal Revenue Service, or other tax authority, the trustee would not first have to file an administrative claim for refund with the tax authority.

However, if the trustee requests a refund in other situations, he would first have to submit an administrative claim for the refund. Under the House amendment, if the Internal Revenue Service, or other tax authority does not rule on the refund claim within 120 days, then the bankruptcy court may rule on the merits of the refund claim.

Under the Internal Revenue Code [title 26], a suit for refund of Federal taxes cannot be filed until 6 months after a claim for refund is filed with the Internal Revenue Service (sec. 6532(a) [title 26]). Because of the bankruptcy aim to close the estate as expeditiously as possible, the House amendment shortens to 120 days the period for the Internal Revenue Service to decide the refund claim.

The House amendment also adopts the substance of the Senate bill rule permitting the bankruptcy court to determine the amount of any penalty, whether punitive or pecuniary in nature, relating to taxes over which it has jurisdiction.

Jurisdiction of the tax court in bankruptcy cases: The Senate amendment provided a detailed series of rules concerning the jurisdiction of the U.S. Tax Court, or similar State or local administrative tribunal to determine personal tax liabilities of an individual debtor. The House amendment deletes these specific rules and relies on procedures to be derived from broad general powers of the bankruptcy court.

Under the House amendment, as under present law, a corporation seeking reorganization under chapter 11 is considered to be personally before the bankruptcy court for purposes of giving that court jurisdiction over the debtor's personal liability for a nondischargeable tax.

The rules are more complex where the debtor is an individual under chapter 7, 11, or 13. An individual debtor or the tax authority can, as under section 17c of the present Bankruptcy Act [section 35(c) of former title 11], file a request that the bankruptcy court determine the debtor's personal liability for the balance of any nondischargeable tax not satisfied from assets of the estate. The House amendment intends to retain these procedures and also adds a rule staying commencement or continuation of any proceeding in the Tax Court after the bankruptcy petition is filed, unless and until that stay is lifted by the bankruptcy judge under section 362(a)(8). The House amendment also stays assessment as well as collection of a prepetition claim against the debtor (sec. 362(a)(6)). A tax authority would not, however, be stayed from issuing a deficiency notice during the bankruptcy case (sec. (b)(7)) [sec. 362(b)(8)]. The Senate amendment repealed the existing authority of the Internal Revenue Service to make an immediate assessment of taxes upon bankruptcy (sec. 6871(a) of the code [title 26]. See section 321 of the Senate bill. As indicated, the substance of that provision, also affecting State and local taxes, is contained in section 362(a)(6) of the House amendment. The statute of limitations is tolled under the House amendment while the bankruptcy case is pending.

Where no proceeding in the Tax Court is pending at the commencement of the bankruptcy case, the tax authority can, under the House amendment, file a claim against the estate for a prepetition tax liability and may also file a request that the bankruptcy court hear arguments and decide the merits of an individual debtor's personal liability for the balance of any nondischargeable tax liability not satisfied from assets of the estate. Bankruptcy terminology refers to the latter type of request as a creditor's complaint to determine the dischargeability of a debt. Where such a complaint is filed, the bankruptcy court will have personal jurisdiction over an individual debtor, and the debtor himself would have no access to the Tax Court, or to any other court, to determine his personal liability for nondischargeable taxes.

If a tax authority decides not to file a claim for taxes which would typically occur where there are few, if any, assets in the estate, normally the tax authority would also not request the bankruptcy court to rule on the debtor's personal liability for a nondischargeable tax. Under the House amendment, the tax authority would then have to follow normal procedures in order to collect a nondischargeable tax. For example, in the case of nondischargeable Federal income taxes, the Internal Revenue Service would be required to issue a deficiency notice to an individual debtor, and the debtor could then file a petition in the Tax Court—or a refund suit in a district court—as the forum in which to litigate his personal liability for a nondischargeable tax.

Under the House amendment, as under present law, an individual debtor can also file a complaint to determine dischargeability. Consequently, where the tax authority does not file a claim or a request that the bankruptcy court determine dischargeability of a specific tax liability, the debtor could file such a request on his own behalf, so that the bankruptcy court would then determine both the validity of the claim against assets in the estate and also the personal liability of the debtor for any nondischargeable tax.

Where a proceeding is pending in the Tax Court at the commencement of the bankruptcy case, the commencement of the bankruptcy case automatically stays further action in the Tax Court case unless and until the stay is lifted by the bankruptcy court. The Senate amendment repealed a provision of the Internal Revenue case barring a debtor from filing a petition in the Tax Court after commencement of a bankruptcy case (sec. 6871(b) of the code [26 U.S.C. 6871(b)]). See section 321 of the Senate bill. As indicated earlier, the equivalent of the code amendment is embodied in section 362(a)(8) of the House amendment, which automatically stays commencement or continuation of any proceeding in the Tax Court until the stay is lifted or the case is terminated. The stay will permit sufficient time for the bankruptcy trustee to determine if he desires to join the Tax Court proceeding on behalf of the estate. Where the trustee chooses to join the Tax Court proceeding, it is expected that he will seek permission to intervene in the Tax Court case and then request that the stay on the Tax Court proceeding be lifted. In such a case, the merits of the tax liability will be determined by the Tax Court, and its decision will bind both the individual debtor as to any taxes which are nondischargeable and the trustee as to the tax claim against the estate.

Where the trustee does not want to intervene in the Tax Court, but an individual debtor wants to have the

Tax Court determine the amount of his personal liability for nondischargeable taxes, the debtor can request the bankruptcy court to lift the automatic stay on existing Tax Court proceedings. If the stay is lifted and the Tax Court reaches its decision before the bankruptcy court's decision on the tax claim against the estate, the decision of the Tax Court would bind the bankruptcy court under principles of res judicata because the decision of the Tax Court affected the personal liability of the debtor. If the trustee does not wish to subject the estate to the decision of the Tax Court if the latter court decides the issues before the bankruptcy court rules, the trustee could resist the lifting of the stay on the existing Tax Court proceeding. If the Internal Revenue Service had issued a deficiency notice to the debtor before the bankruptcy case began, but as of the filing of the bankruptcy petition the 90-day period for filing in the Tax Court was still running, the debtor would be automatically stayed from filing a petition in the Tax Court. If either the debtor or the Internal Revenue Service then files a complaint to determine dischargeability in the bankruptcy court, the decision of the bankruptcy court would bind both the debtor and the Internal Revenue Service.

The bankruptcy judge could, however, lift the stay on the debtor to allow him to petition the Tax Court, while reserving the right to rule on the tax authority's claim against assets of the estate. The bankruptcy court could also, upon request by the trustee, authorize the trustee to intervene in the Tax Court for purposes of having the estate also governed by the decision of the Tax Court.

In essence, under the House amendment, the bankruptcy judge will have authority to determine which court will determine the merits of the tax claim both as to claims against the estate and claims against the debtor concerning his personal liability for nondischargeable taxes. Thus, if the Internal Revenue Service, or a State or local tax authority, files a petition to determine dischargeability, the bankruptcy judge can either rule on the merits of the claim and continue the stay on any pending Tax Court proceeding or lift the stay on the Tax Court and hold the dischargeability complaint in abeyance. If he rules on the merits of the complaint before the decision of the Tax Court is reached, the bankruptcy court's decision would bind the debtor as to nondischargeable taxes and the Tax Court would be governed by that decision under principles of res judicata. If the bankruptcy judge does not rule on the merits of the complaint before the decision of the Tax Court is reached, the bankruptcy court will be bound by the decision of the Tax Court as it affects the amount of any claim against the debtor's estate.

If the Internal Revenue Service does not file a complaint to determine dischargeability and the automatic stay on a pending Tax Court proceeding is not lifted, the bankruptcy court could determine the merits of any tax claim against the estate. That decision will not bind the debtor personally because he would not have been personally before the bankruptcy court unless the debtor himself asks the bankruptcy court to rule on his personal liability. In any such situation where no party filed a dischargeability petition, the debtor would have access to the Tax Court to determine his personal liability for a nondischargeable tax debt. While the Tax Court in such a situation could take into account the ruling of the bankruptcy court on claims against the estate in deciding the debtor's personal liability, the bankruptcy court's ruling would not bind the Tax Court under principles of res judicata, because the debtor, in that situation, would not have been personally before the bankruptcy court.

If neither the debtor nor the Internal Revenue Service files a claim against the estate or a request to rule on the debtor's personal liability, any pending tax court proceeding would be stayed until the closing of the bankruptcy case, at which time the stay on the tax court would cease and the tax court case could continue for purposes of deciding the merits of the debtor's personal liability for nondischargeable taxes.

Audit of trustee's returns: Under both bills, the bankruptcy court could determine the amount of any administrative period taxes. The Senate amendment, however, provided for an expedited audit procedure, which was mandatory in some cases. The House amendment (sec. 505(b)), adopts the provision of the House bill allowing the trustee discretion in all cases whether to ask the Internal Revenue Service, or State or local tax authority for a prompt audit of his returns on behalf of the estate. The House amendment, however, adopts the provision of the Senate bill permitting a prompt audit only on the basis of tax returns filed by the trustee for completed taxable periods. Procedures for a prompt audit set forth in the Senate bill are also adopted in modified form.

Under the procedure, before the case can be closed, the trustee may request a tax audit by the local, State or Federal tax authority of all tax returns filed by the trustee. The taxing authority would have to notify the trustee and the bankruptcy court within 60 days whether it accepts returns or desires to audit the returns more fully. If an audit is conducted, the taxing authority would have to notify the trustee of tax deficiency within 180 days after the original request, subject to extensions of time if the bankruptcy court approves. If the trustee does not agree with the results of the audit, the trustee could ask the bankruptcy court to resolve the dispute. Once the trustee's tax liability for administration period taxes has thus been determined, the legal effect in a case under chapter 7 or 11 would be to discharge the trustee and any predecessor of the trustee, and also the debtor, from any further liability for these taxes.

The prompt audit procedure would not be available with respect to any tax liability as to which any return required to be filed on behalf of the estate is not filed with the proper tax authority. The House amendment also specifies that a discharge of the trustee or the debtor which would otherwise occur will not be granted, or will be void if the return filed on behalf of the estate reflects fraud or material misrepresentation of facts.

For purposes of the above prompt audit procedures, it is intended that the tax authority with which the request for audit is to be filed is, as the Federal taxes, the office of the District Director in the district where the bankruptcy case is pending.

Under the House amendment, if the trustee does not request a prompt audit, the debtor would not be discharged from possible transferee liability if any assets are returned to the debtor.

Assessment after decision: As indicated above, the commencement of a bankruptcy case automatically stays assessment of any tax (sec. 362(a)(6)). However, the House amendment provides (sec. 505(c)) that if the bankruptcy court renders a final judgment with regard to any tax (under the rules discussed above), the tax authority may then make an assessment (if permitted to do so under otherwise applicable tax law) without waiting for termination of the case or confirmation of a reorganization plan.

Trustee's authority to appeal tax cases: The equivalent provision in the House bill (sec. 505(b)) and in the Senate bill (sec. 362(h)) authorizing the trustee to prosecute an appeal or review of a tax case are deleted as unnecessary. Section 541(a) of the House amendment provides that property of the estate is to include all legal or equitable interests of the debtor. These interests include the debtor's causes of action, so that the specific provisions of the House and Senate bills are not needed.

SENATE REPORT NO. 95–989

Subsections (a) and (b) are derived, with only stylistic changes, from section 2a(2A) of the Bankruptcy Act [section 11(a)(2A) of former title 11]. They permit determination by the bankruptcy court of any unpaid tax liability of the debtor that has not been contested before

or adjudicated by a judicial or administrative tribunal of competent jurisdiction before the bankruptcy case, and the prosecution by the trustee of an appeal from an order of such a body if the time for review or appeal has not expired before the commencement of the bankruptcy case. As under current Bankruptcy Act § 2a (2A), *Arkansas Corporation Commissioner v. Thompson*, 313 U.S. 132 (1941), remains good law to permit abstention where uniformity of assessment is of significant importance.

Section (c) deals with procedures for obtaining a prompt audit of tax returns filed by the trustee in a liquidation or reorganization case. Under the bill as originally introduced, a trustee who is ''in doubt'' concerning tax liabilities of the estate incurred during a title 11 proceeding could obtain a discharge from personal liability for himself and the debtor (but not for the debtor or the debtor's successor in a reorganization), provided that certain administrative procedures were followed. The trustee could request a prompt tax audit by the local, State, or Federal governmental unit. The taxing authority would have to notify the trustee and the court within sixty days whether it accepted the return or desired to audit the returns more fully. If an audit were conducted, the tax office would have to notify the trustee of any tax deficiency within 4 months (subject to an extension of time if the court approved). These procedures would apply only to tax years completed on or before the case was closed and for which the trustee had filed a tax return.

The committee bill eliminates the ''in doubt'' rule and makes mandatory (rather than optional) the trustee's request for a prompt audit of the estate's tax returns. In many cases, the trustee could not be certain that his returns raised no doubt about possible tax issues. In addition, it is desirable not to create a situation where the taxing authority asserts a tax liability against the debtor (as transferee of surplus assets, if any, return to him) after the case is over; in any such situation, the debtor would be called on to defend a tax return which he did not prepare. Under the amendment, all disputes concerning these returns are to be resolved by the bankruptcy court, and both the trustee and the debtor himself do not then face potential post-bankruptcy tax liabilities based on these returns. This result would occur as to the debtor, however, only in a liquidation case.

In a reorganization in which the debtor or a successor to the debtor continues in existence, the trustee could obtain a discharge from personal liability through the prompt audit procedure, but the Treasury could still claim a deficiency against the debtor (or his successor) for additional taxes due on returns filed during the title 11 proceedings.

HOUSE REPORT NO. 95–595

Subsection (c) is new. It codifies in part the referee's decision in *In re Statmaster Corp.*, 465 F.2d 987 (5th Cir. 1972). Its purpose is to protect the trustee from personal liability for a tax falling on the estate that is not assessed until after the case is closed. If necessary to permit expeditious closing of the case, the court, on request of the trustee, must order the governmental unit charged with the responsibility for collection or determination of the tax to audit the trustee's return or be barred from attempting later collection. The court will be required to permit sufficient time to perform an audit, if the taxing authority requests it. The final order of the court and the payment of the tax determined in that order discharges the trustee, the debtor, and any successor to the debtor from any further liability for the tax. See Plumb, The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures, 88 Harv. L. Rev. 1360, 1423–42 (1975).

AMENDMENTS

1984—Subsec. (a)(2)(B)(i). Pub. L. 98–353 substituted ''or'' for ''and''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title; title 26 sections 6212, 6512, 6532, 7437; title 28 section 2201.

§ 506. Determination of secured status

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2583; Pub. L. 98–353, title III, § 448, July 10, 1984, 98 Stat. 374.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 506(a) of the House amendment adopts the provision contained in the Senate amendment and rejects a contrary provision as contained in H.R. 8200 as passed by the House. The provision contained in the Senate amendment and adopted by the House amendment recognizes that an amount subject to set-off is sufficient to recognize a secured status in the holder of such right. Additionally a determination of what portion of an allowed claim is secured and what portion is unsecured is binding only for the purpose for which the determination is made. Thus determinations for purposes of adequate protection is not binding for purposes of ''cram down'' on confirmation in a case under chapter 11.

Section 506(b) of the House amendment adopts language contained in the Senate amendment and rejects language contained in H.R. 8200 as passed by the House. If the security agreement between the parties provides for attorneys' fees, it will be enforceable under title 11, notwithstanding contrary law, and is recoverable from the collateral after any recovery under section 506(c).

Section 506(c) of the House amendment was contained in H.R. 8200 as passed by the House and adopted, verbatim, in the Senate amendment. Any time the trustee or debtor in possession expends money to provide for the reasonable and necessary cost and expenses of preserving or disposing of a secured creditor's collateral, the trustee or debtor in possession is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party.

Section 506(d) of the House amendment is derived from H.R. 8200 as passed by the House and is adopted in lieu of the alternative test provided in section 506(d) of the Senate amendment. For purposes of section 506(d) of the House amendment, the debtor is a party in interest.

Determination of Secured Status: The House amendment deletes section 506(d)(3) of the Senate amendment, which insures that a tax lien securing a nondischargeable tax claim is not voided because a tax authority with notice or knowledge of the bankruptcy case fails to file a claim for the liability (as it may elect not to do, if it is clear there are insufficient assets to pay the liability). Since the House amendment retains section 506(d) of the House bill that a lien is not voided unless a party in interest has requested that the court determine and allow or disallow the claim, provision of the Senate amendment is not necessary.

SENATE REPORT NO. 95–989

Subsection (a) of this section separates an undersecured creditor's claim into two parts: He has a secured claim to the extent of the value of his collateral; and he has an unsecured claim for the balance of his claim. The subsection also provides for the valuation of claims which involve setoffs under section 553. While courts will have to determine value on a case-by-case basis, the subsection makes it clear that valuation is to be determined in light of the purpose of the valuation and the proposed disposition or use of the subject property. This determination shall be made in conjunction with any hearing on such disposition or use of property or on a plan affecting the creditor's interest. To illustrate, a valuation early in the case in a proceeding under sections 361–363 would not be binding upon the debtor or creditor at the time of confirmation of the plan. Throughout the bill, references to secured claims are only to the claim determined to be secured under this subsection, and not to the full amount of the creditor's claim. This provision abolishes the use of the terms ''secured creditor'' and ''unsecured creditor'' and substitutes in their places the terms ''secured claim'' and ''unsecured claim.''

Subsection (b) codifies current law by entitling a creditor with an oversecured claim to any reasonable fees (including attorney's fees), costs, or charges provided under the agreement under which the claim arose. These fees, costs, and charges are secured claims to the extent that the value of the collateral exceeds the amount of the underlying claim.

Subsection (c) also codifies current law by permitting the trustee to recover from property the value of which is greater than the sum of the claims secured by a lien on that property the reasonable, necessary costs and expenses of preserving, or disposing of, the property. The recovery is limited to the extent of any benefit to the holder of such claim.

Subsection (d) provides that to the extent a secured claim is not allowed, its lien is void unless the holder had neither actual notice nor knowledge of the case, the lien was not listed by the debtor in a chapter 9 or 11 case or such claim was disallowed only under section 502(e).

HOUSE REPORT NO. 95–595

Subsection (d) permits liens to pass through the bankruptcy case unaffected. However, if a party in interest requests the court to determine and allow or disallow the claim secured by the lien under section 502 and the claim is not allowed, then the lien is void to the extent that the claim is not allowed. The voiding provision does not apply to claims disallowed only under section 502(e), which requires disallowance of certain claims against the debtor by a codebtor, surety, or guarantor for contribution or reimbursement.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353, § 448(a), inserted ''for'' after ''provided''.

Subsec. (d)(1). Pub. L. 98–353, § 448(b), substituted ''such claim was disallowed only under section 502(b)(5) or 502(e) of this title'' for ''a party in interest has not requested that the court determine and allow or disallow such claim under section 502 of this title''.

Subsec. (d)(2). Pub. L. 98–353, § 448(b), substituted ''such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title'' for ''such claim was disallowed only under section 502(e) of this title''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 349, 522, 551, 552, 901, 1111, 1123, 1222, 1322 of this title.

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

(2) Second, unsecured claims allowed under section 502(f) of this title.

(3) Third, allowed unsecured claims, but only to the extent of $4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor;[1]

(4) Fourth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $4,000; less

(ii) the aggregate amount paid to such employees under paragraph (3) of this sub-

[1] So in original. The semicolon probably should be a period.

section, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(5) Fifth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility—

but only to the extent of $4,000 for each such individual.

(6) Sixth, allowed unsecured claims of individuals, to the extent of $1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(7) Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (3) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(1) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in sub-

section (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2583; Pub. L. 98–353, title III, §§350, 449, July 10, 1984, 98 Stat. 358, 374; Pub. L. 101–647, title XXV, §2522(d), Nov. 29, 1990, 104 Stat. 4867; Pub. L. 103–394, title I, §108(c), title II, §207, title III, §304(c), title V, §501(b)(3), (d)(11), Oct. 22, 1994, 108 Stat. 4112, 4123, 4132, 4142, 4145.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 507(a)(3) of the House amendment represents a compromise dollar amount and date for the priority between similar provisions contained in H.R. 8200 as passed by the House and the Senate amendments. A similar compromise is contained in section 507(a)(4).

Section 507(a)(5) represents a compromise on amount between the priority as contained in H.R. 8200 as passed by the House and the Senate amendment. The Senate provision for limiting the priority to consumers having less than a fixed gross income is deleted.

Section 507(a)(6) of the House amendment represents a compromise between similar provisions contained in H.R. 8200 as passed by the House and the Senate amendment.

Section 507(b) of the House amendment is new and is derived from the compromise contained in the House amendment with respect to adequate protection under section 361. Subsection (b) provides that to the extent adequate protection of the interest of a holder of a claim proves to be inadequate, then the creditor's claim is given priority over every other allowable claim entitled to distribution under section 507(a). Section 507(b) of the Senate amendment is deleted.

Section 507(c) of the House amendment is new. Section 507(d) of the House amendment prevents subrogation with respect to priority for certain priority claims. Subrogation with respect to priority is intended to be permitted for administrative claims and claims arising during the gap period.

Priorities: Under the House amendment, taxes receive priority as follows:

First. Administration expenses: The amendment generally follows the Senate amendment in providing expressly that taxes incurred during the administration of the estate share the first priority given to administrative expenses generally. Among the taxes which receives first priority, as defined in section 503, are the employees' and the employer's shares of employment taxes on wages earned and paid after the petition is filed. Section 503(b)(1) also includes in administration expenses a tax liability arising from an excessive allowance by a tax authority of a ''quickie refund'' to the estate. (In the case of Federal taxes, such refunds are allowed under special rules based on net operating loss carrybacks (sec. 6411 of the Internal Revenue Code [title 26]).

An exception is made to first priority treatment for taxes incurred by the estate with regard to the employer's share of employment taxes on wages earned from the debtor before the petition but paid from the estate after the petition has been filed. In this situation, the employer's tax receives either sixth priority or general claim treatment.

The House amendment also adopts the provisions of the Senate amendment which include in the definition of administrative expenses under section 503 any fine, penalty (including ''additions to tax'' under applicable tax laws) or reduction in credit imposed on the estate.

Second. ''Involuntary gap'' claims: ''Involuntary gap'' creditors are granted second priority by paragraph (2) of section 507(a). This priority includes tax claims arising in the ordinary course of the debtor's business or financial affairs after he has been placed involuntarily in bankruptcy but before a trustee is appointed or before the order for relief.

Third. Certain taxes on prepetition wages: Wage claims entitled to third priority are for compensation which does not exceed $2,000 and was earned during the 90 days before the filing of the bankruptcy petition or the cessation of the debtor's business. Certain employment taxes receive third priority in payment from the estate along with the payment of wages to which the taxes relate. In the case of wages earned before the filing of the petition, but paid by the trustee (rather than by the debtor) after the filing of the petition, claims or the employees' share of the employment taxes (withheld income taxes and the employees' share of the social security or railroad retirement tax) receive third priority to the extent the wage claims themselves are entitled to this priority.

In the case of wages earned from and paid by the debtor before the filing of the petition, the employer's share of the employment taxes on these wages paid by the debtor receives sixth priority or, if not entitled to that priority, are treated only as general claims. Under the House amendment, the employer's share of employment taxes on wages earned by employees of the debtor, but paid by the trustee after the filing of the bankruptcy petition, will also receive sixth priority to the extent that claims for the wages receive third priority. To the extent the claims for wages do not receive third priority, but instead are treated only as general claims, claims for the employer's share of the employment taxes attributable to those wages will also be treated as general claims. In calculating the amounts payable as general wage claims, the trustee must pay the employer's share of employment taxes on such wages.

Sixth priority. The House amendment modifies the provisions of both the House bill and Senate amendment in the case of sixth priority taxes. Under the amendment, the following Federal, State and local taxes are included in the sixth priority:

First. Income and gross receipts taxes incurred before the date of the petition for which the last due date of the return, including all extensions of time granted to file the return, occurred within 3 years before the date on which the petition was filed, or after the petition date. Under this rule, the due date of the return, rather than the date on which the taxes were assessed, determines the priority.

Second. Income and gross receipts taxes assessed at any time within 240 days before the petition date. Under this rule, the date on which the governmental unit assesses the tax, rather than the due date of the return, determines the priority.

If, following assessment of a tax, the debtor submits an offer in compromise to the governmental unit, the House amendment provides that the 240-day period is to be suspended for the duration of the offer and will resume running after the offer is withdrawn or rejected by the governmental unit, but the tax liability will receive priority if the title 11 petition is filed during the balance of the 240-day period or during a minimum of 30 days after the offer is withdrawn or rejected. This rule modifies a provision of the Senate amendment dealing specifically with offers in compromise. Under the modified rule, if, after the assessment, an offer in compromise is submitted by the debtor and is still pending (without having been accepted or rejected) at the date on which a title 11 petition is filed, the underlying liability will receive sixth priority. However, if an assessment of a tax liability is made but the tax is not collected within 240 days, the tax will not receive priority under section 507(a)(6)(A)(i) and the debtor cannot revive a priority for that tax by submitting an offer in compromise.

Third. Income and gross receipts taxes not assessed before the petition date but still permitted, under otherwise applicable tax laws, to be assessed. Thus, for example, a prepetition tax liability is to receive sixth priority under this rule if, under the applicable statute of limitations, the tax liability can still be assessed by the tax authority. This rule also covers situations re-

ferred to in section 507(a)(6)(B)(ii) of the Senate amendment where the assessment or collection of a tax was prohibited before the petition pending exhaustion of judicial or administrative remedies, except that the House amendment eliminates the 300-day limitation of the Senate bill. So, for example, if before the petition a debtor was engaged in litigation in the Tax Court, during which the Internal Revenue Code [title 26] bars the Internal Revenue Service from assessing or collecting the tax, and if the tax court decision is made in favor of the Service before the petition under title 11 is filed, thereby lifting the restrictions on assessment and collection, the tax liability will receive sixth priority even if the tax authority does not make an assessment within 300 days before the petition (provided, of course, that the statute of limitations on assessment has not expired by the petition date).

In light of the above categories of the sixth priority, and tax liability of the debtor (under the Internal Revenue Code [title 26] or State or local law) as a transferee of property from another person will receive sixth priority without the limitations contained in the Senate amendment so long as the transferee liability had not been assessed by the tax authority by the petition date but could still have been assessed by that date under the applicable tax statute of limitations or, if the transferee liability had been assessed before the petition, the assessment was made no more than 240 days before the petition date.

Also in light of the above categories, the treatment of prepetition tax liabilities arising from an excessive allowance to the debtor of a tentative carryback adjustment, such as a ''quickie refund'' under section 6411 of the Internal Revenue Code [title 26] is revised as follows: If the tax authority has assessed the additional tax before the petition, the tax liability will receive priority if the date of assessment was within 240 days before the petition date. If the tax authority had not assessed the additional tax by the petition, the tax liability will still receive priority so long as, on the petition date, assessment of the liability is not barred by the statute of limitations.

Fourth. Any property tax assessed before the commencement of the case and last payable without penalty within 1 year before the petition, or thereafter.

Fifth. Taxes which the debtor was required by law to withhold or collect from others and for which he is liable in any capacity, regardless of the age of the tax claims. This category covers the so-called ''trust fund'' taxes, that is, income taxes which an employer is required to withhold from the pay of his employees, and the employees' share of social security taxes.

In addition, this category includes the liability of a responsible officer under the Internal Revenue Code (sec. 6672) [title 26] for income taxes or for the employees' share of social security taxes which that officer was responsible for withholding from the wages of employees and paying to the Treasury, although he was not himself the employer. This priority will operate when a person found to be a responsible officer has himself filed in title 11, and the priority will cover the debtor's responsible officer liability regardless of the age of the tax year to which the tax relates. The U.S. Supreme Court has interpreted present law to require the same result as will be reached under this rule. *U.S. v. Sotelo*, 436 U.S. 268 (1978) [98 S.Ct. 1795, 56 L.Ed.2d 275, rehearing denied 98 S.Ct. 3126, 438 U.S. 907, 57 L.Ed.2d 1150].

This category also includes the liability under section 3505 of the Internal Revenue Code [26 U.S.C. 3505] of a taxpayer who loans money for the payment of wages or other compensation.

Sixth. The employer's share of employment taxes on wages paid before the petition and on third-priority wages paid postpetition by the estate. The priority rules under the House amendment governing employment taxes can thus be summarized as follows: Claims for the employees' shares of employment taxes attributable to wages both earned and paid before the filing of the petition are to receive sixth priority. In the case of employee wages earned, but not paid, before the filing of the bankruptcy petition, claims for the employees' share of employment taxes receive third priority to the extent the wages themselves receive third priority. Claims which relate to wages earned before the petition, but not paid before the petition (and which are not entitled to the third priority under the rule set out above), will be paid as general claims. Since the related wages will receive no priority, the related employment taxes would also be paid as nonpriority general claims.

The employer's share of the employment taxes on wages earned and paid before the bankruptcy petition will receive sixth priority to the extent the return for these taxes was last due (including extensions of time) within 3 years before the filing of the petition, or was due after the petition was filed. Older tax claims of this nature will be payable as general claims. In the case of wages earned by employees before the petition, but actually paid by the trustee (as claims against the estate) after the title 11 case commenced, the employer's share of the employment taxes on third priority wages will be payable as sixth priority claims and the employer's taxes on prepetition wages which are treated only as general claims will be payable only as general claims. In calculating the amounts payable as general wage claims, the trustee must pay the employer's share of employment taxes on such wages. The House amendment thus deletes the provision of the Senate amendment that certain employer taxes receive third priority and are to be paid immediately after payment of third priority wages and the employees' shares of employment taxes on those wages.

In the case of employment taxes relating to wages earned and paid after the petition, both the employees' shares and the employer's share will receive first priority as administration expenses of the estate.

Seventh. Excise taxes on transactions for which a return, if required, is last due, under otherwise applicable law or under any extension of time to file the return, within 3 years before the petition was filed, or thereafter. If a return is not required with regard to a particular excise tax, priority is given if the transaction or event itself occurred within 3 years before the date on which the title 11 petition was filed. All Federal, State or local taxes generally considered or expressly treated as excises are covered by this category, including sales taxes, estate and gift taxes, gasoline and special fuel taxes, and wagering and truck taxes.

Eighth. Certain unpaid customs duties. The House amendment covers in this category duties on imports entered for consumption within 1 year before the filing of the petition, but which are still unliquidated on the petition date; duties covered by an entry liquidated or reliquidated within 1 year before the petition date; and any duty on merchandise entered for consumption within 4 years before the petition but not liquidated on the petition date, if the Secretary of the Treasury or his delegate certifies that duties were not liquidated because of possible assessment of antidumping or countervailing duties or fraud penalties.

For purposes of the above priority rules, the House amendment adopts the provision of the Senate bill that any tax liability which, under otherwise applicable tax law, is collectible in the form of a ''penalty,'' is to be treated in the same manner as a tax liability. In bankruptcy terminology, such tax liabilities are referred to as pecuniary loss penalties. Thus, any tax liability which under the Internal Revenue Code [title 26] or State or local tax law is payable as a ''penalty,'' in addition to the liability of a responsible person under section 6672 of the Internal Revenue Code [26 U.S.C. 6672] will be entitled to the priority which the liability would receive if it were expressly labeled as a ''tax'' under the applicable tax law. However, a tax penalty which is punitive in nature is given subordi- nated treatment under section 726(a)(4).

The House amendment also adopts the provision of the Senate amendment that a claim arising from an erroneous refund or credit of tax, other than a ''quickie refund,'' is to receive the same priority as the tax to which the refund or credit relates.

The House amendment deletes the express provision of the Senate amendment that a tax liability is to receive sixth priority if it satisfies any one of the subparagraphs of section 507(a)(6) even if the liability fails to satisfy the terms of one or more other subparagraphs. No change of substance is intended by the deletion, however, in light of section 102(5) of the House amendment, providing a rule of construction that the word ''or'' is not intended to be exclusive.

The House amendment deletes from the express priority categories of the Senate amendment the priority for a debtor's liability as a third party for failing to surrender property or to pay an obligation in response to a levy for taxes of another, and the priority for amounts provided for under deferred payment agreements between a debtor and the tax authority.

The House amendment also adopts the substance of the definition in section 346(a) the Senate amendment of when taxes are to be considered ''incurred'' except that the House amendment applies these definitions solely for purposes of determining which category of section 507 tests the priority of a particular tax liability. Thus, for example, the House amendment contains a special rule for the treatment of taxes under the 45-day exception to the preference rules under section 547 and the definitions of when a tax is incurred for priority purposes are not to apply to such preference rules. Under the House amendment, for purposes of the priority rules, a tax on income for a particular period is to be considered ''incurred'' on the last day of the period. A tax on or measured by some event, such as the payment of wages or a transfer by reason of death or gift, or an excise tax on a sale or other transaction, is to be considered ''incurred'' on the date of the transaction or event.

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Section 507 specifies the kinds of claims that are entitled to priority in distribution, and the order of their priority. Paragraph (1) grants first priority to allowed administrative expenses and to fees and charges assessed against the estate under chapter 123 [§1911 et seq.] of title 28. Taxes included as administrative expenses under section 503(b)(1) of the bill generally receive the first priority, but the bill makes certain qualifications: Examples of these specially treated claims are the estate's liability for recapture of an investment tax credit claimed by the debtor before the title 11 case (this liability receives sixth priority) and the estate's employment tax liabilities on wages earned before, but paid after, the petition was filed (this liability generally receives the same priority as the wages).

''Involuntary gap'' creditors, granted first priority under current law, are granted second priority by paragraph (2). This priority, covering claims arising in the ordinary course of the debtor's business or financial affairs after a title 11 case has begun but before a trustee is appointed or before the order for relief, includes taxes incurred during the conduct of such activities.

Paragraph (3) expands and increases the wage priority found in current section 64a(2) [section 104(a)(2) of former title 11]. The amount entitled to priority is raised from $600 to $1,800. The former figure was last adjusted in 1926. Inflation has made it nearly meaningless, and the bill brings it more than up to date. The three month limit of current law is retained, but is modified to run from the earlier of the date of the filing of the petition or the date of the cessation of the debtor's business. The priority is expanded to cover vacation, severance, and sick leave pay. The bill adds to the third priority so-called ''trust fund'' taxes, that is, withheld income taxes and the employees' share of the social security or railroad retirement taxes, but only to the extent that the wages on which taxes are imposed are themselves entitled to third priority.

The employer's share, the employment tax and the employer's share of the social security or railroad retirement tax on third priority compensation, is also included in the third priority category, but only if, and to the extent that the wages and related trust fund taxes have first been paid in full. Because of the claimants urgent need for their wages in the typical cases, the employer's taxes should not be paid before the wage claims entitled to priority, as well as the related trust fund taxes, are fully paid.

Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered within 120 days before the commencement of the case or the date of cessation of the debtor's business, whichever occurs first. The dollar limit placed on the total of all contributions payable under this paragraph is equal to the difference between the maximum allowable priority under paragraph (3), $1,800, times the number of employees covered by the plan less the actual distributions under paragraph (3) with respect to these employees.

Paragraph (5) is a new priority for consumer creditors—those who have deposited money in connection with the purchase, lease, or rental of property, or the purchase of services, for their personal, family, or household use, that were not delivered or provided. The priority amount is not to exceed $600. In order to reach only those persons most deserving of this special priority, it is limited to individuals whose adjustable gross income from all sources derived does not exceed $20,000. See Senate Hearings, testimony of Prof. Vern Countryman, at pp. 848–849. The income of the husband and wife should be aggregated for the purposes of the $20,000 limit if either or both spouses assert such a priority claim.

The sixth priority is for certain taxes. Priority is given to income taxes for a taxable year that ended on or before the date of the filing of the petition, if the last due date of the return for such year occurred not more than 3 years immediately before the date on which the petition was filed (§507(a)(6)(A)(i)). For the purposes of this rule, the last due date of the return is the last date under any extension of time to file the return which the taxing authority may have granted the debtor.

Employment taxes and transfer taxes (including gift, estate, sales, use and other excise taxes) are also given sixth priority if the transaction or event which gave rise to the tax occurred before the petition date, provided that the required return or report of such tax liabilities was last due within 3 years before the petition was filed or was last due after the petition date (§507(a)(6)(A)(ii)). The employment taxes covered under this rule are the employer's share of the social security and railroad retirement taxes and required employer payments toward unemployment insurance.

Priority is given to income taxes and other taxes of a kind described in section 507(a)(6)(A)(i) and (ii) which the Federal, State, or local tax authority had assessed within 3 years after the last due date of the return, that is, including any extension of time to file the return, if the debtor filed in title 11 within 240 days after the assessment was made (§507(a)(6)(B)(i)). This rule may bring into the sixth priority the debtor's tax liability for some taxable years which would not qualify for priority under the general three-year rule of section 507(a)(6)(A).

The sixth priority category also includes taxes which the tax authority was barred by law from assessing or collecting at any time during the 300 days before the petition under title 11 was filed (§507(a)(6)(B)(ii)). In the case of certain Federal taxes, this preserves a priority for tax liabilities for years more than three years before the filing of the petition where the debtor and the Internal Revenue Service were negotiating over an audit of the debtor's returns or were engaged in litigation in the Tax Court. In such situations, the tax law prohibits the service's right to assess a tax deficiency until ninety days after the service sends the taxpayer

a deficiency letter or, if the taxpayer files a petition in the Tax Court during that 90-day period, until the outcome of the litigation. A similar priority exists in present law, except that the taxing authority is allowed no time to assess and collect the taxes after the restrictions on assessment (discussed above) are lifted. Some taxpayers have exploited this loophole by filing in bankruptcy immediately after the end of the 90-day period or immediately after the close of Tax Court proceedings. The bill remedies this defect by preserving a priority for taxes the assessment of which was barred by law by giving the tax authority 300 days within which to make the assessment after the lifting of the bar and then to collect or file public notice of its tax lien. Thus, if a taxpayer files a title 11 petition at any time during that 300-day period, the tax deficiency will be entitled to priority. If the petition is filed more than 300 days after the restriction on assessment was lifted, the taxing authority will not have priority for the tax deficiency.

Taxes for which an offer in compromise was withdrawn by the debtor, or rejected by a governmental unit, within 240 days before the petition date (§ 507(a)(6)(B)(iii)) will also receive sixth priority. This rule closes a loophole under present law under which, following an assessment of tax, some taxpayers have submitted a formal offer in compromise, dragged out negotiations with the taxing authority until the tax liability would lose priority under the three-year priority period of present law, and then filed in bankruptcy before the governmental unit could take collection steps.

Also included are certain taxes for which no return or report is required by law (§ 507(a)(6)(C)), if the taxable transaction occurred within three years before the petition was filed.

Taxes (not covered by the third priority) which the debtor was required by law to withhold or collect from others and for which he is liable in any capacity, regardless of the age of the tax claims (§ 507(a)(6)(D)) are included. This category covers the so-called ''trust fund'' taxes, that is, income taxes which an employer is required to withhold from the pay of his employees, the employees' shares of social security and railroad retirement taxes, and also Federal unemployment insurance. This category also includes excise taxes which a seller of goods or services is required to collect from a buyer and pay over to a taxing authority.

This category also covers the liability of a responsible corporate officer under the Internal Revenue Code [title 26] for income taxes or for the employees' share of employment taxes which, under the tax law, the employer was required to withhold from the wages of employees. This priority will operate where a person found to be a responsible officer has himself filed a petition under title 11, and the priority covers the debtor's liability as an officer under the Internal Revenue Code, regardless of the age of the tax year to which the tax relates.

The priority rules under the bill governing employment taxes can be summarized as follows: In the case of wages earned and actually paid before the petition under title 11 was filed, the liability for the employees' share of the employment taxes, regardless of the prepetition year in which the wages were earned and paid. The employer's share of the employment taxes on all wages earned and paid before the petition receive sixth priority; generally, these taxes will be those for which a return was due within three years before the petition. With respect to wages earned by employees before the petition but actually paid by the trustee after the title 11 case commenced, taxes required to be withheld receives the same priority as the wages themselves. Thus, the employees' share of taxes on third priority wages also receives third priority. Taxes on the balance of such wages receive no priority and are collectible only as general claims because the wages themselves are payable only as general claims and liability for the taxes arises only to the extent the wages are actually paid. The employer's share of employment taxes on third priority wages earned before the petition but paid after the petition was filed receives third priority, but only if the wages in this category have first been paid in full. Assuming there are sufficient funds to pay third priority wages and the related employer taxes in full, the employer's share of taxes on the balance of wage payments becomes a general claim (because the wages themselves are payable as general claims). Both the employees' and the employer's share of employment taxes on wages earned and paid after the petition was filed receive first priority as administrative expenses.

Also covered by this sixth priority are property taxes required to be assessed within 3 years before the filing of the petition (§ 507(a)(6)(E)).

Taxes attributable to a tentative carryback adjustment received by the debtor before the petition was filed, such as a ''quickie refund'' received under section 6411 of the Internal Revenue Code [title 26] (§ 507(a)(6)(F)) are included. However, the tax claim against the debtor will rein a prepetition loss year for which the tax return was last due, including extensions, within 3 years before the petition was filed.

Taxes resulting from a recapture, occasioned by a transfer during bankruptcy, of a tax credit or deduction taken during an earlier tax year (§ 507(a)(6)(G)) are included. A typical example occurs when there is a sale by the trustee of depreciable property during the case and depreciation deductions taken in prepetition years are subject to recapture under section 1250 of the Code [title 26].

Taxes owed by the debtor as a transferee of assets from another person who is liable for a tax, if the tax claim against the transferor would have received priority in a chapter 11 case commenced by the transferor within 1 year before the date of the petition filed by the transferee (§ 507(a)(6)(H)), are included.

Also included are certain tax payments required to have been made during the 1 year immediately before the petition was filed, where the debtor had previously entered into a deferred payment agreement (including an offer in compromise) to pay an agreed liability in periodic installments but had become delinquent in one or more installments before the petition was filed (§ 507(a)(6)(I)). This priority covers all types of deferred or part payment agreements. The priority covers only installments which first became due during the 1 year before the petition but which remained unpaid at the date of the petition. The priority does not come into play, however, if before the case began or during the case, the debtor and the taxing authority agree to a further extension of time to pay the delinquent amounts.

Certain tax-related liabilities which are not true taxes or which are not collected by regular assessment procedures (§ 507(a)(6)(J)) are included. One type of liability covered in this category is the liability under section 3505 of the Internal Revenue Code [title 26] of a lender who pays wages directly to employees of another employer or who supplies funds to an employer for the payment of wages. Another is the liability under section 6332 of the Internal Revenue Code [title 26], of a person who fails to turn over money or property of the taxpayer in response to a levy. Since the taxing authority must collect such a liability from the third party by suit rather than normal assessment procedures, an extra year is added to the normal 3-year priority periods. If a suit was commenced by the taxing authority within the four-year period and before the petition was filed, the priority is also preserved, provided that the suit had not terminated more than 1 year before the date of the filing of the petition.

Also included are certain unpaid customs duties which have not grown unreasonably ''stale'' (§ 507(a)(6)(K)). These include duties on imports entered for consumption with 3 years before the filing of the petition if the duties are still unliquidated on the petition date. If an import entry has been liquidated (in general, liquidation is in an administrative determination of the value and tariff rate of the item) or reliquidated, within two years of the filing of the petition

the customs liability is given priority. If the Secretary of the Treasury certifies that customs duties were not liquidated because of an investigation into possible assessment of antidumping or countervailing duties, or because of fraud penalties, duties not liquidated for this reason during the five years before the importer filed under title 11 also will receive priority.

Subsection (a) of this section also provides specifically that interest on sixth priority tax claims accrued before the filing of the petition is also entitled to sixth priority.

Subsection (b) of this section provides that any fine or penalty which represents compensation for actual pecuniary loss of a governmental unit, and which involves a tax liability entitled to sixth priority, is to receive the same priority.

Subsection (b) also provides that a claim arising from an erroneous refund or credit of tax is to be given the same priority as the tax to which the refund or credit relates.

AMENDMENTS

1994—Subsec. (a)(3). Pub. L. 103–394, §207, amended par. (3) generally. Prior to amendment, par. (3) read as follows: ''Third, allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay—

''(A) earned by an individual within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

''(B) to the extent of $2,000 for each such individual.''

Subsec. (a)(4)(B)(i). Pub. L. 103–394, §108(c)(1), substituted ''$4,000'' for ''$2,000''.

Subsec. (a)(5). Pub. L. 103–394, §§108(c)(2), 501(b)(3), substituted ''section 557(b)'' for ''section 557(b)(1)'' after ''grain, as defined in'' and ''section 557(b)'' for ''section 557(b)(2)'' after ''facility, as defined in'' in subpar. (A) and ''$4,000'' for ''$2,000'' in concluding provisions.

Subsec. (a)(6). Pub. L. 103–394, §108(c)(3), substituted ''$1,800'' for ''$900''.

Subsec. (a)(7). Pub. L. 103–394, §304(c)(3), added par. (7). Former par. (7) redesignated (8).

Subsec. (a)(8). Pub. L. 103–394, §304(c)(2), redesignated par. (7) as (8) and substituted ''Eighth'' for ''Seventh''. Former par. (8) redesignated (9).

Subsec. (a)(9). Pub. L. 103–394, §§304(c)(1), 501(d)(11)(A), redesignated par. (8) as (9) and substituted ''Ninth'' for ''Eighth'' and ''a Federal depository institutions regulatory agency (or predecessor to such agency)'' for ''the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Governors of the Federal Reserve System, or their predecessors or successors,''.

Subsec. (d). Pub. L. 103–394, §501(d)(11)(B), substituted ''(a)(6), (a)(7), (a)(8), or (a)(9)'' for ''or (a)(6)''.

1990—Subsec. (a)(8). Pub. L. 101–647 added par. (8).

1984—Subsec. (a)(3). Pub. L. 98–353, §449(a)(1), inserted a comma after ''severance''.

Subsec. (a)(4). Pub. L. 98–353, §449(a)(2), substituted ''an employee benefit plan'' for ''employee benefit plans'' in provisions preceding subpar. (A).

Subsec. (a)(4)(B)(i). Pub. L. 98–353, §449(a)(3), inserted ''each'' after ''covered by''.

Subsec. (a)(5). Pub. L. 98–353, §350(3), added par. (5). Former par. (5) redesignated (6).

Subsec. (a)(6). Pub. L. 98–353, §350(1), redesignated former par. (5) as (6) and substituted ''Sixth'' for ''Fifth''. Former par. (6) redesignated (7).

Subsec. (a)(7). Pub. L. 98–353, §§350(2), 449(a)(4), redesignated former par. (6) as (7), substituted ''Seventh'' for ''Sixth'', and inserted ''only'' after ''units,''.

Subsec. (c). Pub. L. 98–353, §449(b), substituted ''has the same priority'' for ''shall be treated the same''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

ADJUSTMENT OF DOLLAR AMOUNTS

For adjustment of dollar amounts specified in subsec. (a)(3), (4)(B)(i), (5), (6) of this section by the Judicial Conference of the United States, effective Apr. 1, 1998, see note set out under section 104 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 104, 364, 365, 502, 503, 523, 724, 726, 752, 766, 901, 943, 1123, 1129, 1222, 1226, 1322, 1326 of this title; title 15 section 78fff.

§ 508. Effect of distribution other than under this title

(a) If a creditor receives, in a foreign proceeding, payment of, or a transfer of property on account of, a claim that is allowed under this title, such creditor may not receive any payment under this title on account of such claim until each of the other holders of claims on account of which such holders are entitled to share equally with such creditor under this title has received payment under this title equal in value to the consideration received by such creditor in such foreign proceeding.

(b) If a creditor of a partnership debtor receives, from a general partner that is not a debtor in a case under chapter 7 of this title, payment of, or a transfer of property on account of, a claim that is allowed under this title and that is not secured by a lien on property of such partner, such creditor may not receive any payment under this title on account of such claim until each of the other holders of claims on account of which such holders are entitled to share equally with such creditor under this title has received payment under this title equal in value to the consideration received by such creditor from such general partner.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2585.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 508(b) of the House amendment is new and provides an identical rule with respect to a creditor of a partnership who receives payment from a partner, to that of a creditor of a debtor who receives a payment in a foreign proceeding involving the debtor.

SENATE REPORT NO. 95–989

This section prohibits a creditor from receiving any distribution in the bankruptcy case if he has received payment of a portion of his claim in a foreign proceeding, until the other creditors in the bankruptcy case in this country that are entitled to share equally with that creditor have received as much as he has in the foreign proceeding.

§ 509. Claims of codebtors

(a) Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such

claim, is subrogated to the rights of such creditor to the extent of such payment.

(b) Such entity is not subrogated to the rights of such creditor to the extent that—

(1) a claim of such entity for reimbursement or contribution on account of such payment of such creditor's claim is—

(A) allowed under section 502 of this title;

(B) disallowed other than under section 502(e) of this title; or

(C) subordinated under section 510 of this title; or

(2) as between the debtor and such entity, such entity received the consideration for the claim held by such creditor.

(c) The court shall subordinate to the claim of a creditor and for the benefit of such creditor an allowed claim, by way of subrogation under this section, or for reimbursement or contribution, of an entity that is liable with the debtor on, or that has secured, such creditor's claim, until such creditor's claim is paid in full, either through payments under this title or otherwise.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2585; Pub. L. 98–353, title III, § 450, July 10, 1984, 98 Stat. 375.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 509 of the House amendment represents a substantial revision of provisions contained in H.R. 8200 as passed by the House and in the Senate amendment. Section 509(a) states a general rule that a surety or co-debtor is subrogated to the rights of a creditor assured by the surety or co-debtor to the extent the surety or co-debtor pays such creditor. Section 509(b) states a general exception indicating that subrogation is not granted to the extent that a claim of a surety or co-debtor for reimbursement or contribution is allowed under section 502 or disallowed other than under section 502(e). Additionally, section 509(b)(1)(C) provides that such claims for subrogation are subordinated to the extent that a claim of the surety or co-debtor for reimbursement or contribution is subordinated under section 510(a)(1) or 510(b). Section 509(b)(2) reiterates the well-known rule that prevents a debtor that is ultimately liable on the debt from recovering from a surety or a co-debtor. Although the language in section 509(b)(2) focuses in terms of receipt of consideration, legislative history appearing elsewhere indicates that an agreement to share liabilities should prevail over an agreement to share profits throughout title 11. This is particularly important in the context of co-debtors who are partners. Section 509(c) subordinates the claim of a surety or co-debtor to the claim of an assured creditor until the creditor's claim is paid in full.

SENATE REPORT NO. 95–989

Section 509 deals with codebtors generally, and is in addition to the disallowance provision in section 502(e). This section is based on the notion that the only rights available to a surety, guarantor, or comaker are contribution, reimbursement, and subrogation. The right that applies in a particular situation will depend on the agreement between the debtor and the codebtor, and on whether and how payment was made by the codebtor to the creditor. The claim of a surety or codebtor for contribution or reimbursement is discharged even if the claim is never filed, as is any claim for subrogation even if the surety or codebtor chooses to file a claim for contribution or reimbursement instead.

Subsection (a) subrogates the codebtor (whether as a codebtor, surety, or guarantor) to the rights of the creditor, to the extent of any payment made by the co-debtor to the creditor. Whether the creditor's claim was filed under section 501(a) or 501(b) is irrelevant. The right of subrogation will exist even if the primary creditor's claim is allowed by virtue of being listed under proposed 11 U.S.C. 924 or 1111, and not by reason of a proof of claim.

Subsection (b) permits a subrogated codebtor to receive payments in the bankruptcy case only if the creditor has been paid in full, either through payments under the bankruptcy code or otherwise.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353, § 450(a), substituted ''subsection (b) or'' for ''subsections (b) and'', and inserted ''against the debtor'' after ''a creditor''.

Subsec. (b)(1). Pub. L. 98–353, § 450(b), substituted ''of such'' for ''of a'' after ''account''.

Subsec. (c). Pub. L. 98–353, § 450(c), substituted ''this section'' for ''section 509 of this title''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 502, 901 of this title.

§ 510. Subordination

(a) A subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

(b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2586; Pub. L. 98–353, title III, § 451, July 10, 1984, 98 Stat. 375.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 510(c)(1) of the House amendment represents a compromise between similar provisions in the House bill and Senate amendment. After notice and a hearing, the court may, under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest. As a matter of equity, it is reasonable that a court subordinate claims to claims and interests to interests. It is intended that the term ''principles of equitable subordination'' follow

existing case law and leave to the courts development of this principle. To date, under existing law, a claim is generally subordinated only if holder of such claim is guilty of inequitable conduct, or the claim itself is of a status susceptible to subordination, such as a penalty or a claim for damages arising from the purchase or sale of a security of the debtor. The fact that such a claim may be secured is of no consequence to the issue of subordination. However, it is inconceivable that the status of a claim as a secured claim could ever be grounds for justifying equitable subordination.

Subordination: Since the House amendment authorizes subordination of claims only under principles of equitable subordination, and thus incorporates principles of existing case law, a tax claim would rarely be subordinated under this provision of the bill.

Section 511 of the Senate amendment is deleted. Its substance is adopted in section 502(b)(9) of the House amendment which reflects an identical provision contained in H.R. 8200 as passed by the House.

SENATE REPORT NO. 95–989

Subsection (a) requires the court to enforce subordination agreements. A subordination agreement will not be enforced, however, in a reorganization case in which the class that is the beneficiary of the agreement has accepted, as specified in proposed 11 U.S.C. 1126, a plan that waives their rights under the agreement. Otherwise, the agreement would prevent just what chapter 11 contemplates: that seniors may give up rights to juniors in the interest of confirmation of a plan and rehabilitation of the debtor. The subsection also requires the court to subordinate in payment any claim for rescission of a purchase or sale of a security of the debtor or of an affiliate, or for damages arising from the purchase or sale of such a security, to all claims and interests that are senior to the claim or interest represented by the security. Thus, the later subordination varies with the claim or interest involved. If the security is a debt instrument, the damages or rescission claim will be granted the status of a general unsecured claim. If the security is an equity security, the damages or rescission claim is subordinated to all creditors and treated the same as the equity security itself.

Subsection (b) authorizes the bankruptcy court, in ordering distribution of assets, to subordinate all or any part of any claim to all or any part of another claim, regardless of the priority ranking of either claim. In addition, any lien securing such a subordinated claim may be transferred to the estate. The bill provides, however, that any subordination ordered under this provision must be based on principles of equitable subordination. These principles are defined by case law, and have generally indicated that a claim may normally be subordinated only if its holder is guilty of misconduct. As originally introduced, the bill provided specifically that a tax claim may not be subordinated on equitable grounds. The bill deletes this express exception, but the effect under the amendment should be much the same in most situations since, under the judicial doctrine of equitable subordination, a tax claim would rarely be subordinated.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353 amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: ''Any claim for recission of a purchase or sale of a security of the debtor or of an affiliate or for damages arising from the purchase or sale of such a security shall be subordinated for purposes of distribution to all claims and interests that are senior or equal to the claim or interest represented by such security.''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 349, 509, 522, 541, 726, 747, 752, 766, 901, 1129 of this title.

SUBCHAPTER II—DEBTOR'S DUTIES AND BENEFITS

§ 521. Debtor's duties

The debtor shall—

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title, and

(5) appear at the hearing required under section 524(d) of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2586; Pub. L. 98–353, title III, §§ 305, 452, July 10, 1984, 98 Stat. 352, 375; Pub. L. 99–554, title II, § 283(h), Oct. 27, 1986, 100 Stat. 3117.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 521 of the House amendment modifies a comparable provision contained in the House bill and Senate amendment. The Rules of Bankruptcy Procedure should provide where the list of creditors is to be filed. In addition, the debtor is required to attend the hearing on discharge under section 524(d).

SENATE REPORT NO. 95–989

This section lists three duties of the debtor in a bankruptcy case. The Rules of Bankruptcy Procedure

will specify the means of carrying out these duties. The first duty is to file with the court a list of creditors and, unless the court orders otherwise, a schedule of assets and liabilities and a statement of his financial affairs. Second, the debtor is required to cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties. Finally, the debtor must surrender to the trustee all property of the estate, and any recorded information, including books, documents, records, and papers, relating to property of the estate. This phrase ''recorded information, including books, documents, records, and papers,'' has been used here and throughout the bill as a more general term, and includes such other forms of recorded information as data in computer storage or in other machine readable forms.

The list in this section is not exhaustive of the debtor's duties. Others are listed elsewhere in proposed title 11, such as in section 343, which requires the debtor to submit to examination, or in the Rules of Bankruptcy Procedure, as continued by § 404(a) of S. 2266, such as the duty to attend any hearing on discharge, Rule 402(2).

AMENDMENTS

1986—Par. (4). Pub. L. 99–554 inserted '', whether or not immunity is granted under section 344 of this title'' after second reference to ''estate''.

1984—Par. (1). Pub. L. 98–353, § 305(2), inserted ''a schedule of current income and current expenditures,'' after ''liabilities,''.

Pars. (2) to (5). Pub. L. 98–353, § 305(1), (3), added par. (2), redesignated former pars. (2) to (4) as (3) to (5), respectively.

Pub. L. 98–353, § 452, which directed the insertion of '', whether or not immunity is granted under section 344 of this title'' after second reference to ''estate'' in par. (3) as redesignated above, could not be executed because such reference appeared in par. (4) rather than in par. (3).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 110, 523, 554, 704, 707, 1106, 1111, 1112, 1307 of this title.

§ 522. Exemptions

(a) In this section—

(1) ''dependent'' includes spouse, whether or not actually dependent; and

(2) ''value'' means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except—

(1) a debt of a kind specified in section 523(a)(1) or 523(a)(5) of this title;

(2) a debt secured by a lien that is—

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed; or

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

(d) The following property may be exempted under subsection (b)(1) of this section:

(1) The debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $2,400 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments,

that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $8,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive—

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to—

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $15,000, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(e) A waiver of an exemption executed in favor of a creditor that holds an unsecured claim against the debtor is unenforceable in a case under this title with respect to such claim against property that the debtor may exempt under subsection (b) of this section. A waiver by the debtor of a power under subsection (f) or (h) of this section to avoid a transfer, under subsection (g) or (i) of this section to exempt property, or under subsection (i) of this section to recover property or to preserve a transfer, is unenforceable in a case under this title.

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(A) a judicial lien, other than a judicial lien that secures a debt—

(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

(ii) to the extent that such debt—

(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.;[1] or

(B) a nonpossessory, nonpurchase-money security interest in any—

(i) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(ii) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(iii) professionally prescribed health aids for the debtor or a dependent of the debtor.

(2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of—

[1] So in original. The period preceding the semicolon probably should not appear.

(i) the lien;

(ii) all other liens on the property; and

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.

(B) In the case of a property subject to more than 1 lien, a lien that has been avoided shall not be considered in making the calculation under subparagraph (A) with respect to other liens.

(C) This paragraph shall not apply with respect to a judgment arising out of a mortgage foreclosure.

(3) In a case in which State law that is applicable to the debtor—

(A) permits a person to voluntarily waive a right to claim exemptions under subsection (d) or prohibits a debtor from claiming exemptions under subsection (d); and

(B) either permits the debtor to claim exemptions under State law without limitation in amount, except to the extent that the debtor has permitted the fixing of a consensual lien on any property or prohibits avoidance of a consensual lien on property otherwise eligible to be claimed as exempt property;

the debtor may not avoid the fixing of a lien on an interest of the debtor or a dependent of the debtor in property if the lien is a nonpossessory, nonpurchase-money security interest in implements, professional books, or tools of the trade of the debtor or a dependent of the debtor or farm animals or crops of the debtor or a dependent of the debtor to the extent the value of such implements, professional books, tools of the trade, animals, and crops exceeds $5,000.

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) the debtor could have avoided such transfer under subsection (f)(2) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if—

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

(i)(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title, the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.

(2) Notwithstanding section 551 of this title, a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, under subsection (f) or (h) of this section, or property recovered under section 553 of this title, may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

(j) Notwithstanding subsections (g) and (i) of this section, the debtor may exempt a particular kind of property under subsections (g) and (i) of this section only to the extent that the debtor has exempted less property in value of such kind than that to which the debtor is entitled under subsection (b) of this section.

(k) Property that the debtor exempts under this section is not liable for payment of any administrative expense except—

(1) the aliquot share of the costs and expenses of avoiding a transfer of property that the debtor exempts under subsection (g) of this section, or of recovery of such property, that is attributable to the value of the portion of such property exempted in relation to the value of the property recovered; and

(2) any costs and expenses of avoiding a transfer under subsection (f) or (h) of this section, or of recovery of property under subsection (i)(1) of this section, that the debtor has not paid.

(*l*) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

(m) Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2586; Pub. L. 98–353, title III, §§ 306, 453, July 10, 1984, 98 Stat. 353, 375; Pub. L. 99–554, title II, § 283(i), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 101–647, title XXV, § 2522(b), Nov. 29, 1990, 104 Stat. 4866; Pub. L. 103–394, title I, § 108(d), title III, §§ 303, 304(d), 310, title V, § 501(d)(12), Oct. 22, 1994, 108 Stat. 4112, 4132, 4133, 4137, 4145.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 522 of the House amendment represents a compromise on the issue of exemptions between the position taken in the House bill, and that taken in the Senate amendment. Dollar amounts specified in section 522(d) of the House bill have been reduced from amounts as contained in H.R. 8200 as passed by the House. The States may, by passing a law, determine whether the Federal exemptions will apply as an alternative to State exemptions in bankruptcy cases.

Section 522(c)(1) tracks the House bill and provides that dischargeable tax claims may not be collected out of exempt property.

Section 522(f)(2) is derived from the Senate amendment restricting the debtor to avoidance of nonpossessory, nonpurchase money security interests.

Exemptions: Section 522(c)(1) of the House amendment adopts a provision contained in the House bill that dischargeable taxes cannot be collected from exempt assets. This changes present law, which allows collection of dischargeable taxes from exempt property, a rule followed in the Senate amendment. Nondischargeable taxes, however, will continue to the [be] collectable out of exempt property. It is anticipated that in the next session Congress will review the exemptions from levy currently contained in the Internal Revenue Code [title 26] with a view to increasing the exemptions to more realistic levels.

SENATE REPORT NO. 95–989

Subsection (a) of this section defines two terms: ''dependent'' includes the debtor's spouse, whether or not actually dependent; and ''value'' means fair market value as of the date of the filing of the petition.

Subsection (b) tracks current law. It permits a debtor the exemptions to which he is entitled under other Federal law and the law of the State of his domicile. Some of the items that may be exempted under Federal laws other than title 11 include:

Foreign Service Retirement and Disability payments, 22 U.S.C. 1104;[2]

Social security payments, 42 U.S.C. 407;

Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717;

Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601;[3]

Civil service retirement benefits, 5 U.S.C. 729, 2265;[4]

Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. 916;

Railroad Retirement Act annuities and pensions, 45 U.S.C. 228(L);[5]

Veterans benefits, 45 U.S.C. 352(E);[6]

Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101;[7] and

Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. 175.

He may also exempt an interest in property in which the debtor had an interest as a tenant by the entirety or joint tenant to the extent that interest would have been exempt from process under applicable nonbankruptcy law.

Under proposed section 541, all property of the debtor becomes property of the estate, but the debtor is permitted to exempt certain property from property of the estate under this section. Property may be exempted even if it is subject to a lien, but only the unencumbered portion of the property is to be counted in computing the ''value'' of the property for the purposes of exemption.

As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.

Subsection (c) insulates exempt property from prepetition claims other than tax claims (whether or not dischargeable), and other than alimony, maintenance, or support claims that are excepted from discharge. The bankruptcy discharge does not prevent enforcement of valid liens. The rule of *Long v. Bullard*, 117 U.S. 617 (1886), is accepted with respect to the enforcement of valid liens on nonexempt property as well as on exempt property. Cf. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 583 (1935).

Subsection (c)(3) permits the collection of dischargeable taxes from exempt assets. Only assets exempted from levy under Section 6334 of the Internal Revenue Code [title 26] or under applicable state or local tax law cannot be applied to satisfy these tax claims. This rule applies to prepetition tax claims against the debtor regardless of whether the claims do or do not receive priority and whether they are dischargeable or nondischargeable. Thus, even if a tax is dischargeable vis-a-vis the debtor's after-acquired assets, it may nevertheless be collectible from exempt property held by the estate. (Taxes incurred by the debtor's estate which are collectible as first priority administrative expenses are not collectible from the debtor's estate which are collectible as first priority administrative expenses are not collectible from the debtor's exempt assets.)

Subsection (d) protects the debtor's exemptions, either Federal or State, by making unenforceable in a bankruptcy case a waiver of exemptions or a waiver of the debtor's avoiding powers under the following subsections.

Subsection (e) protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien, and may similarly avoid a nonpurchase-money security interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions.

Subsection (f) gives the debtor the ability to exempt property that the trustee recovers under one of the trustee's avoiding powers if the property was involuntarily transferred away from the debtor (such as by the fixing of a judicial lien) and if the debtor did not conceal the property. The debtor is also permitted to exempt property that the trustee recovers as the result of the avoiding of the fixing of certain security interests to the extent that the debtor could otherwise have exempted the property.

Subsection (g) provides that if the trustee does not exercise an avoiding power to recover a transfer of property that would be exempt, the debtor may exercise it and exempt the property, if the transfer was involuntary and the debtor did not conceal the property. If the debtor wishes to preserve his right to pursue any action under this provision, then he must intervene in any action brought by the trustee based on the same cause of action. It is not intended that the debtor be given an additional opportunity to avoid a transfer or that the transferee should have to defend the same action twice. Rather, the section is primarily designed to give the debtor the rights the trustee could have, but has not, pursued. The debtor is given no greater rights under this provision than the trustee, and thus, the debtor's avoiding powers under proposed sections 544, 545, 547, and 548, are subject to proposed 546, as are the trustee's powers.

These subsections are cumulative. The debtor is not required to choose which he will use to gain an exemption. Instead, he may use more than one in any particular instance, just as the trustee's avoiding powers are cumulative.

Subsection (h) permits recovery by the debtor of property transferred by an avoided transfer from either the initial or subsequent transferees. It also permits preserving a transfer for the benefit of the debtor. In either event, the debtor may exempt the property recovered or preserved.

Subsection (i) makes clear that the debtor may exempt property under the avoiding subsections (f) and (h) only to the extent he has exempted less property than allowed under subsection (b).

Subsection (j) makes clear that the liability of the debtor's exempt property is limited to the debtor's aliquot share of the costs and expenses recovery of property that the trustee recovers and the debtor later exempts, and any costs and expenses of avoiding a transfer by the debtor that the debtor has not already paid.

Subsection (k) requires the debtor to file a list of property that he claims as exempt from property of the estate. Absent an objection to the list, the property is

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[2] Replaced by 22 U.S.C. 4060(c).

[3] Replaced by 46 U.S.C. 11108, 11109.

[4] Replaced by 5 U.S.C. 8346.

[5] Replaced by 45 U.S.C. 231m.

[6] Railroad unemployment benefits are covered by 45 U.S.C. 352(e).

[7] Veterans benefits generally are covered by 38 U.S.C. 3101 [now 5301].

exempted. A dependent of the debtor may file it and thus be protected if the debtor fails to file the list.

Subsection (*l*) provides the rule for a joint case.

HOUSE REPORT NO. 95–595

Subsection (a) of this section defines two terms: ''dependent'' includes the debtor's spouse, whether or not actually dependent; and ''value'' means fair market value as of the date of the filing of the petition.

Subsection (b), the operative subsection of this section, is a significant departure from present law. It permits an individual debtor in a bankruptcy case a choice between exemption systems. The debtor may choose the Federal exemptions prescribed in subsection (d), or he may choose the exemptions to which he is entitled under other Federal law and the law of the State of his domicile. If the debtor chooses the latter, some of the items that may be exempted under other Federal laws include:

—Foreign Service Retirement and Disability payments, 22 U.S.C. 1104;[8]
—Social security payments, 42 U.S.C. 407;
—Injury or death compensation payments from war risk hazards, 42 U.S.C. 1717;
—Wages of fishermen, seamen, and apprentices, 46 U.S.C. 601;
—Civil service retirement benefits, 5 U.S.C. 729, 2265;[9]
—Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. 916;
—Railroad Retirement Act annuities and pensions, 45 U.S.C. 228(*l*);[10]
—Veterans benefits, 45 U.S.C. 352(E);[11]
—Special pensions paid to winners of the Congressional Medal of Honor, 38 U.S.C. 3101;[12] and
—Federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. 175.

He may also exempt an interest in property in which the debtor had an interest as a tenant by the entirety or joint tenant to the extent that interest would have been exempt from process under applicable nonbankruptcy law. The Rules will provide for the situation where the debtor's choice of exemption, Federal or State, was improvident and should be changed, for example, where the court has ruled against the debtor with respect to a major exemption.

Under proposed 11 U.S.C. 541, all property of the debtor becomes property of the estate, but the debtor is permitted to exempt certain property from property of the estate under this section. Property may be exempted even if it is subject to a lien, but only the unencumbered portion of the property is to be counted in computing the ''value'' of the property for the purposes of exemption. Thus, for example, a residence worth $30,000 with a mortgage of $25,000 will be exemptable to the extent of $5,000. This follows current law. The remaining value of the property will be dealt with in the bankruptcy case as is any interest in property that is subject to a lien.

As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. See Hearings, pt. 3, at 1355–58. The practice is not fraudulent as to creditors and permits the debtor to make full use of the exemptions to which he is entitled under the law.

Subsection (c) insulates exempt property from prepetition claims, except tax and alimony, maintenance, or support claims that are excepted from discharge. The bankruptcy discharge will not prevent enforcement of valid liens. The rule of *Long v. Bullard*, 117 U.S. 617 (1886) [6 S.Ct. 917, 29 L.Ed. 1004], is accepted with respect to the enforcement of valid liens on nonexempt property as well as on exempt property. Cf. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 583 (1935) [55 S.Ct. 854].

Subsection (d) specifies the Federal exemptions to which the debtor is entitled. They are derived in large part from the Uniform Exemptions Act, promulgated by the Commissioners of Uniform State Laws in August, 1976. Eleven categories of property are exempted. First is a homestead to the extent of $10,000, which may be claimed in real or personal property that the debtor or a dependent of the debtor uses as a residence. Second, the debtor may exempt a motor vehicle to the extent of $1500. Third, the debtor may exempt household goods, furnishings, clothing, and similar household items, held primarily for the personal, family, or household use of the debtor or a dependent of the debtor. ''Animals'' includes all animals, such as pets, livestock, poultry, and fish, if they are held primarily for personal, family or household use. The limitation for third category items is $300 on any particular item. The debtor may also exempt up to $750 of personal jewelry.

Paragraph (5) permits the exemption of $500, plus any unused amount of the homestead exemption, in any property, in order not to discriminate against the nonhomeowner. Paragraph (6) grants the debtor up to $1000 in implements, professional books, or tools, of the trade of the debtor or a dependent. Paragraph (7) exempts a life insurance contract, other than a credit life insurance contract, owned by the debtor. This paragraph refers to the life insurance contract itself. It does not encompass any other rights under the contract, such as the right to borrow out the loan value. Because of this provision, the trustee may not surrender a life insurance contract, which remains property of the debtor if he chooses the Federal exemptions. Paragraph (8) permits the debtor to exempt up to $5000 in loan value in a life insurance policy owned by the debtor under which the debtor or an individual of whom the debtor is a dependent is the insured. The exemption provided by this paragraph and paragraph (7) will also include the debtor's rights in a group insurance certificate under which the insured is an individual of whom the debtor is a dependent (assuming the debtor has rights in the policy that could be exempted) or the debtor. A trustee is authorized to collect the entire loan value on every life insurance policy owned by the debtor as property of the estate. First, however, the debtor will choose which policy or policies under which the loan value will be exempted. The $5000 figure is reduced by the amount of any automatic premium loan authorized after the date of the filing of the petition under section 542(d). Paragraph (9) exempts professionally prescribed health aids.

Paragraph (10) exempts certain benefits that are akin to future earnings of the debtor. These include social security, unemployment compensation, or public assistance benefits, veteran's benefits, disability, illness, or unemployment benefits, alimony, support, or separate maintenance (but only to the extent reasonably necessary for the support of the debtor and any dependents of the debtor), and benefits under a certain stock bonus, pension, profitsharing, annuity or similar plan based on illness, disability, death, age or length of service. Paragraph (11) allows the debtor to exempt certain compensation for losses. These include crime victim's reparation benefits, wrongful death benefits (with a reasonably necessary for support limitation), life insurance proceeds (same limitation), compensation for bodily injury, not including pain and suffering ($10,000 limitation), and loss of future earnings payments (support limitation). This provision in subparagraph (D)(11) is designed to cover payments in compensation of actual bodily injury, such as the loss of a limb, and is not intended to include the attendant costs that accompany such a loss, such as medical payments, pain and suffering, or loss of earnings. Those items are handled separately by the bill.

Subsection (e) protects the debtor's exemptions, either Federal or State, by making unenforceable in a bankruptcy case a waiver of exemptions or a waiver of

[8] Replaced by 22 U.S.C. 4060(c).

[9] Replaced by 5 U.S.C. 8346.

[10] Replaced by 45 U.S.C. 231m.

[11] Railroad unemployment benefits are covered by 45 U.S.C. 352(e).

[12] Veterans benefits generally are covered by 38 U.S.C. 3101 [now 5301].

the debtor's avoiding powers under the following subsections.

Subsection (f) protects the debtor's exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on exempt property. The debtor may avoid a judicial lien on any property to the extent that the property could have been exempted in the absence of the lien, and may similarly avoid a nonpurchase-money security interest in certain household and personal goods. The avoiding power is independent of any waiver of exemptions.

Subsection (g) gives the debtor the ability to exempt property that the trustee recovers under one of the trustee's avoiding powers if the property was involuntarily transferred away from the debtor (such as by the fixing of a judicial lien) and if the debtor did not conceal the property. The debtor is also permitted to exempt property that the trustee recovers as the result of the avoiding of the fixing of certain security interests to the extent that the debtor could otherwise have exempted the property.

If the trustee does not pursue an avoiding power to recover a transfer of property that would be exempt, the debtor may pursue it and exempt the property, if the transfer was involuntary and the debtor did not conceal the property. If the debtor wishes to preserve his right to pursue an action under this provision, then he must intervene in any action brought by the trustee based on the same cause of action. It is not intended that the debtor be given an additional opportunity to avoid a transfer or that the transferee have to defend the same action twice. Rather, the section is primarily designed to give the debtor the rights the trustee could have pursued if the trustee chooses not to pursue them. The debtor is given no greater rights under this provision than the trustee, and thus the debtor's avoiding powers under proposed 11 U.S.C. 544, 545, 547, and 548, are subject to proposed 11 U.S.C. 546, as are the trustee's powers.

These subsections are cumulative. The debtor is not required to choose which he will use to gain an exemption. Instead, he may use more than one in any particular instance, just as the trustee's avoiding powers are cumulative.

Subsection (i) permits recovery by the debtor of property transferred in an avoided transfer from either the initial or subsequent transferees. It also permits preserving a transfer for the benefit of the debtor. Under either case the debtor may exempt the property recovered or preserved.

Subsection (k) makes clear that the debtor's aliquot share of the costs and expenses [for] recovery of property that the trustee recovers and the debtor later exempts, and any costs and expenses of avoiding a transfer by the debtor that the debtor has not already paid.

Subsection (*l*) requires the debtor to file a list of property that he claims as exempt from property of the estate. Absent an objection to the list, the property is exempted. A dependent of the debtor may file it and thus be protected if the debtor fails to file the list.

Subsection (m) requires the clerk of the bankruptcy court to give notice of any exemptions claimed under subsection (*l*), in order that parties in interest may have an opportunity to object to the claim.

Subsection (n) provides the rule for a joint case: each debtor is entitled to the Federal exemptions provided under this section or to the State exemptions, whichever the debtor chooses.

REFERENCES IN TEXT

The Federal Rules of Bankruptcy Procedure, referred to in subsec. (b), are set out in the Appendix to this title.

The Internal Revenue Code of 1986, referred to in subsec. (d)(10)(E)(iii), is classified to Title 26, Internal Revenue Code.

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394, §501(d)(12)(A), substituted ''Federal Rules of Bankruptcy Procedure'' for ''Bankruptcy Rules''.

Subsec. (d)(1) to (6). Pub. L. 103–394, §108(d)(1)–(6), substituted ''$15,000'' for ''$7,500'' in par. (1), ''$2,400'' for ''$1,200'' in par. (2), ''$400'' and ''$8,000'' for ''$200'' and ''$4,000'', respectively, in par. (3), ''$1,000'' for ''$500'' in par. (4), ''$800'' and ''$7,500'' for ''$400'' and ''$3,750'', respectively, in par. (5), and ''$1,500'' for ''$750'' in par. (6).

Subsec. (d)(8). Pub. L. 103–394, §108(d)(7), substituted ''$8,000'' for ''$4,000''.

Subsec. (d)(10)(E)(iii). Pub. L. 103–394, §501(d)(12)(B), substituted ''or 408'' for ''408, or 409'' and ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409)''.

Subsec. (d)(11)(D). Pub. L. 103–394, §108(d)(8), substituted ''$15,000'' for ''$7,500''.

Subsec. (f)(1). Pub. L. 103–394, §§303(3), 310(1), designated existing provisions as par. (1) and inserted ''but subject to paragraph (3)'' after ''waiver of exemptions'' in introductory provisions. Former par. (1) redesignated subpar. (A) of par. (1).

Subsec. (f)(1)(A). Pub. L. 103–394, §§303(2), 304(d), redesignated par. (1) as subpar. (A) of par. (1) and inserted '', other than a judicial lien that secures a debt—

''(i) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement; and

''(ii) to the extent that such debt—

''(I) is not assigned to another entity, voluntarily, by operation of law, or otherwise; and

''(II) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.''

Subsec. (f)(1)(B). Pub. L. 103–394, §303(1), redesignated par. (2) as subpar. (B) of par. (1) and subpars. (A) to (C) of par. (2) as cls. (i) to (iii), respectively, of subpar. (B) of par. (1).

Subsec. (f)(2). Pub. L. 103–394, §303(4), added par. (2). Former par. (2) redesignated subpar. (B) of par. (1).

Subsec. (f)(3). Pub. L. 103–394, §310(2), added par. (3).

1990—Subsec. (c)(3). Pub. L. 101–647 added par. (3).

1986—Subsec. (h)(1). Pub. L. 99–554, §283(i)(1), substituted ''553 of this title'' for ''553 of this tittle''.

Subsec. (i)(2). Pub. L. 99–554, §283(i)(2), substituted ''this'' for ''his'' after ''subsection (g) of''.

1984—Subsec. (a)(2). Pub. L. 98–353, §453(a), inserted ''or, with respect to property that becomes property of an estate after such date, as of the date such property becomes property of the estate''.

Subsec. (b). Pub. L. 98–353, §306(a), inserted provision that in joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection, but that if the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed.

Subsec. (c). Pub. L. 98–353, §453(b), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: ''Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, except—

''(1) a debt of a kind specified in section 523(a)(1) or section 523(a)(5) of this title; or

''(2) a lien that is—

''(A) not avoided under section 544, 545, 547, 548, 549, or 724(a) of this title;

''(B) not voided under section 506(d) of this title; or

''(C)(i) a tax lien, notice of which is properly filed; and

''(ii) avoided under section 545(2) of this title.''

Subsec. (d)(3). Pub. L. 98–353, § 306(b), inserted ''or $4,000 in aggregate value''.

Subsec. (d)(5). Pub. L. 98–353, § 306(c), amended par. (5) generally. Prior to amendment, par. (5) read as follows: ''The debtor's aggregate interest, not to exceed in value $400 plus any unused amount of the exemption provided under paragraph (1) of this subsection, in any property.''

Subsec. (e). Pub. L. 98–353, § 453(c), substituted ''an exemption'' for ''exemptions''.

Subsec. (m). Pub. L. 98–353, § 306(d), substituted ''Subject to the limitation in subsection (b), this section shall apply separately with respect to each debtor in a joint case'' for ''This section shall apply separately with respect to each debtor in a joint case''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

ADJUSTMENT OF DOLLAR AMOUNTS

For adjustment of dollar amounts specified in subsec. (d)(1) to (6), (8), (11)(D) of this section by the Judicial Conference of the United States, effective Apr. 1, 1998, see note set out under section 104 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 104, 106, 110, 349, 502, 542, 551, 552, 722, 1123 of this title; title 26 sections 1017, 1398; title 28 section 3014; title 29 section 1405.

§ 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required—

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for ''luxury goods or services'' incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; ''luxury goods or services'' do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act;

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that—

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to section 408(a)(3) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a dwelling unit that has condominium ownership or in a share of a cooperative housing corporation, but only if such fee or assessment is payable for a period during which—

(A) the debtor physically occupied a dwelling unit in the condominium or cooperative project; or

(B) the debtor rented the dwelling unit to a tenant and received payments from the tenant for such period,

but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of title 28, or the debtor's status as a prisoner, as defined in section 1915(h) of title 28; or

(18) owed under State law to a State or municipality that is—

(A) in the nature of support, and

(B) enforceable under part D of title IV of the Social Security Act (42 U.S.C. 601 et seq.).

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A[1] of the Higher Education Act of 1965, or under section 733(g)[1] of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described

[1] See References in Text note below.

in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of a[2] insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2590; Pub. L. 96–56, § 3, Aug. 14, 1979, 93 Stat. 387; Pub. L. 97–35, title XXIII, § 2334(b), Aug. 13, 1981, 95 Stat. 863; Pub. L. 98–353, title III, §§ 307, 371, 454, July 10, 1984, 98 Stat. 353, 364, 375; Pub. L. 99–554, title II, §§ 257(n), 281, 283(j), Oct. 27, 1986, 100 Stat. 3115–3117; Pub. L. 101–581, § 2(a), Nov. 15, 1990, 104 Stat. 2865; Pub. L. 101–647, title XXV, § 2522(a), title XXXI, § 3102(a), title XXXVI, § 3621, Nov. 29, 1990, 104 Stat. 4865, 4916, 4964; Pub. L. 103–322, title XXXII, § 320934, Sept. 13, 1994, 108 Stat. 2135; Pub. L. 103–394, title II, § 221, title III, §§ 304(e), (h)(3), 306, 309, title V, § 501(d)(13), Oct. 22, 1994, 108 Stat. 4129, 4133–4135, 4137, 4145; Pub. L. 104–134, title I, § 101[(a)] [title VIII, § 804(b)], Apr. 26, 1996, 110 Stat. 1321, 1321–74; renumbered title I, Pub. L. 104–140, § 1(a), May 2, 1996, 110 Stat. 1327; Pub. L. 104–193, title III, § 374(a), Aug. 22, 1996, 110 Stat. 2255; Pub. L. 105–244, title IX, § 971(a), Oct. 7, 1998, 112 Stat. 1837.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 523(a)(1) represents a compromise between the position taken in the House bill and the Senate amendment. Section 523(a)(2) likewise represents a compromise between the position taken in the House bill and the Senate amendment with respect to the false financial statement exception to discharge. In order to clarify that a ''renewal of credit'' includes a ''refinancing of credit'', explicit reference to a refinancing of credit is made in the preamble to section 523(a)(2). A renewal of credit or refinancing of credit that was obtained by a false financial statement within the terms of section 523(a)(2) is nondischargeable. However, each of the provisions of section 523(a)(2) must be proved. Thus, under section 523(a)(2)(A) a creditor must prove that the debt was obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. Subparagraph (A) is intended to codify current case law e.g., *Neal v. Clark*, 95 U.S. 704 (1887) [24 L. Ed. 586], which interprets ''fraud'' to mean actual or positive fraud rather than fraud implied in law. Subparagraph (A) is mutually exclusive from subparagraph (B). Subparagraph (B) pertains to the so-called false financial statement. In order for the debt to be nondischargeable, the creditor must prove that the debt was obtained by the use of a statement in writing (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for obtaining money, property, services, or credit reasonably relied; (iv) that the debtor caused to be made or published with intent to deceive. Section 523(a)(2)(B)(iv) is not intended to change from present law since the statement that the debtor causes to be made or published with the intent to deceive automatically includes a statement that the debtor actually makes or publishes with an intent to deceive. Section 523(a)(2)(B) is explained in the House report. Under section 523(a)(2)(B)(i) a discharge is barred only as to that portion of a loan with respect to which a false financial statement is materially false.

In many cases, a creditor is required by state law to refinance existing credit on which there has been no default. If the creditor does not forfeit remedies or otherwise rely to his detriment on a false financial statement with respect to existing credit, then an extension, renewal, or refinancing of such credit is nondischargeable only to the extent of the new money advanced; on the other hand, if an existing loan is in default or the creditor otherwise reasonably relies to his detriment on a false financial statement with regard to an existing loan, then the entire debt is nondischargeable under section 523(a)(2)(B). This codifies the reasoning expressed by the second circuit in *In re Danns*, 558 F.2d 114 (2d Cir. 1977).

Section 523(a)(3) of the House amendment is derived from the Senate amendment. The provision is intended to overrule *Birkett v. Columbia Bank*, 195 U.S. 345 (1904) [25 S.Ct. 38, 49 L.Ed. 231, 12 Am.Bankr.Rep. 691].

Section 523(a)(4) of the House amendment represents a compromise between the House bill and the Senate amendment.

Section 523(a)(5) is a compromise between the House bill and the Senate amendment. The provision excepts from discharge a debt owed to a spouse, former spouse or child of the debtor, in connection with a separation agreement, divorce decree, or property settlement agreement, for alimony to, maintenance for, or support of such spouse or child but not to the extent that the debt is assigned to another entity. If the debtor has assumed an obligation of the debtor's spouse to a third party in connection with a separation agreement, property settlement agreement, or divorce proceeding, such debt is dischargeable to the extent that payment of the debt by the debtor is not actually in the nature of alimony, maintenance, or support of debtor's spouse, former spouse, or child.

Section 523(a)(6) adopts the position taken in the House bill and rejects the alternative suggested in the Senate amendment. The phrase ''willful and malicious injury'' covers a willful and malicious conversion.

Section 523(a)(7) of the House amendment adopts the position taken in the Senate amendment and rejects the position taken in the House bill. A penalty relating to a tax cannot be nondischargeable unless the tax itself is nondischargeable.

Section 523(a)(8) represents a compromise between the House bill and the Senate amendment regarding educational loans. This provision is broader than current law which is limited to federally insured loans. Only educational loans owing to a governmental unit or a nonprofit institution of higher education are made nondischargeable under this paragraph.

Section 523(b) is new. The section represents a modification of similar provisions contained in the House bill and the Senate amendment.

Section 523(c) of the House amendment adopts the position taken in the Senate amendment.

Section 523(d) represents a compromise between the position taken in the House bill and the Senate amendment on the issue of attorneys' fees in false financial statement complaints to determine dischargeability. The provision contained in the House bill permitting

[2] So in original. Probably should be ''an''.

the court to award damages is eliminated. The court must grant the debtor judgment or a reasonable attorneys' fee unless the granting of judgment would be clearly inequitable.

Nondischargeable debts: The House amendment retains the basic categories of nondischargeable tax liabilities contained in both bills, but restricts the time limits on certain nondischargeable taxes. Under the amendment, nondischargeable taxes cover taxes entitled to priority under section 507(a)(6) of title 11 and, in the case of individual debtors under chapters 7, 11, or 13, tax liabilities with respect to which no required return had been filed or as to which a late return had been filed if the return became last due, including extensions, within 2 years before the date of the petition or became due after the petition or as to which the debtor made a fraudulent return, entry or invoice or fraudulently attempted to evade or defeat the tax.

In the case of individuals in liquidation under chapter 7 or in reorganization under chapter 11 of title 11, section 1141(d)(2) incorporates by reference the exceptions to discharge continued in section 523. Different rules concerning the discharge of taxes where a partnership or corporation reorganizes under chapter 11, apply under section 1141.

The House amendment also deletes the reduction rule contained in section 523(e) of the Senate amendment. Under that rule, the amount of an otherwise nondischargeable tax liability would be reduced by the amount which a governmental tax authority could have collected from the debtor's estate if it had filed a timely claim against the estate but which it did not collect because no such claim was filed. This provision is deleted in order not to effectively compel a tax authority to file claim against the estate in ''no asset'' cases, along with a dischargeability petition. In no-asset cases, therefore, if the tax authority is not potentially penalized by failing to file a claim, the debtor in such cases will have a better opportunity to choose the prepayment forum, bankruptcy court or the Tax Court, in which to litigate his personal liability for a nondischargeable tax.

The House amendment also adopts the Senate amendment provision limiting the nondischargeability of punitive tax penalties, that is, penalties other than those which represent collection of a principal amount of tax liability through the form of a ''penalty.'' Under the House amendment, tax penalties which are basically punitive in nature are to be nondischargeable only if the penalty is computed by reference to a related tax liability which is nondischargeable or, if the amount of the penalty is not computed by reference to a tax liability, the transaction or event giving rise to the penalty occurred during the 3-year period ending on the date of the petition.

SENATE REPORT NO. 95–989

This section specifies which of the debtor's debts are not discharged in a bankruptcy case, and certain procedures for effectuating the section. The provision in Bankruptcy Act §17c [section 35(c) of former title 11] granting the bankruptcy courts jurisdiction to determine dischargeability is deleted as unnecessary, in view of the comprehensive grant of jurisdiction prescribed in proposed 28 U.S.C. 1334(b), which is adequate to cover the full jurisdiction that the bankruptcy courts have today over dischargeability and related issues under Bankruptcy Act §17c. The Rules of Bankruptcy Procedure will specify, as they do today, who may request determinations of dischargeability, subject, of course, to proposed 11 U.S.C. 523(c), and when such a request may be made. Proposed 11 U.S.C. 350, providing for reopening of cases, provides one possible procedure for a determination of dischargeability and related issues after a case is closed.

Subsection (a) lists nine kinds of debts excepted from discharge. Taxes that are excepted from discharge are set forth in paragraph (1). These include claims against the debtor which receive priority in the second, third and sixth categories (§507(a)(3)(B) and (c) and (6)). These categories include taxes for which the tax authority failed to file a claim against the estate or filed its claim late. Whether or not the taxing authority's claim is secured will also not affect the claim's nondischargeability if the tax liability in question is otherwise entitled to priority.

Also included in the nondischargeable debts are taxes for which the debtor had not filed a required return as of the petition date, or for which a return had been filed beyond its last permitted due date (§523(a)(1)(B)). For this purpose, the date of the tax year to which the return relates is immaterial. The late return rule applies, however, only to the late returns filed within three years before the petition was filed, and to late returns filed after the petition in title 11 was filed. For this purpose, the taxable year in question need not be one or more of the three years immediately preceding the filing of the petition.

Tax claims with respect to which the debtor filed a fraudulent return, entry or invoice, or fraudulently attempted to evade or defeat any tax (§523(a)(1)(C)) are included. The date of the taxable year with regard to which the fraud occurred is immaterial.

Also included are tax payments due under an agreement for deferred payment of taxes, which a debtor had entered into with the Internal Revenue Service (or State or local tax authority) before the filing of the petition and which relate to a prepetition tax liability (§523(a)(1)(D)) are also nondischargeable. This classification applies only to tax claims which would have received priority under section 507(a) if the taxpayer had filed a title 11 petition on the date on which the deferred payment agreement was entered into. This rule also applies only to installment payments which become due during and after the commencement of the title 11 case. Payments which had become due within one year before the filing of the petition receive sixth priority, and will be nondischargeable under the general rule of section 523(a)(1)(A).

The above categories of nondischargeability apply to customs duties as well as to taxes.

Paragraph (2) provides that as under Bankruptcy Act §17a(2) [section 35(a)(2) of former title 11], a debt for obtaining money, property, services, or a refinancing extension or renewal of credit by false pretenses, a false representation, or actual fraud, or by use of a statement in writing respecting the debtor's financial condition that is materially false, on which the creditor reasonably relied, and which the debtor made or published with intent to deceive, is excepted from discharge. This provision is modified only slightly from current section 17a(2). First, ''actual fraud'' is added as a ground for exception from discharge. Second, the creditor must not only have relied on a false statement in writing, but the reliance must have been reasonable. This codifies case law construing present section 17a(2). Third, the phrase ''in any manner whatsoever'' that appears in current law after ''made or published'' is deleted as unnecessary, the word ''published'' is used in the same sense that it is used in defamation cases.

Unscheduled debts are excepted from discharge under paragraph (3). The provision, derived from section 17a(3) [section 35(a)(3) of former title 11], follows current law, but clarifies some uncertainties generated by the case law construing 17a(3). The debt is excepted from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights, unless the creditor had notice or actual knowledge of the case.

Paragraph (4) excepts debts for fraud incurred by the debtor while acting in a fiduciary capacity or for defalcation, embezzlement, or misappropriation.

Paragraph (5) provides that debts for willful and malicious conversion or injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph ''willful'' means deliberate or intentional. To the extent that *Tinker v. Colwell*, 139 U.S. 473 (1902), held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a ''reckless disregard'' standard, they are overruled.

Paragraph (6) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (42 U.S.C. 656(b)) by section 326 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not State law. Thus, cases such as *In re Waller*, 494 F.2d 447 (6th Cir. 1974), are overruled, and the result in cases such as *Fife v. Fife*, 1 Utah 2d 281, 265 P.2d 642 (1952) is followed. The proviso, however, makes nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations as to whether a particular agreement to pay money to a spouse is actually alimony or a property settlement.

Paragraph (7) makes nondischargeable certain liabilities for penalties including tax penalties if the underlying tax with respect to which the penalty was imposed is also nondischargeable (sec. 523(a)(7)). These latter liabilities cover those which, but are penal in nature, as distinct from so-called ''pecuniary loss'' penalties which, in the case of taxes, involve basically the collection of a tax under the label of a ''penalty.'' This provision differs from the bill as introduced, which did not link the nondischarge of a tax penalty with the treatment of the underlying tax. The amended provision reflects the existing position of the Internal Revenue Service as to tax penalties imposed by the Internal Revenue Code (Rev.Rul. 68–574, 1968–2 C.B. 595).

Paragraph (8) follows generally current law and excerpts from discharge student loans until such loans have been due and owing for five years. Such loans include direct student loans as well as insured and guaranteed loans. This provision is intended to be self-executing and the lender or institution is not required to file a complaint to determine the nondischargeability of any student loan.

Paragraph (9) excepts from discharge debts that the debtor owed before a previous bankruptcy case concerning the debtor in which the debtor was denied a discharge other than on the basis of the six-year bar.

Subsection (b) of this section permits discharge in a bankruptcy case of an unscheduled debt from a prior case. This provision is carried over from Bankruptcy Act §17b [section 35(b) of former title 11]. The result dictated by the subsection would probably not be different if the subsection were not included. It is included nevertheless for clarity.

Subsection (c) requires a creditor who is owed a debt that may be excepted from discharge under paragraph (2), (4), or (5), (false statements, defalcation or larceny misappropriation, or willful and malicious injury) to initiate proceedings in the bankruptcy court for an exception to discharge. If the creditor does not act, the debt is discharged. This provision does not change current law.

Subsection (d) is new. It provides protection to a consumer debtor that dealt honestly with a creditor who sought to have a debt excepted from discharge on the ground of falsity in the incurring of the debt. The debtor may be awarded costs and a reasonable attorney's fee for the proceeding to determine the dischargeability of a debt under subsection (a)(2), if the court finds that the proceeding was frivolous or not brought by its creditor in good faith.

The purpose of the provision is to discourage creditors from initiating proceedings to obtaining a false financial statement exception to discharge in the hope of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start and are contrary to the spirit of the bankruptcy laws.

HOUSE REPORT NO. 95–595

Subsection (a) lists eight kinds of debts excepted from discharge. Taxes that are entitled to priority are excepted from discharge under paragraph (1). In addition, taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat, or with respect to which a return (if required) was not filed or was not filed after the due date and after one year before the bankruptcy case are excepted from discharge. If the taxing authority's claim has been disallowed, then it would be barred by the more modern rules of collateral estoppel from reasserting that claim against the debtor after the case was closed. See Plumb, The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures, 88 Harv.L.Rev. 1360, 1388 (1975).

As under Bankruptcy Act §17a(2) [section 35(a)(2) of former title 11], debt for obtaining money, property, services, or an extension or renewal of credit by false pretenses, a false representation, or actual fraud, or by use of a statement in writing respecting the debtor's financial condition that is materially false, on which the creditor reasonably relied, and that the debtor made or published with intent to deceive, is excepted from discharge. This provision is modified only slightly from current section 17a(2). First, ''actual fraud'' is added as a grounds for exception from discharge. Second, the creditor must not only have relied on a false statement in writing, the reliance must have been reasonable. This codifies case law construing this provision. Third, the phrase ''in any manner whatsoever'' that appears in current law after ''made or published'' is deleted as unnecessary. The word ''published'' is used in the same sense that it is used in slander actions.

Unscheduled debts are excepted from discharge under paragraph (3). The provision, derived from section 17a(3) [section 35(a)(3) of former title 11], follows current law, but clarifies some uncertainties generated by the case law construing 17a(3). The debt is excepted from discharge if it was not scheduled in time to permit timely action by the creditor to protect his rights, unless the creditor had notice or actual knowledge of the case.

Paragraph (4) excepts debts for embezzlement or larceny. The deletion of willful and malicious conversion from §17a(2) of the Bankruptcy Act [section 35(a)(2) of former title 11] is not intended to effect a substantive change. The intent is to include in the category of nondischargeable debts a conversion under which the debtor willfully and maliciously intends to borrow property for a short period of time with no intent to inflict injury but on which injury is in fact inflicted.

Paragraph (5) excepts from discharge debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of, the spouse or child. This language, in combination with the repeal of section 456(b) of the Social Security Act (42 U.S.C. 656(b)) by section 327 of the bill, will apply to make nondischargeable only alimony, maintenance, or support owed directly to a spouse or dependent. See Hearings, pt. 2, at 942. What constitutes alimony, maintenance, or support, will be determined under the bankruptcy laws, not State law. Thus, cases such as *In re Waller*, 494 F.2d 447 (6th Cir. 1974); Hearings, pt. 3, at 1308–10, are overruled, and the result in cases such as *Fife v. Fife*, 1 Utah 2d 281, 265 P.2d 642 (1952) is followed. This provision will, however, make nondischargeable any debts resulting from an agreement by the debtor to hold the debtor's spouse harmless on joint debts, to the extent that the agreement is in payment of alimony, maintenance, or support of the spouse, as determined under bankruptcy law considerations that are similar to considerations of whether a particular agreement to pay money to a spouse is actually alimony or a property settlement. See Hearings, pt. 3, at 1287–1290.

Paragraph (6) excepts debts for willful and malicious injury by the debtor to another person or to the property of another person. Under this paragraph, ''willful'' means deliberate or intentional. To the extent that

Tinker v. Colwell, 193 U.S. 473 (1902) [24 S.Ct. 505, 48 L.Ed. 754, 11 Am.Bankr.Rep. 568], held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a ''reckless disregard'' standard, they are overruled.

Paragraph (7) excepts from discharge a debt for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, that is not compensation for actual pecuniary loss.

Paragraph (8) [enacted as (9)] excepts from discharge debts that the debtor owed before a previous bankruptcy case concerning the debtor in which the debtor was denied a discharge other than on the basis of the six-year bar.

Subsection (d) is new. It provides protection to a consumer debtor that dealt honestly with a creditor who sought to have a debt excepted from discharge on grounds of falsity in the incurring of the debt. The debtor is entitled to costs of and a reasonable attorney's fee for the proceeding to determine the dischargeability of a debt under subsection (a)(2), if the creditor initiated the proceeding and the debt was determined to be dischargeable. The court is permitted to award any actual pecuniary loss that the debtor may have suffered as a result of the proceeding (such as loss of a day's pay). The purpose of the provision is to discourage creditors from initiating false financial statement exception to discharge actions in the hopes of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start.

REFERENCES IN TEXT

The Consumer Credit Protection Act, referred to in subsec. (a)(2)(C), is Pub. L. 90–321, May 29, 1968, 82 Stat. 146, as amended, which is classified principally to chapter 41 (§1601 et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 15 and Tables.

The Bankruptcy Act, referred to in subsecs. (a)(10) and (b), is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified generally to former Title 11. Sections 14c and 17a of the Bankruptcy Act were classified to sections 32(c) and 35(a) of former Title 11.

The Social Security Act, referred to in subsec. (a)(18)(B), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Part D of title IV of the Act is classified generally to part D (§651 et seq.) of subchapter IV of chapter 7 of Title 42, The Public Health and Welfare. Section 408(a)(3) of the Act is classified to section 608(a)(3) of Title 42. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

Section 439A of the Higher Education Act of 1965, referred to in subsec. (b), was classified to section 1087–3 of Title 20, Education, and was repealed by Pub. L. 95–598, title III, §317, Nov. 6, 1978, 92 Stat. 2678.

Section 733(g) of the Public Health Service Act, referred to in subsec. (b), was repealed by Pub. L. 95–598, title III, §327, Nov. 6, 1978, 92 Stat. 2679. A subsec. (g), containing similar provisions, was added to section 733 by Pub. L. 97–35, title XXVII, §2730, Aug. 13, 1981, 95 Stat. 919. Section 733 was subsequently omitted in the general revision of subchapter V of chapter 6A of Title 42, The Public Health and Welfare, by Pub. L. 102–408, title I, §102, Oct. 13, 1992, 106 Stat. 1994. See section 292f(g) of Title 42.

AMENDMENTS

1998—Subsec. (a)(8). Pub. L. 105–244 substituted ''stipend, unless'' for ''stipend, unless—'' and struck out ''(B)'' before ''excepting such debt'' and subpar. (A) which read as follows: ''such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or''.

1996—Subsec. (a)(5)(A). Pub. L. 104–193, §374(a)(4), substituted ''section 408(a)(3)'' for ''section 402(a)(26)''.

Subsec. (a)(17). Pub. L. 104–134 added par. (17).

Subsec. (a)(18). Pub. L. 104–193, §374(a)(1)–(3), added par. (18).

1994—Subsec. (a). Pub. L. 103–394, §501(d)(13)(A)(i), substituted ''1141,'' for ''1141,,'' in introductory provisions.

Subsec. (a)(1)(A). Pub. L. 103–394, §304(h)(3), substituted ''507(a)(8)'' for ''507(a)(7)''.

Subsec. (a)(2)(C). Pub. L. 103–394, §§306, 501(d)(13)(A)(ii), substituted ''$1,000 for'' for ''$500 for'', ''60'' for ''forty'' after ''incurred by an individual debtor on or within'', and ''60'' for ''twenty'' after ''obtained by an individual debtor on or within'', and struck out ''(15 U.S.C. 1601 et seq.)'' after ''Protection Act''.

Subsec. (a)(11). Pub. L. 103–322, §320934(1), struck out ''or'' after semicolon at end.

Subsec. (a)(12). Pub. L. 103–322, §320934(2), which directed the substitution of ''; or'' for a period at end of par. (12), could not be executed because a period did not appear at end.

Subsec. (a)(13). Pub. L. 103–394, §221(1), substituted semicolon for period at end.

Pub. L. 103–322, §320934(3), added par. (13).

Subsec. (a)(14). Pub. L. 103–394, §221(2), added par. (14).

Subsec. (a)(15). Pub. L. 103–394, §304(e)[(1)], which directed the amendment of this section by adding par. (15) ''at the end'' was executed by adding par. (15) at the end of subsec. (a) to reflect the probable intent of Congress.

Subsec. (a)(16). Pub. L. 103–394, §309, added par. (16).

Subsec. (b). Pub. L. 103–394, §501(d)(13)(B), struck out ''(20 U.S.C. 1087–3)'' after ''Act of 1965'' and ''(42 U.S.C. 294f)'' after ''Service Act''.

Subsec. (c)(1). Pub. L. 103–394, §304(e)(2), substituted ''(6), or (15)'' for ''or (6)'' in two places.

Subsec. (e). Pub. L. 103–394, §501(d)(13)(C), substituted ''insured depository institution'' for ''depository institution or insured credit union''.

1990—Subsec. (a)(8). Pub. L. 101–647, §3621, substituted ''for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless'' for ''for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless'' in introductory provisions and amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or''.

Subsec. (a)(9). Pub. L. 101–581 and Pub. L. 101–647, §3102(a), identically amended par. (9) generally. Prior to amendment, par. (9) read as follows: ''to any entity, to the extent that such debt arises from a judgment or consent decree entered in a court of record against the debtor wherein liability was incurred by such debtor as a result of the debtor's operation of a motor vehicle while legally intoxicated under the laws or regulations of any jurisdiction within the United States or its territories wherein such motor vehicle was operated and within which such liability was incurred; or''.

Subsec. (a)(11), (12). Pub. L. 101–647, §2522(a)(1), added pars. (11) and (12).

Subsec. (c). Pub. L. 101–647, §2522(a)(3), designated existing provisions as par. (1) and added par. (2).

Subsec. (e). Pub. L. 101–647, §2522(a)(2), added subsec. (e).

1986—Subsec. (a). Pub. L. 99–554, §257(n), inserted reference to sections 1228(a) and 1228(b) of this title.

Subsec. (a)(1)(A). Pub. L. 99–554, §283(j)(1)(A), substituted ''507(a)(7)'' for ''507(a)(6)''.

Subsec. (a)(5). Pub. L. 99–554, §281, struck out the comma after ''decree'' and inserted '', determination made in accordance with State or territorial law by a governmental unit,'' after ''record''.

Subsec. (a)(9), (10). Pub. L. 99–554, §283(j)(1)(B), redesignated par. (9) relating to debts incurred by persons

driving while intoxicated, added by Pub. L. 98–353, as (10).

Subsec. (b). Pub. L. 99–554, § 283(j)(2), substituted ''Service'' for ''Services''.

1984—Subsec. (a)(2). Pub. L. 98–353, § 454(a)(1), in provisions preceding subpar. (A), struck out ''obtaining'' after ''for'', and substituted ''refinancing of credit, to the extent obtained'' for ''refinance of credit,''.

Subsec. (a)(2)(A). Pub. L. 98–353, § 307(a)(1), struck out ''or'' at end.

Subsec. (a)(2)(B). Pub. L. 98–353, § 307(a)(2), inserted ''or'' at end.

Subsec. (a)(2)(B)(iii). Pub. L. 98–353, § 454(a)(1)(A), struck out ''obtaining'' before ''such''.

Subsec. (a)(2)(C). Pub. L. 98–353, § 307(a)(3), added subpar. (C).

Subsec. (a)(5). Pub. L. 98–353, § 454(b)(1), inserted ''or other order of a court of record'' after ''divorce decree,'' in provisions preceding subpar. (A).

Subsec. (a)(5)(A). Pub. L. 98–353, § 454(b)(2), inserted '', or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State''.

Subsec. (a)(8). Pub. L. 98–353, §§ 371(1), 454(a)(2), struck out ''of higher education'' after ''a nonprofit institution of'' and struck out ''or'' at end.

Subsec. (a)(9). Pub. L. 98–353, § 371(2), added the par. (9) relating to debts incurred by persons driving while intoxicated.

Subsec. (c). Pub. L. 98–353, § 454(c), inserted ''of a kind'' after ''debt''.

Subsec. (d). Pub. L. 98–353, § 307(b), substituted ''the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust'' for ''the court shall grant judgment against such creditor and in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding to determine dischargeability, unless such granting of judgment would be clearly inequitable''.

1981—Subsec. (a)(5)(A). Pub. L. 97–35 substituted ''law, or otherwise (other than debts assigned pursuant to section 402(a)(26) of the Social Security Act);'' for ''law, or otherwise;''.

1979—Subsec. (a)(8). Pub. L. 96–56 substituted ''for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education'' for ''to a governmental unit, or a nonprofit institution of higher education, for an educational loan'' in the provisions preceding subpar. (A) and inserted ''(exclusive of any applicable suspension of the repayment period)'' after ''before five years'' in subpar. (A).

EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105–244, title IX, § 971(b), Oct. 7, 1998, 112 Stat. 1837, provided that: ''The amendment made by subsection (a) [amending this section] shall apply only with respect to cases commenced under title 11, United States Code, after the date of enactment of this Act [Oct. 7, 1998].''

EFFECTIVE DATE OF 1996 AMENDMENT

Section 374(c) of Pub. L. 104–193 provided that: ''The amendments made by this section [amending this section and section 656 of Title 42, The Public Health and Welfare] shall apply only with respect to cases commenced under title 11 of the United States Code after the date of the enactment of this Act [Aug. 22, 1996].''

For provisions relating to effective date of title III of Pub. L. 104–193, see section 395(a)–(c) of Pub. L. 104–193, set out as a note under section 654 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1990 AMENDMENTS

Section 3104 of title XXXI of Pub. L. 101–647 provided that:

''(a) EFFECTIVE DATE.—This title and the amendments made by this title [amending this section and section 1328 of this title and enacting provisions set out as a note under section 101 of this title] shall take effect on the date of the enactment of this Act [Nov. 29, 1990].

''(b) APPLICATION OF AMENDMENTS.—The amendments made by this title [amending this section and section 1328 of this title] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.''

Amendment by section 3621 of Pub. L. 101–647 effective 180 days after Nov. 29, 1990, see section 3631 of Pub. L. 101–647, set out as an Effective Date note under section 3001 of Title 28, Judiciary and Judicial Procedure.

Section 4 of Pub. L. 101–581 provided that:

''(a) EFFECTIVE DATE.—This Act and the amendments made by this Act [amending this section and section 1328 of this title and enacting provisions set out as a note under section 101 of this title] shall take effect on the date of the enactment of this Act [Nov. 15, 1990].

''(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act [amending this section and section 1328 of this title] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.''

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by sections 281 and 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97–35 effective Aug. 13, 1981, see section 2334(c) of Pub. L. 97–35, set out as a note under section 656 of Title 42, The Public Health and Welfare.

ADJUSTMENT OF DOLLAR AMOUNTS

For adjustment of dollar amounts specified in subsec. (a)(2)(C) of this section by the Judicial Conference of the United States, effective Apr. 1, 1998, see note set out under section 104 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 104, 106, 502, 507, 522, 524, 727, 1141, 1228, 1328 of this title; title 20 section 1087; title 26 sections 6327, 7437.

§ 524. Effect of discharge

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1)[1] of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if—

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—

(1) inform the debtor—

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of—

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer

[1] See 1986 and 1994 Amendment notes below.

debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan of reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, then after entry of such injunction, any proceeding that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that—

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization—

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of—

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (h), the court determines that—

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan—

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (h), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan—

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to—

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be lia-

ble to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of—

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to—

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term ''related party'' means—

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor; or

(III) any entity that owned a financial interest in—

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if—

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term ''demand'' means a demand for payment, present or future, that—

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 or the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) APPLICATION TO EXISTING INJUNCTIONS.—For purposes of subsection (g)—

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if—

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims—

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2592; Pub. L. 98–353, title III, §§308, 455, July 10, 1984, 98 Stat. 354, 376; Pub. L. 99–554, title II, §§257(*o*), 282, 283(k), Oct. 27, 1986, 100 Stat. 3115–3117; Pub. L. 103–394, title I, §§103, 111(a), title V, §501(d)(14), Oct. 22, 1994, 108 Stat. 4108, 4113, 4145.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 524(a) of the House amendment represents a compromise between the House bill and the Senate amendment. Section 524(b) of the House amendment is new, and represents standards clarifying the operation of section 524(a)(3) with respect to community property.

Sections 524(c) and (d) represent a compromise between the House bill and Senate amendment on the issue of reaffirmation of a debt discharged in bankruptcy. Every reaffirmation to be enforceable must be approved by the court, and any debtor may rescind a reaffirmation for 30 days from the time the reaffirmation becomes enforceable. If the debtor is an individual the court must advise the debtor of various effects of reaffirmation at a hearing. In addition, to any extent the debt is a consumer debt that is not secured by real property of the debtor reaffirmation is permitted only if the court approves the reaffirmation agreement, before granting a discharge under section 727, 1141, or 1328, as not imposing a hardship on the debtor or a dependent of the debtor and in the best interest of the debtor; alternatively, the court may approve an agreement entered into in good faith that is in settlement of litigation of a complaint to determine dischargeability or that is entered into in connection with redemption under section 722. The hearing on discharge under section 524(d) will be held whether or not the debtor desires to reaffirm any debts.

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Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt, and operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, including telephone calls, letters, and personal contacts, to collect, recover, or offset any discharged debt as a personal liability of the debtor, or from property of the debtor, whether or not the debtor has waived discharge of the debt involved. The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts. This paragraph has been expanded over a comparable provision in Bankruptcy Act §14f [section 32(f) of former title 11] to cover any act to collect, such as dunning by telephone or letter, or indirectly through friends, relatives, or employers, harassment, threats of repossession, and the like. The change is consonant with the new policy forbidding binding reaffirmation agreements under proposed 11 U.S.C. 524(b), and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that. The language ''whether or not discharge of such debt is waived'' is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section. It is directed at waiver of discharge of a particular debt, not waiver of discharge in toto as permitted under section 727(a)(9).

Subsection (a) also codifies the split discharge for debtors in community property states. If community property was in the estate and community claims were discharged, the discharge is effective against community creditors of the nondebtor spouse as well as of the debtor spouse.

Subsection (b) gives further effect to the discharge. It prohibits reaffirmation agreements after the commencement of the case with respect to any dischargeable debt. The prohibition extends to agreements the consideration for which in whole or in part is based on a dischargeable debt, and it applies whether or not discharge of the debt involved in the agreement has been waived. Thus, the prohibition on reaffirmation agreements extends to debts that are based on discharged debts. Thus, ''second generation'' debts, which included all or a part of a discharged debt could not be included in any new agreement for new money. This subsection will not have any effect on reaffirmations of debts discharged under the Bankruptcy Act [former title 11]. It will only apply to discharges granted if commenced under the new title 11 bankruptcy code.

Subsection (c) grants an exception to the anti-reaffirmation provision. It permits reaffirmation in connection with the settlement of a proceeding to determine the dischargeability of the debt being reaffirmed, or in connection with a redemption agreement permitted under section 722. In either case, the reaffirmation agreement must be entered into in good faith and must be approved by the court.

Subsection (d) provides the discharge of the debtor does not affect co-debtors or guarantors.

REFERENCES IN TEXT

The Bankruptcy Act, referred to in subsec. (b)(1), is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified generally to former Title 11.

The date of the enactment of this subsection, referred to in subsec. (g)(7), is the date of enactment of Pub. L. 103–394, which enacted subsec. (g) and was approved Oct. 22, 1994.

The date of the enactment of this Act, referred to in subsec. (h), probably means the date of enactment of Pub. L. 103–394, which enacted subsec. (h) and was approved Oct. 22, 1994.

AMENDMENTS

1994—Subsec. (a)(3). Pub. L. 103–394, §501(d)(14)(A), substituted ''1328(a)(1)'' for ''1328(c)(1)''. See 1986 Amendment note below.

Subsec. (c)(2). Pub. L. 103–394, §103(a)(1), designated existing provisions as subpar. (A), inserted ''and'' at end, and added subpar. (B).

Subsec. (c)(3). Pub. L. 103–394, §103(a)(2), struck out ''such agreement'' after ''which states that'' in introductory provisions, struck out ''and'' at end of subpar. (A), inserted ''such agreement'' in subpars. (A) and (B), and added subpar. (C).

Subsec. (c)(4). Pub. L. 103–394, §501(d)(14)(B), substituted ''rescission'' for ''recission''.

Subsec. (d). Pub. L. 103–394, §103(b), inserted ''and was not represented by an attorney during the course of negotiating such agreement'' after ''this section'' in introductory provisions.

Subsec. (d)(1)(B)(ii). Pub. L. 103–394, §501(d)(14)(C), inserted ''and'' at end.

Subsecs. (g), (h). Pub. L. 103–394, §111(a), added subsecs. (g) and (h).

1986—Subsec. (a)(1). Pub. L. 99–554, §257(*o*)(1), inserted reference to section 1228 of this title.

Subsec. (a)(3). Pub. L. 99–554, §257(*o*)(2), which directed the substitution of '', 1228(a)(1), or 1328(a)(1)'' for ''or 1328(a)(1)'' was executed by making the substitution for ''or 1328(c)(1)'' to reflect the probable intent of Congress. See 1994 Amendment note above.

Subsec. (c)(1). Pub. L. 99–554, §257(*o*)(1), inserted reference to section 1228 of this title.

Subsec. (d). Pub. L. 99–554, §257(*o*)(1), inserted reference to section 1228 of this title.

Pub. L. 99–554, §282, substituted ''shall'' for ''may'' before ''hold'' in first sentence, inserted ''any'' after ''At'' in second sentence, and inserted ''the court shall hold a hearing at which the debtor shall appear in person and'' after ''then'' in third sentence.

Subsec. (d)(2). Pub. L. 99–554, §283(k), substituted ''section'' for ''subsection'' after ''subsection (c)(6) of this''.

1984—Subsec. (a)(2). Pub. L. 98–353, §§308(a), 455, struck out ''or from property of the debtor,'' before ''whether or not discharge'', and substituted ''an act'' for ''any act''.

Subsec. (a)(3). Pub. L. 98–353, §455, substituted ''an act'' for ''any act''.

Subsec. (c)(2). Pub. L. 98–353, §308(b)(1), (3), added par. (2). Former par. (2), which related to situations where the debtor had not rescinded the agreement within 30 days after the agreement became enforceable, was struck out.

Subsec. (c)(3), (4). Pub. L. 98–352, §308(b)(3), added pars. (3) and (4). Former pars. (3) and (4) redesignated (5) and (6), respectively.

Subsec. (c)(5). Pub. L. 98–353, §308(b)(2), redesignated former par. (3) as (5).

Subsec. (c)(6). Pub. L. 98–353, §308(b)(2), (4), redesignated former par. (4) as (6) and generally amended par. (6), as so redesignated, thereby striking out provisions relating to court approval of such agreements as are entered into in good faith and are in settlement of litigation under section 523 of this title or provide for redemption under section 722 of this title.

Subsec. (d)(2). Pub. L. 98–353, §308(c), substituted ''subsection (c)(6)'' for ''subsection (c)(4)''.

Subsec. (f). Pub. L. 98–353, §308(d), added subsec. (f).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and, except with respect to amendment by section 111(a) of Pub. L. 103–394, amendment by Pub. L. 103–394 not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by sections 282 and 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

CONSTRUCTION

Section 111(b) of Pub. L. 103–394 provided that: ''Nothing in subsection (a), or in the amendments made by subsection (a) [amending this section], shall be construed to modify, impair, or supersede any other authority the court has to issue injunctions in connection with an order confirming a plan of reorganization.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 108, 341, 521, 901 of this title.

§ 525. Protection against discriminatory treatment

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled ''An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes,'' approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

(c)(1) A governmental unit that operates a student grant or loan program and a person engaged in a business that includes the making of loans guaranteed or insured under a student loan program may not deny a grant, loan, loan guarantee, or loan insurance to a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, or another person with whom the debtor or bankrupt has been associated, because the debtor or bankrupt is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of a case under this title or during the pendency of the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

(2) In this section, ''student loan program'' means the program operated under part B, D, or E of title IV of the Higher Education Act of 1965 or a similar program operated under State or local law.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2593; Pub. L. 98–353, title III, §309, July 10, 1984, 98 Stat. 354; Pub. L. 103–394, title III, §313, title V, §501(d)(15), Oct. 22, 1994, 108 Stat. 4140, 4145.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section is additional debtor protection. It codifies the result of *Perez v. Campbell*, 402 U.S. 637 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy.

Notwithstanding any other laws, section 525 prohibits a governmental unit from denying, revoking, suspending, or refusing to renew a license, permit, charter, franchise, or other similar grant to, from conditioning such a grant to, from discrimination with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor or that is or has been associated with a debtor. The prohibition extends only to discrimination or other action based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, or on the basis of nonpayment of a debt discharged in the bankruptcy case (the *Perez* situation). It does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.

In addition, the section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the *Perez* rule. This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start, such as exclusion from a union on the basis of discharge of a debt to the union's credit union.

The effect of the section, and of further interpretations of the *Perez* rule, is to strengthen the anti-reaffirmation policy found in section 524(b). Discrimination based solely on nonpayment could encourage reaffirmations, contrary to the expressed policy.

The section is not so broad as a comparable section proposed by the Bankruptcy Commission, S. 236, 94th Cong., 1st Sess. §4–508 (1975), which would have extended the prohibition to any discrimination, even by private parties. Nevertheless, it is not limiting either, as noted. The courts will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy.

REFERENCES IN TEXT

The Perishable Agricultural Commodities Act, 1930, referred to in subsec. (a), is act June 10, 1930, ch. 436, 46 Stat. 531, as amended, which is classified generally to chapter 20A (§499a et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 499a(a) of Title 7 and Tables.

The Packers and Stockyards Act, 1921, referred to in subsec. (a), is act Aug. 15, 1921, ch. 64, 42 Stat. 159, as amended, which is classified generally to chapter 9 (§181 et seq.) of Title 7. For complete classification of this Act to the Code, see section 181 of Title 7 and Tables.

Section 1 of the Act entitled ''An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes,'' approved July 12, 1943, referred to in subsec. (a), is classified to section 204 of Title 7.

The Bankruptcy Act, referred to in text, is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified generally to former Title 11.

The Higher Education Act of 1965, referred to in subsec. (c)(2), is Pub. L. 89–329, Nov. 8, 1965, 79 Stat. 1219, as amended. Parts B, D, and E of title IV of the Act are classified generally to parts B (§1071 et seq.), C (§1087a et seq.), and D (§1087aa et seq.), respectively, of subchapter IV of chapter 28 of Title 20, Education. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 20 and Tables.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394, §501(d)(15), struck out ''(7 U.S.C. 499a–499s)'' after ''Act, 1930'', ''(7 U.S.C. 181–229)'' after ''Act, 1921'', and ''(57 Stat. 422; 7 U.S.C. 204)'' after ''July 12, 1943''.

Subsec. (c). Pub. L. 103–394, §313, added subsec. (c).

1984—Pub. L. 98–353 designated existing provisions as subsec. (a), inserted ''the'' before ''Perishable'', and added subsec. (b).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

SUBCHAPTER III—THE ESTATE

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2594; Pub. L. 98–353, title III, §§ 363(a), 456, July 10, 1984, 98 Stat. 363, 376; Pub. L. 101–508, title III, § 3007(a)(2), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 102–486, title XXX, § 3017(b), Oct. 24, 1992, 106 Stat. 3130; Pub. L. 103–394, title II, §§ 208(b), 223, Oct. 22, 1994, 108 Stat. 4124, 4129.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 541(a)(7) is new. The provision clarifies that any interest in property that the estate acquires after the commencement of the case is property of the estate; for example, if the estate enters into a contract, after the commencement of the case, such a contract would be property of the estate. The addition of this provision by the House amendment merely clarifies that section 541(a) is an all-embracing definition which includes charges on property, such as liens held by the debtor on property of a third party, or beneficial rights and interests that the debtor may have in property of another. However, only the debtor's interest in such property becomes property of the estate. If the debtor holds bare legal title or holds property in trust for another, only those rights which the debtor would have otherwise had emanating from such interest pass to the estate under section 541. Neither this section nor section 545 will affect various statutory provisions that give a creditor a lien that is valid both inside and outside bankruptcy against a bona fide purchaser of property from the debtor, or that creates a trust fund for the benefit of creditors meeting similar criteria. See Packers and Stockyards Act § 206, 7 U.S.C. 196 (1976).

Section 541(c)(2) follows the position taken in the House bill and rejects the position taken in the Senate amendment with respect to income limitations on a spend-thrift trust.

Section 541(d) of the House amendment is derived from section 541(e) of the Senate amendment and reiterates the general principle that where the debtor holds

bare legal title without any equitable interest, that the estate acquires bare legal title without any equitable interest in the property. The purpose of section 541(d) as applied to the secondary mortgage market is identical to the purpose of section 541(e) of the Senate amendment and section 541(d) will accomplish the same result as would have been accomplished by section 541(e). Even if a mortgage seller retains for purposes of servicing legal title to mortgages or interests in mortgages sold in the secondary mortgage market, the trustee would be required by section 541(d) to turn over the mortgages or interests in mortgages to the purchaser of those mortgages.

The seller of mortgages in the secondary mortgage market will often retain the original mortgage notes and related documents and the seller will not endorse the notes to reflect the sale to the purchaser. Similarly, the purchaser will often not record the purchaser's ownership of the mortgages or interests in mortgages under State recording statutes. These facts are irrelevant and the seller's retention of the mortgage documents and the purchaser's decision not to record do not change the trustee's obligation to turn the mortgages or interests in mortgages over to the purchaser. The application of section 541(d) to secondary mortgage market transactions will not be affected by the terms of the servicing agreement between the mortgage servicer and the purchaser of the mortgages. Under section 541(d), the trustee is required to recognize the purchaser's title to the mortgages or interests in mortgages and to turn this property over to the purchaser. It makes no difference whether the servicer and the purchaser characterize their relationship as one of trust, agency, or independent contractor.

The purpose of section 541(d) as applied to the secondary mortgage market is therefore to make certain that secondary mortgage market sales as they are currently structured are not subject to challenge by bankruptcy trustees and that purchasers of mortgages will be able to obtain the mortgages or interests in mortgages which they have purchased from trustees without the trustees asserting that a sale of mortgages is a loan from the purchaser to the seller.

Thus, as section 541(a)(1) clearly states, the estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. To the extent such an interest is limited in the hands of the debtor, it is equally limited in the hands of the estate except to the extent that defenses which are personal against the debtor are not effective against the estate.

Property of the estate: The Senate amendment provided that property of the estate does not include amounts held by the debtor as trustee and any taxes withheld or collected from others before the commencement of the case. The House amendment removes these two provisions. As to property held by the debtor as a trustee, the House amendment provides that property of the estate will include whatever interest the debtor held in the property at the commencement of the case. Thus, where the debtor held only legal title to the property and the beneficial interest in that property belongs to another, such as exists in the case of property held in trust, the property of the estate includes the legal title, but not the beneficial interest in the property.

As to withheld taxes, the House amendment deletes the rule in the Senate bill as unnecessary since property of the estate does not include the beneficial interest in property held by the debtor as a trustee. Under the Internal Revenue Code of 1954 (section 7501) [26 U.S.C. 7501], the amounts of withheld taxes are held to be a special fund in trust for the United States. Where the Internal Revenue Service can demonstrate that the amounts of taxes withheld are still in the possession of the debtor at the commencement of the case, then if a trust is created, those amounts are not property of the estate. Compare *In re Shakesteers Coffee Shops*, 546 F.2d 821 (9th Cir. 1976) with *In re Glynn Wholesale Building Materials, Inc.* (S.D. Ga. 1978) and *In re Progress Tech Colleges, Inc.*, 42 Aftr 2d 78–5573 (S.D. Ohio 1977).

Where it is not possible for the Internal Revenue Service to demonstrate that the amounts of taxes withheld are still in the possession of the debtor at the commencement of the case, present law generally includes amounts of withheld taxes as property of the estate. See, e.g., *United States v. Randall*, 401 U.S. 513 (1973) [91 S. Ct. 991, 28 L.Ed.2d 273] and *In re Tamasha Town and Country Club*, 483 F.2d 1377 (9th Cir. 1973). Nonetheless, a serious problem exists where ''trust fund taxes'' withheld from others are held to be property of the estate where the withheld amounts are commingled with other assets of the debtor. The courts should permit the use of reasonable assumptions under which the Internal Revenue Service, and other tax authorities, can demonstrate that amounts of withheld taxes are still in the possession of the debtor at the commencement of the case. For example, where the debtor had commingled that amount of withheld taxes in his general checking account, it might be reasonable to assume that any remaining amounts in that account on the commencement of the case are the withheld taxes. In addition, Congress may consider future amendments to the Internal Revenue Code [title 26] making clear that amounts of withheld taxes are held by the debtor in a trust relationship and, consequently, that such amounts are not property of the estate.

SENATE REPORT NO. 95–989

This section defines property of the estate, and specifies what property becomes property of the estate. The commencement of a bankruptcy case creates an estate. Under paragraph (1) of subsection (a), the estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6) [section 110(a)(6) of former title 11]), and all other forms of property currently specified in section 70a of the Bankruptcy Act § 70a [section 110(a) of former title 11], as well as property recovered by the trustee under section 542 of proposed title 11, if the property recovered was merely out of the possession of the debtor, yet remained ''property of the debtor.'' The debtor's interest in property also includes ''title'' to property, which is an interest, just as are a possessory interest, or lease-hold interest, for example. The result of *Segal v. Rochelle*, 382 U.S. 375 (1966), is followed, and the right to a refund is property of the estate.

Though this paragraph will include choses in action and claims by the debtor against others, it is not intended to expand the debtor's rights against others more than they exist at the commencement of the case. For example, if the debtor has a claim that is barred at the time of the commencement of the case by the statute of limitations, then the trustee would not be able to pursue that claim, because he too would be barred. He could take no greater rights than the debtor himself had. But see proposed 11 U.S.C. 108, which would permit the trustee a tolling of the statute of limitations if it had not run before the date of the filing of the petition.

Paragraph (1) has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate. The broad jurisdictional grant in proposed 28 U.S.C. 1334 would have the effect of overruling *Lockwood* independently of the change made by this provision.

Paragraph (1) also has the effect of overruling *Lines v. Frederick*, 400 U.S. 18 (1970).

Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. For example, if the debtor has incurred medical bills that were covered by insurance, and the insurance com-

pany had sent the payment of the bills to the debtor before the debtor had paid the bill for which the payment was reimbursement, the payment would actually be held in a constructive trust for the person to whom the bill was owed. This section and proposed 11 U.S.C. 545 also will not affect various statutory provisions that give a creditor of the debtor a lien that is valid outside as well as inside bankruptcy, or that creates a trust fund for the benefit of a creditor of the debtor. See Packers and Stockyards Act § 206, 7 U.S.C. 196.

Bankruptcy Act § 8 [section 26 of former title 11] has been deleted as unnecessary. Once the estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue in rem with respect to property of the state, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts.

The estate also includes the interests of the debtor and the debtor's spouse in community property, subject to certain limitations; property that the trustee recovers under the avoiding powers; property that the debtor acquires by bequest, devise, inheritance, a property settlement agreement with the debtor's spouse, or as the beneficiary of a life insurance policy within 180 days after the petition; and proceeds, product, offspring, rents, and profits of or from property of the estate, except such as are earning from services performed by an individual debtor after the commencement of the case. Proceeds here is not used in a confining sense, as defined in the Uniform Commercial Code, but is intended to be a broad term to encompass all proceeds of property of the estate. The conversion in form of property of the estate does not change its character as property of the estate.

Subsection (b) excludes from property of the estate any power, such as a power of appointment, that the debtor may exercise solely for the benefit of an entity other than the debtor. This changes present law which excludes powers solely benefiting other persons but not other entities.

Subsection (c) invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become property of the estate. The provisions invalidated are those that restrict or condition transfer of the debtor's interest, and those that are conditioned on the insolvency or financial condition of the debtor, on the commencement of a bankruptcy case, or on the appointment of a custodian of the debtor's property. Paragraph (2) of subsection (c), however, preserves restrictions on a transfer of a spendthrift trust that the restriction is enforceable nonbankruptcy law to the extent of the income reasonably necessary for the support of a debtor and his dependents.

Subsection (d) [enacted as (e)], derived from section 70c of the Bankruptcy Act [section 110(c) of former title 11], gives the estate the benefit of all defenses available to the debtor as against an entity other than the estate, including such defenses as statutes of limitations, statutes of frauds, usury, and other personal defenses, and makes waiver by the debtor after the commencement of the case ineffective to bind the estate.

Section 541(e) [enacted as (d)] confirms the current status under the Bankruptcy Act [former title 11] of bona fide secondary mortgage market transactions as the purchase and sale of assets. Mortgages or interests in mortgages sold in the secondary market should not be considered as part of the debtor's estate. To permit the efficient servicing of mortgages or interests in mortgages the seller often retains the original mortgage notes and related documents, and the purchaser records under State recording statutes the purchaser's ownership of the mortgages or interests in mortgages purchased. Section 541(e) makes clear that the seller's retention of the mortgage documents and the purchaser's decision not to record do not impair the asset sale character of secondary mortgage market transactions. The committee notes that in secondary mortgage market transactions the parties may characterize their relationship as one of trust, agency, or independent contractor. The characterization adopted by the parties should not affect the statutes in bankruptcy on bona fide secondary mortgage market purchases and sales.

REFERENCES IN TEXT

The Higher Education Act of 1965, referred to in subsec. (b)(3), is Pub. L. 89–329, Nov. 8, 1965, 79 Stat. 1219, as amended, which is classified principally to chapter 28 (§ 1001 et seq.) of Title 20, Education. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 20 and Tables.

AMENDMENTS

1994—Subsec. (b)(4). Pub. L. 103–394, § 208(b), designated existing provisions of subpar. (A) as cl. (i) of subpar. (A), redesignated subpar. (B) as cl. (ii) of subpar. (A), substituted ''the interest referred to in clause (i)'' for ''such interest'', substituted ''; or'' for period at end of cl. (ii), and added subpar. (B).

Pub. L. 103–394, § 223(2), which directed the amendment of subsec. (b)(4) by striking out period at end and inserting ''; or'', was executed by inserting ''or'' after semicolon at end of subsec. (b)(4)(B)(ii), as added by Pub. L. 103–394, § 208(b)(3), to reflect the probable intent of Congress.

Subsec. (b)(5). Pub. L. 103–394, § 223, added par. (5).

1992—Subsec. (b). Pub. L. 102–486 added par. (4) and closing provisions.

1990—Subsec. (b)(3). Pub. L. 101–508 added par. (3).

1984—Subsec. (a). Pub. L. 98–353, § 456(a)(1), (2), struck out ''under'' after ''under'' and inserted ''and by whomever held'' after ''located''.

Subsec. (a)(3). Pub. L. 98–353, § 456(a)(3), inserted ''329(b), 363(n),''.

Subsec. (a)(5). Pub. L. 98–353, § 456(a)(4), substituted ''Any'' for ''An''.

Subsec. (a)(6). Pub. L. 98–353, § 456(a)(5), substituted ''or profits'' for ''and profits''.

Subsec. (b). Pub. L. 98–353, § 363(a), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: ''Property of the estate does not include any power that the debtor may only exercise solely for the benefit of an entity other than the debtor.''

Subsec. (c)(1). Pub. L. 98–353, § 456(b)(1), inserted ''in an agreement, transfer, instrument, or applicable nonbankruptcy law''.

Subsec. (c)(1)(B). Pub. L. 98–353, § 456(b)(2), substituted ''taking'' for ''the taking'', and inserted ''before such commencement'' after ''custodian''.

Subsec. (d). Pub. L. 98–353, § 456(c), inserted ''(1) or (2)'' after ''(a)''.

Subsec. (e). Pub. L. 98–353, § 456(d), struck out subsec. (e) which read as follows: ''The estate shall have the benefit of any defense available to the debtor as against an entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.''

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102–486 effective Oct. 24, 1992, but not applicable with respect to cases commenced under this title before Oct. 24, 1992, see section 3017(c) of Pub. L. 102–486, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 365, 522, 524, 726, 728, 1207, 1306 of this title; title 28 section 1409.

§ 542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2595; Pub. L. 98–353, title III, § 457, July 10, 1984, 98 Stat. 376; Pub. L. 103–394, title V, § 501(d)(16), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 542(a) of the House amendment modifies similar provisions contained in the House bill and the Senate amendment treating with turnover of property to the estate. The section makes clear that any entity, other than a custodian, is required to deliver property of the estate to the trustee or debtor in possession whenever such property is acquired by the entity during the case, if the trustee or debtor in possession may use, sell, or lease the property under section 363, or if the debtor may exempt the property under section 522, unless the property is of inconsequential value or benefit to the estate. This section is not intended to require an entity to deliver property to the trustee if such entity has obtained an order of the court authorizing the entity to retain possession, custody or control of the property.

The House amendment adopts section 542(c) of the House bill in preference to a similar provision contained in section 542(c) of the Senate amendment. Protection afforded by section 542(c) applies only to the transferor or payor and not to a transferee or payee receiving a transfer or payment, as the case may be. Such transferee or payee is treated under section 549 and section 550 of title 11.

The extent to which the attorney client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case by case basis.

SENATE REPORT NO. 95–989

Subsection (a) of this section requires anyone holding property of the estate on the date of the filing of the petition, or property that the trustee may use, sell, or lease under section 363, to deliver it to the trustee. The subsection also requires an accounting. The holder of property of the estate is excused from the turnover requirement of this subsection if the property held is of inconsequential value to the estate. However, this provision must be read in conjunction with the remainder of the subsection, so that if the property is of inconsequential monetary value, yet has a significant use value for the estate, the holder of the property would not be excused from turnover.

Subsection (b) requires an entity that owes money to the debtor as of the date of the petition, or that holds money payable on demand or payable on order, to pay the money to the order of the trustee. An exception is made to the extent that the entity has a valid right of setoff, as recognized by section 553.

Subsection (c) provides an exception to subsections (a) and (b). It protects an entity that has neither actual notice nor actual knowledge of the case and that transfers, in good faith, property that is deliverable or payable to the trustee to someone other than to the estate or on order of the estate. This subsection codifies the result of *Bank of Marin v. England*, 385 U.S. 99 (1966), but does not go so far as to permit bank setoff in violation of the automatic stay, proposed 11 U.S.C. 362(a)(7), even if the bank offsetting the debtor's balance has no knowledge of the case.

Subsection (d) protects life insurance companies that are required by contract to make automatic premium loans from property that might otherwise be property of the estate.

Subsection (e) requires an attorney, accountant, or other professional that holds recorded information relating to the debtor's property or financial affairs, to surrender it to the trustee. This duty is subject to any applicable claim of privilege, such as attorney-client privilege. It is a new provision that deprives accountants and attorneys of the leverage that they have today, under State law lien provisions, to receive payment in full ahead of other creditors when the information they hold is necessary to the administration of the estate.

AMENDMENTS

1994—Subsec. (e). Pub. L. 103–394 substituted ''to'' for ''to to'' after ''financial affairs,''.

1984—Subsec. (e). Pub. L. 98–353 inserted ''to turn over or'' before ''disclose''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 349, 502, 522, 541, 549 of this title.

§ 543. Turnover of property by a custodian

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall—

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

(c) The court, after notice and a hearing, shall—

(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;

(2) provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian; and

(3) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.

(d) After notice and hearing, the bankruptcy court—

(1) may excuse compliance with subsection (a), (b), or (c) of this section if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and

(2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2595; Pub. L. 98–353, title III, § 458, July 10, 1984, 98 Stat. 376; Pub. L. 103–394, title V, § 501(d)(17), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 543(a) is a modification of similar provisions contained in the House bill and the Senate amendment. The provision clarifies that a custodian may always act as is necessary to preserve property of the debtor. Section 543(c)(3) excepts from surcharge a custodian that is an assignee for the benefit of creditors, who was appointed or took possession before 120 days before the date of the filing of the petition, whichever is later. The provision also prevents a custodian from being surcharged in connection with payments made in accordance with applicable law.

SENATE REPORT NO. 95–989

This section requires a custodian appointed before the bankruptcy case to deliver to the trustee and to account for property that has come into his possession, custody, or control as a custodian. ''Property of the debtor'' in section (a) includes property that was property of the debtor at the time the custodian took the property, but the title to which passed to the custodian. The section requires the court to protect any obligations incurred by the custodian, provide for the payment of reasonable compensation for services rendered and costs and expenses incurred by the custodian, and to surcharge the custodian for any improper or excessive disbursement, unless it has been approved by a court of competent jurisdiction. Subsection (d) reinforces the general abstention policy in section 305 by permitting the bankruptcy court to authorize the custodianship to proceed notwithstanding this section.

AMENDMENTS

1994—Subsec. (d)(1). Pub. L. 103–394 struck out comma after ''section''.

1984—Subsec. (a). Pub. L. 98–353, § 458(a), inserted '', product, offspring, rents, or profits'' after ''proceeds''.

Subsec. (b)(1). Pub. L. 98–353, § 458(b)(1), inserted ''held by or'' after ''debtor'', and '', product, offspring, rents, or profits'' after ''proceeds''.

Subsec. (b)(2). Pub. L. 98–353, § 458(b)(2), inserted '', product, offspring, rents, or profits'' after ''proceeds''.

Subsec. (c)(1). Pub. L. 98–353, § 458(c)(1), inserted ''or proceeds, product, offspring, rents, or profits of such property'' after ''property''.

Subsec. (c)(3). Pub. L. 98–353, § 458(c)(2), inserted ''that has been'' before ''approved''.

Subsec. (d). Pub. L. 98–353, § 458(d), designated existing provisions as par. (1) and added par. (2).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 349, 502, 503, 522, 541, 726 of this title.

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2596; Pub. L. 98–353, title III, § 459, July 10, 1984, 98 Stat. 377; Pub. L. 105–183, § 3(b), June 19, 1998, 112 Stat. 518.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 544(a)(3) modifies similar provisions contained in the House bill and Senate amendment so as not to require a creditor to perform the impossible in order to perfect his interest. Both the lien creditor test in section 544(a)(1), and the bona fide purchaser test in section 544(a)(3) should not require a transferee to perfect a transfer against an entity with respect to which applicable law does not permit perfection. The avoiding powers under section 544(a)(1), (2), and (3) are new. In particular, section 544(a)(1) overrules *Pacific Finance Corp. v. Edwards*, 309 F.2d 224 (9th Cir. 1962), and *In re Federals, Inc.*, 553 F.2d 509 (6th Cir. 1977), insofar as those cases held that the trustee did not have the status of a creditor who extended credit immediately prior to the commencement of the case.

The House amendment deletes section 544(c) of the House bill.

SENATE REPORT NO. 95–989

Subsection (a) is the ''strong arm clause'' of current law, now found in Bankruptcy Act § 70c [section 110(c) of former title 11]. It gives the trustee the rights of a creditor on a simple contract with a judicial lien on the property of the debtor as of the date of the petition; of a creditor with a writ of execution against the property of the debtor unsatisfied as of the date of the petition; and a bona fide purchaser of the real property of the debtor as of the date of the petition. ''Simple contract'' as used here is derived from Bankruptcy Act § 60a(4) [section 96(a)(4) of former title 11]. The third status, that of a bona fide purchaser of real property, is new.

Subsection (b) is derived from current section 70e [section 110(e) of former title 11]. It gives the trustee the rights of actual unsecured creditors under applicable law to void transfers. It follows *Moore v. Bay*, 284 U.S. 4 (1931), and overrules those cases that hold section 70e gives the trustee the rights of secured creditors.

AMENDMENTS

1998—Subsec. (b). Pub. L. 105–183 designated existing provisions as par. (1), substituted ''Except as provided in paragraph (2), the trustee'' for ''The trustee'', and added par. (2).

1984—Subsec. (a)(1). Pub. L. 98–353, § 459(1), inserted ''such'' after ''obtained''.

Subsec. (a)(2). Pub. L. 98–353, § 459(2), substituted ''; or'' for ''; and''.

Subsec. (a)(3). Pub. L. 98–353, § 459(3), inserted '', other than fixtures,'' after ''property'', and ''and has perfected such transfer'' after ''purchaser'' the second place it appeared.

EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105–183, § 5, June 19, 1998, 112 Stat. 518, provided that: ''This Act [amending this section and sections 546, 548, 707, and 1325 of this title and enacting provisions set out as notes under this section and section 101 of this title] and the amendments made by this Act shall apply to any case brought under an applicable provision of title 11, United States Code, that is pending or commenced on or after the date of enactment of this Act [June 19, 1998].''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

CONSTRUCTION OF 1998 AMENDMENT

Pub. L. 105–183, § 6, June 19, 1998, 112 Stat. 519, provided that: ''Nothing in the amendments made by this Act [amending this section and sections 546, 548, 707, and 1325 of this title] is intended to limit the applicability of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2002bb [2000bb] et seq.).''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 303, 349, 502, 522, 541, 546, 548, 550, 551, 552, 749, 764, 901, 926 of this title; title 28 section 1409.

§ 545. Statutory liens

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

(1) first becomes effective against the debtor—

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists;

(3) is for rent; or

(4) is a lien of distress for rent.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2597; Pub. L. 98–353, title III, § 460, July 10, 1984, 98 Stat. 377.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 545 of the House amendment modifies similar provisions contained in the House bill and Senate amendment to make clear that a statutory lien may be avoided under section 545 only to the extent the lien violates the perfection standards of section 545. Thus a Federal tax lien is invalid under section 545(2) with respect to property specified in sections 6323(b) and (c) of the Internal Revenue Code of 1954 [title 26]. As a result of this modification, section 545(b) of the Senate amendment is deleted as unnecessary.

Statutory liens: The House amendment retains the provision of section 545(2) of the House bill giving the trustee in a bankruptcy case the same power which a bona fide purchaser has to take over certain kinds of personal property despite the existence of a tax lien covering that property. The amendment thus retains present law, and deletes section 545(b) of the Senate amendment which would have no longer allowed the trustee to step into the shoes of a bona fide purchaser for this purpose.

SENATE REPORT NO. 95–989

This section permits the trustee to avoid the fixing of certain statutory liens. It is derived from subsections 67b and 67c of present law [section 107(b) and (c) of former title 11]. Liens that first become effective on the bankruptcy or insolvency of the debtor are voidable by the trustee. Liens that are not perfected or enforceable on the date of the petition against a bona fide purchaser are voidable. If a transferee is able to perfect under section 546(a) and that perfection relates back to an earlier date, then in spite of the filing of the bankruptcy petition, the trustee would not be able to defeat the lien, because the lien would be perfected and enforceable against a bona fide purchaser that purchased the property on the date of the filing of the petition. Finally, a lien for rent or of distress for rent is voidable, whether the lien is a statutory lien or a common law lien of distress for rent. See proposed 11 U.S.C. 101(37); Bankruptcy Act § 67(c)(1)(C). The trustee may avoid a lien under this section even if the lien has been enforced by sale before the commencement of the case. To that extent, Bankruptcy Act § 67c(5) is not followed.

Subsection (b) limits the trustee's power to avoid tax liens under Federal, state, or local law. For example, under § 6323 of the Internal Revenue Code [Title 26]. Once public notice of a tax lien has been filed, the Government is generally entitled to priority over subsequent lienholders. However, certain purchasers who acquire an interest in certain specific kinds of personal property will take free of an existing filed tax lien attaching to such property. Among the specific kinds of personal property which a purchaser can acquire free of an existing tax lien (unless the buyer knows of the existence of the lien) are stocks and securities, motor vehicles, inventory, and certain household goods. Under the present Bankruptcy Act (§ 67(c)(1)) [section 107(c)(1) of former title 11], the trustee may be viewed as a bona fide purchaser, so that he can take over any such designated items free of tax liens even if the tax authority has perfected its lien. However, the reasons for enabling a bona fide purchaser to take these kinds of assets free of an unfiled tax lien, that is, to encourage free movement of these assets in general commerce, do not apply to a trustee in a title 11 case, who is not in the same position as an ordinary bona fide purchaser as to such property. The bill accordingly adds a new subsection (b) to sec. 545 providing, in effect, that a trustee in bankruptcy does not have the right under this section to take otherwise specially treated items of personal property free of a tax lien filed before the filing of the petition.

AMENDMENTS

1984—Par. (1)(A). Pub. L. 98–353, § 460(1), struck out ''is'' after ''is''.

Par. (1)(C). Pub. L. 98–353, § 460(2), substituted ''appointed or authorized to take'' for ''apponted''.

Par. (2). Pub. L. 98–353, § 460(3), substituted ''at the time of the commencement of the case'' for ''on the date of the filing of the petition'' in two places.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 303, 349, 502, 522, 546, 547, 548, 550, 551, 552, 749, 764, 901, 926 of this title; title 26 sections 6327, 7437.

§ 546. Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) the later of—

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If—

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

(c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but—

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—

(A) before 10 days after receipt of such goods by the debtor; or

(B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—

(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title; or

(B) secures such claim by a lien.

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but—

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor; and

(2) the court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(f) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, made by or to a repo participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may not avoid a transfer under a swap agreement, made by or to a swap participant, in connection with a swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(g)[1] Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2597; Pub. L. 97–222, § 4, July 27, 1982, 96 Stat. 236; Pub. L. 98–353, title III, §§ 351, 393, 461, July 10, 1984, 98 Stat. 358, 365, 377; Pub. L. 99–554, title II, §§ 257(d), 283(*l*), Oct. 27, 1986, 100 Stat. 3114, 3117; Pub. L. 101–311, title I, § 103, title II, § 203, June 25, 1990, 104 Stat. 268, 269; Pub. L. 103–394, title II, §§ 204(b), 209, 216, 222(a), title V, § 501(b)(4), Oct. 22, 1994, 108 Stat. 4122, 4125, 4126, 4129, 4142; Pub. L. 105–183, § 3(c), June 19, 1998, 112 Stat. 518.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 546(a) of the House amendment is derived from section 546(c) of the Senate amendment. Section 546(c) of the House amendment is derived from section 546(b) of the Senate amendment. It applies to receipt of goods on credit as well as by cash sales. The section clarifies that a demand for reclamation must be made in writing anytime before 10 days after receipt of the goods by the debtor. The section also permits the court to grant the reclaiming creditor a lien or an administrative expense in lieu of turning over the property.

SENATE REPORT NO. 95–989

The trustee's rights and powers under certain of the avoiding powers are limited by section 546. First, if an interest holder against whom the trustee would have rights still has, under applicable nonbankruptcy law, and as of the date of the petition, the opportunity to perfect his lien against an intervening interest holder, then he may perfect his interest against the trustee. If applicable law requires seizure for perfection, then perfection is by notice to the trustee instead. The rights granted to a creditor under this subsection prevail over the trustee only if the transferee has perfected the transfer in accordance with applicable law, and that perfection relates back to a date that is before the commencement of the case.

The phrase ''generally applicable law'' relates to those provisions of applicable law that apply both in bankruptcy cases and outside of bankruptcy cases. For example, many State laws, under the Uniform Commer-

[1] So in original. Probably should be ''(h)''.

cial Code, permit perfection of a purchase-money security interest to relate back to defeat an earlier levy by another creditor if the former was perfected within ten days of delivery of the property. U.C.C. §9–301(2). Such perfection would then be able to defeat an intervening hypothetical judicial lien creditor on the date of the filing of the petition. The purpose of the subsection is to protect, in spite of the surprise intervention of a bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection. It is not designed to give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases.

Subsection (b) [enacted as (c)] specifies that the trustee's rights and powers under the strong arm clause, the successor to creditors provision, the preference section, and the postpetition transaction section are all subject to any statutory or common-law right of a seller, in the ordinary course of business, of goods to the debtor to reclaim the goods if the debtor received the goods on credit while insolvent. The seller must demand reclamation within ten days after receipt of the goods by the debtor. As under nonbankruptcy law, the right is subject to any superior rights of secured creditors. The purpose of the provision is to recognize, in part, the validity of section 2–702 of the Uniform Commercial Code, which has generated much litigation, confusion, and divergent decisions in different circuits. The right is subject, however, to the power of the court to deny reclamation and protect the seller by granting him a priority as an administrative expense for his claim arising out of the sale of the goods.

Subsection (c) [enacted as (a)] adds a statute of limitations to the use by the trustee of the avoiding powers. The limitation is two years after his appointment, or the time the case is closed or dismissed, whichever occurs later.

AMENDMENTS

1998—Subsecs. (e) to (g). Pub. L. 105–183 substituted ''548(a)(1)(B)'' for ''548(a)(2)'' and ''548(a)(1)(A)'' for ''548(a)(1)''.

1994—Subsec. (a)(1). Pub. L. 103–394, §216, amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or''.

Subsec. (b). Pub. L. 103–394, §204(b), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: ''The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.''

Subsec. (c)(1). Pub. L. 103–394, §209, amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor; and''.

Subsec. (e). Pub. L. 103–394, §501(b)(4)(A), substituted ''section 101, 741, or 761'' for ''section 101(34), 741(5), or 761(15)'' and ''section 101 or 741'' for ''section 101(35) or 741(8)''.

Subsec. (f). Pub. L. 103–394, §501(b)(4)(B), substituted ''section 741 or 761'' for ''section 741(5) or 761(15)'' and ''section 741'' for ''section 741(8)''.

Subsec. (g). Pub. L. 103–394, §222(a), added subsec. (g) relating to return of goods.

1990—Subsec. (e). Pub. L. 101–311, §203, inserted reference to sections 101(34) and 101(35) of this title.

Subsec. (g). Pub. L. 101–311, §103, added subsec. (g) relating to trustee's authority to avoid transfer involving swap agreement.

1986—Subsec. (a)(1). Pub. L. 99–554, §257(d), inserted reference to section 1202 of this title.

Subsec. (e). Pub. L. 99–554, §283(*l*), inserted a comma after ''stockbroker''.

1984—Subsec. (a)(1). Pub. L. 98–353, §461(a), substituted ''; or'' for ''; and''.

Subsec. (b). Pub. L. 98–353, §461(b), substituted ''a trustee under sections 544, 545, and'' for ''the trustee under sections 544, 545, or''.

Subsec. (c). Pub. L. 98–353, §§351(1), 461(c)(1)–(4), substituted ''Except as provided in subsection (d) of this section, the'' for ''The'', substituted ''a trustee'' for ''the trustee'', struck out ''right'' before ''or common-law'', inserted ''of goods that has sold goods to the debtor'' after ''seller'', and struck out ''of goods to the debtor'' after ''business,''.

Subsec. (c)(2). Pub. L. 98–353, §461(c)(5)(A), inserted ''the'' after ''if'' in provisions preceding subpar. (A).

Subsec. (c)(2)(A). Pub. L. 98–353, §461(c)(5)(B), substituted ''a claim of a kind specified in section 503(b) of this title'' for ''an administrative expense''.

Subsec. (d). Pub. L. 98–353, §351(3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 98–353, §§351(2), 461(d), redesignated former subsec. (d) as (e) and inserted ''financial institution'' after ''stockbroker''.

Subsec. (f). Pub. L. 98–353, §393, added subsec. (f).

1982—Subsec. (d). Pub. L. 97–222 added subsec. (d).

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–183 applicable to any case brought under an applicable provision of this title that is pending or commenced on or after June 19, 1998, see section 5 of Pub. L. 105–183, set out as a note under section 544 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 362, 552, 901 of this title.

§ 547. Preferences

(a) In this section—

(1) ''inventory'' means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) ''new value'' means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction

that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) ''receivable'' means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was—

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt—

(A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or

(B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support; or

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real

property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2597; Pub. L. 98–353, title III, §§310, 462, July 10, 1984, 98 Stat. 355, 377; Pub. L. 99–554, title II, §283(m), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 103–394, title II, §203, title III, §304(f), Oct. 22, 1994, 108 Stat. 4121, 4133.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

No limitation is provided for payments to commodity brokers as in section 766 of the Senate amendment other than the amendment to section 548 of title 11. Section 547(c)(2) protects most payments.

Section 547(b)(2) of the House amendment adopts a provision contained in the House bill and rejects an alternative contained in the Senate amendment relating to the avoidance of a preferential transfer that is payment of a tax claim owing to a governmental unit. As provided, section 106(c) of the House amendment overrules contrary language in the House report with the result that the Government is subject to avoidance of preferential transfers.

Contrary to language contained in the House report, payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of sections 547(c)(1) and (2).

Section 547(c)(6) of the House bill is deleted and is treated in a different fashion in section 553 of the House amendment.

Section 547(c)(6) represents a modification of a similar provision contained in the House bill and Senate amendment. The exception relating to satisfaction of a statutory lien is deleted. The exception for a lien created under title 11 is deleted since such a lien is a statutory lien that will not be avoidable in a subsequent bankruptcy.

Section 547(e)(1)(B) is adopted from the House bill and Senate amendment without change. It is intended that the simple contract test used in this section will be applied as under section 544(a)(1) not to require a creditor to perfect against a creditor on a simple contract in the event applicable law makes such perfection impossible. For example, a purchaser from a debtor at an improperly noticed bulk sale may take subject to the rights of a creditor on a simple contract of the debtor for 1 year after the bulk sale. Since the purchaser cannot perfect against such a creditor on a simple contract, he should not be held responsible for failing to do the impossible. In the event the debtor goes into bankruptcy within a short time after the bulk sale, the trustee should not be able to use the avoiding powers under section 544(a)(1) or 547 merely because State law has made some transfers of personal property subject to the rights of a creditor on a simple contract to acquire a judicial lien with no opportunity to perfect against such a creditor.

Preferences: The House amendment deletes from the category of transfers on account of antecedent debts which may be avoided under the preference rules, section 547(b)(2), the exception in the Senate amendment for taxes owed to governmental authorities. However, for purposes of the ''ordinary course'' exception to the preference rules contained in section 547(c)(2), the House amendment specifies that the 45-day period referred to in section 547(c)(2)(B) is to begin running, in the case of taxes from the last due date, including extensions, of the return with respect to which the tax payment was made.

SENATE REPORT NO. 95–989

This section is a substantial modification of present law. It modernizes the preference provisions and brings them more into conformity with commercial practice and the Uniform Commercial Code.

Subsection (a) contains three definitions. Inventory, new value, and receivable are defined in their ordinary senses, but are defined to avoid any confusion or uncertainty surrounding the terms.

Subsection (b) is the operative provision of the section. It authorizes the trustee to avoid a transfer if five conditions are met. These are the five elements of a preference action. First, the transfer must be to or for the benefit of a creditor. Second, the transfer must be for or on account of an antecedent debt owed by the debtor before the transfer was made. Third, the transfer must have been made when the debtor was insolvent. Fourth, the transfer must have been made during the 90 days immediately preceding the commencement of the case. If the transfer was to an insider, the trustee may avoid the transfer if it was made during the period that begins one year before the filing of the petition and ends 90 days before the filing, if the insider to whom the transfer was made had reasonable cause to believe the debtor was insolvent at the time the transfer was made.

Finally, the transfer must enable the creditor to whom or for whose benefit it was made to receive a greater percentage of his claim than he would receive under the distributive provisions of the bankruptcy code. Specifically, the creditor must receive more than he would if the case were a liquidation case, if the transfer had not been made, and if the creditor received payment of the debt to the extent provided by the provisions of the code.

The phrasing of the final element changes the application of the greater percentage test from that employed under current law. Under this language, the court must focus on the relative distribution between classes as well as the amount that will be received by the members of the class of which the creditor is a member. The language also requires the court to focus

on the allowability of the claim for which the preference was made. If the claim would have been entirely disallowed, for example, then the test of paragraph (5) will be met, because the creditor would have received nothing under the distributive provisions of the bankruptcy code.

The trustee may avoid a transfer of a lien under this section even if the lien has been enforced by sale before the commencement of the case,

Subsection (b)(2) of this section in effect exempts from the preference rules payments by the debtor of tax liabilities, regardless of their priority status.

Subsection (c) contains exceptions to the trustee's avoiding power. If a creditor can qualify under any one of the exceptions, then he is protected to that extent. If he can qualify under several, he is protected by each to the extent that he can qualify under each.

The first exception is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. Normally, a check is a credit transaction. However, for the purposes of this paragraph, a transfer involving a check is considered to be ''intended to be contemporaneous'', and if the check is presented for payment in the normal course of affairs, which the Uniform Commercial Code specifies as 30 days, U.C.C. §3–503(2)(a), that will amount to a transfer that is ''in fact substantially contemporaneous.''

The second exception protects transfers in the ordinary course of business (or of financial affairs, where a business is not involved) transfers. For the case of a consumer, the paragraph uses the phrase ''financial affairs'' to include such nonbusiness activities as payment of monthly utility bills. If the debt on account of which the transfer was made was incurred in the ordinary course of both the debtor and the transferee, if the transfer was made not later than 45 days after the debt was incurred, if the transfer itself was made in the ordinary course of both the debtor and the transferee, and if the transfer was made according to ordinary business terms, then the transfer is protected. The purpose of this exception is to leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy.

The third exception is for enabling loans in connection with which the debtor acquires the property that the loan enabled him to purchase after the loan is actually made.

The fourth exception codifies the net result rule in section 60c of current law [section 96(c) of former title 11]. If the creditor and the debtor have more than one exchange during the 90-day period, the exchanges are netted out according to the formula in paragraph (4). Any new value that the creditor advances must be unsecured in order for it to qualify under this exception.

Paragraph (5) codifies the improvement in position test, and thereby overrules such cases as *DuBay v. Williams*, 417 F.2d 1277 (C.A.9, 1966), and *Grain Merchants of Indiana, Inc. v. Union Bank and Savings Co*., 408 F.2d 209 (C.A.7, 1969). A creditor with a security interest in a floating mass, such as inventory or accounts receivable, is subject to preference attack to the extent he improves his position during the 90-day period before bankruptcy. The test is a two-point test, and requires determination of the secured creditor's position 90 days before the petition and on the date of the petition. If new value was first given after 90 days before the case, the date on which it was first given substitutes for the 90-day point.

Paragraph (6) excepts statutory liens validated under section 545 from preference attack. It also protects transfers in satisfaction of such liens, and the fixing of a lien under section 365(j), which protects a vendee whose contract to purchase real property from the debtor is rejected.

Subsection (d), derived from section 67a of the Bankruptcy Act [section 107(a) of former title 11], permits the trustee to avoid a transfer to reimburse a surety that posts a bond to dissolve a judicial lien that would have been avoidable under this section. The second sentence protects the surety from double liability.

Subsection (e) determines when a transfer is made for the purposes of the preference section. Paragraph (1) defines when a transfer is perfected. For real property, a transfer is perfected when it is valid against a bona fide purchaser. For personal property and fixtures, a transfer is perfected when it is valid against a creditor on a simple contract that obtains a judicial lien after the transfer is perfected. ''Simple contract'' as used here is derived from Bankruptcy Act §60a(4) [section 96(a)(4) of former title 11]. Paragraph (2) specifies that a transfer is made when it takes effect between the transferor and the transferee if it is perfected at or within 10 days after that time. Otherwise, it is made when the transfer is perfected. If it is not perfected before the commencement of the case, it is made immediately before the commencement of the case. Paragraph (3) specifies that a transfer is not made until the debtor has acquired rights in the property transferred. This provision, more than any other in the section, overrules *DuBay* and *Grain Merchants*, and in combination with subsection (b)(2), overrules *In re King-Porter Co*., 446 F.2d 722 (5th Cir. 1971).

Subsection (e) is designed to reach the different results under the 1962 version of Article 9 of the U.C.C. and under the 1972 version because different actions are required under each version in order to make a security agreement effective between the parties.

Subsection (f) creates a presumption of insolvency for the 90 days preceding the bankruptcy case. The presumption is as defined in Rule 301 of the Federal Rules of Evidence, made applicable in bankruptcy cases by sections 224 and 225 of the bill. The presumption requires the party against whom the presumption exists to come forward with some evidence to rebut the presumption, but the burden of proof remains on the party in whose favor the presumption exists.

AMENDMENTS

1994—Subsec. (c)(3)(B). Pub. L. 103–394, §203(1), substituted ''20'' for ''10''.

Subsec. (c)(7), (8). Pub. L. 103–394, §304(f), added par. (7) and redesignated former par. (7) as (8).

Subsec. (e)(2)(A). Pub. L. 103–394, §203(2), inserted before semicolon at end '', except as provided in subsection (c)(3)(B)''.

1986—Subsec. (b)(4)(B). Pub. L. 99–554 inserted ''and'' after the semicolon.

1984—Subsec. (a)(2). Pub. L. 98–353, §462(a)(1), inserted ''including proceeds of such property,'' after ''law,''.

Subsec. (a)(4). Pub. L. 98–353, §462(a)(2), struck out '', without penalty'' after ''any extension'', and inserted ''without penalty'' after ''payable''.

Subsec. (b). Pub. L. 98–353, §462(b)(1), substituted ''of an interest of the debtor in property'' for ''of property of the debtor'' in provisions preceding par. (1).

Subsec. (b)(4)(B). Pub. L. 98–353, §462(b)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: ''between 90 days and one year before the date of the filing of the petition, if such creditor, at the time of such transfer—

''(i) was an insider; and

''(ii) had reasonable cause to believe the debtor was insolvent at the time of such transfer; and''.

Subsec. (c)(2)(A). Pub. L. 98–353, §462(d)(1), inserted ''by the debtor'' after ''incurred''.

Subsec. (c)(2)(B) to (D). Pub. L. 98–353, §462(c), struck out subpar. (B) which read as follows: ''made not later than 45 days after such debt was incurred;'' and redesignated subpars. (C) and (D) as (B) and (C), respectively.

Subsec. (c)(3). Pub. L. 98–353, §462(d)(2), substituted ''that creates'' for ''of''.

Subsec. (c)(3)(B). Pub. L. 98–353, §462(d)(3), inserted ''on or'' after ''perfected'', and substituted ''the debtor receives possession of such property'' for ''such security interest attaches''.

Subsec. (c)(5). Pub. L. 98–353, §462(d)(4), substituted ''that creates'' for ''of'', and ''all security interests'' for ''all security interest''.

Subsec. (c)(5)(A)(ii). Pub. L. 98–353, § 462(d)(5), substituted ''or'' for ''and''.

Subsec. (c)(7). Pub. L. 98–353, § 310(3), added par. (7).

Subsec. (d). Pub. L. 98–353, § 462(e), substituted ''The'' for ''A'' before ''trustee may avoid'', inserted ''an interest in'' after ''transfer of'', inserted ''to or for the benefit of a surety'' after ''transferred'', and inserted ''such'' after ''reimbursement of''.

Subsec. (e)(2)(C)(i). Pub. L. 98–353, § 462(f), substituted ''or'' for ''and''.

Subsec. (g). Pub. L. 98–353, § 462(g), added subsec. (g).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 109, 303, 349, 362, 502, 522, 546, 548, 550, 551, 552, 749, 764, 901, 926 of this title.

§ 548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation 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 or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which—

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section—

(A) ''value'' means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

(3) In this section, the term ''charitable contribution'' means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution—

(A) is made by a natural person; and

(B) consists of—

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term ''qualified religious or charitable entity or organization'' means—

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2600; Pub. L. 97–222, § 5, July 27, 1982, 96 Stat. 236; Pub. L. 98–353, title III, §§ 394, 463, July 10, 1984, 98 Stat. 365, 378; Pub. L. 99–554, title II, § 283(n), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 101–311, title I, § 104, title II, § 204, June 25, 1990, 104 Stat. 268, 269; Pub. L. 103–394, title V, § 501(b)(5), Oct. 22, 1994, 108 Stat. 4142; Pub. L. 105–183, §§ 2, 3(a), June 19, 1998, 112 Stat. 517.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 548(d)(2) is modified to reflect general application of a provision contained in section 766 of the Senate amendment with respect to commodity brokers. In particular, section 548(d)(2)(B) of the House amendment makes clear that a commodity broker who receives a margin payment is considered to receive the margin payment in return for ''value'' for purposes of section 548.

SENATE REPORT NO. 95–989

This section is derived in large part from section 67d of the Bankruptcy Act [section 107(d) of former title 11]. It permits the trustee to avoid transfers by the debtor in fraud of his creditors. Its history dates from the statute of 13 Eliz. c. 5 (1570).

The trustee may avoid fraudulent transfers or obligations if made with actual intent to hinder, delay, or defraud a past or future creditor. Transfers made for less than a reasonably equivalent consideration are also vulnerable if the debtor was or thereby becomes insolvent, was engaged in business with an unreasonably small capital, or intended to incur debts that would be beyond his ability to repay.

The trustee of a partnership debtor may avoid any transfer of partnership property to a partner in the debtor if the debtor was or thereby became insolvent.

If a transferee's only liability to the trustee is under this section, and if he takes for value and in good faith, then subsection (c) grants him a lien on the property transferred, or other similar protection.

Subsection (d) specifies that for the purposes of fraudulent transfer section, a transfer is made when it is valid against a subsequent bona fide purchaser. If not made before the commencement of the case, it is considered made immediately before then. Subsection (d) also defines ''value'' to mean property, or the satisfaction or securing of a present or antecedent debt, but does not include an unperformed promise to furnish support to the debtor or a relative of the debtor.

REFERENCES IN TEXT

Sections 170(c) and 731(c)(2)(C) of the Internal Revenue Code of 1986, referred to in subsec. (d)(3), (4), are classified to sections 170(c) and 731(c)(2)(C), respectively, of Title 26, Internal Revenue Code.

AMENDMENTS

1998—Subsec. (a). Pub. L. 105–183, § 3(a), designated existing provisions as par. (1), redesignated former pars. (1) and (2) as par. (1)(A) and (B), respectively, redesignated former par. (2)(A) and (B) as par. (1)(B)(i) and (ii), respectively, and redesignated former par. (2)(B)(i) to (iii) as par. (1)(B)(ii)(I) to (III), respectively, and added par. (2).

Subsec. (d)(3), (4). Pub. L. 105–183, § 2, added pars. (3) and (4).

1994—Subsec. (d)(2)(B). Pub. L. 103–394, § 501(b)(5)(A), substituted ''section 101, 741, or 761'' for ''section 101(34), 741(5) or 761(15)'' and ''section 101 or 741'' for ''section 101(35) or 741(8)''.

Subsec. (d)(2)(C). Pub. L. 103–394, § 501(b)(5)(B), substituted ''section 741 or 761'' for ''section 741(5) or 761(15)'' and ''section 741'' for ''section 741(8)''.

1990—Subsec. (d)(2)(B). Pub. L. 101–311, § 204, inserted reference to sections 101(34) and 101(35) of this title.

Subsec. (d)(2)(D). Pub. L. 101–311, § 104, added subpar. (D).

1986—Subsec. (d)(2)(B). Pub. L. 99–554 substituted '', financial institution'' for ''financial institution,''.

1984—Subsec. (a). Pub. L. 98–353, § 463(a)(1), substituted ''if the debtor voluntarily or involuntarily'' for ''if the debtor'' in provisions preceding par. (1).

Subsec. (a)(1). Pub. L. 98–353, § 463(a)(2), substituted ''was made'' for ''occurred''.

Subsec. (a)(2)(B)(ii). Pub. L. 98–353, § 463(a)(3), inserted ''or a transaction'' after ''engaged in business''.

Subsec. (c). Pub. L. 98–353, § 463(b), inserted ''or may retain'' after ''lien on'' and struck out '', may retain any lien transferred,'' before ''or may enforce any obligation incurred''.

Subsec. (d)(1). Pub. L. 98–353, § 463(c)(1), substituted ''is so'' for ''becomes so far'', ''applicable law permits such transfer to be'' for ''such transfer could have been'', and ''is made'' for ''occurs''.

Subsec. (d)(2)(B). Pub. L. 98–353, § 463(c)(2), inserted ''financial institution,'' after ''stockbroker''.

Subsec. (d)(2)(C). Pub. L. 98–353, § 394(2), added subpar. (C).

1982—Subsec. (d)(2)(B). Pub. L. 97–222 substituted ''a commodity broker, forward contract merchant, stockbroker, or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to extent of such payment'' for ''a commodity broker or forward contract merchant that receives a margin payment, as defined in section 761(15) of this title, takes for value''.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–183 applicable to any case brought under an applicable provision of this title that is pending or commenced on or after June 19, 1998, see section 5 of Pub. L. 105–183, set out as a note under section 544 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 303, 349, 502, 522, 544, 546, 550, 551, 552, 707, 749, 764, 901, 926, 1325 of this title.

§ 549. Postpetition transactions

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate—

(1) that occurs after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of—

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2601; Pub. L. 98–353, title III, §464, July 10, 1984, 98 Stat. 379; Pub. L. 99–554, title II, §283(*o*), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 103–394, title V, §501(d)(18), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 549 of the House amendment has been redrafted in order to incorporate sections 342(b) and (c) of the Senate amendment. Those sections have been consolidated and redrafted in section 549(c) of the House amendment. Section 549(d) of the House amendment adopts a provision contained in section 549(c) of the Senate amendment.

SENATE REPORT NO. 95–989

This section modifies section 70d of current law [section 110(d) of former title 11]. It permits the trustee to avoid transfers of property that occur after the commencement of the case. The transfer must either have been unauthorized, or authorized under a section that protects only the transferor. Subsection (b) protects ''involuntary gap'' transferees to the extent of any value (including services, but not including satisfaction of a debt that arose before the commencement of the case), given after commencement in exchange for the transfer. Notice or knowledge of the transferee is irrelevant in determining whether he is protected under this provision.

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394 inserted ''the trustee may not avoid under subsection (a) of this section'' after ''involuntary case,''.

1986—Subsec. (b). Pub. L. 99–554 substituted ''made'' for ''that occurs'', and ''to the extent'' for ''is valid against the trustee to the extent of'', and inserted ''is'' before ''given''.

1984—Subsec. (a). Pub. L. 98–353, §464(a)(1), (2), substituted ''(b) or (c)'' for ''(b) and (c)'' in provisions preceding par. (1) and inserted ''only'' between ''authorized'' and ''under'' in par. (2)(A). In the original of Pub. L. 98–353, subsec. (a)(2) of section 464 thereof ended with a period but was followed by pars. (3), (4), and (5). Such pars. (3), (4), and (5) purported to amend subsec. (a) of this section in ways not susceptible of execution. In a predecessor bill [S. 445], these pars. (3), (4), and (5) formed a part of a subsec. (b) of section 361 thereof which amended subsec. (b) of this section. Such subsec. (b) of section 361 of S. 445 was not carried into Pub. L. 98–353, §464.

Subsec. (c). Pub. L. 98–353, §464(c), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: ''The trustee may not avoid under subsection (a) of this section a transfer, to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value or to a purchaser at a judicial sale, of real property located other than in the county in which the case is commenced, unless a copy of the petition was filed in the office where conveyances of real property in such county are recorded before such transfer was so far perfected that a bona fide purchaser of such property against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of such good faith or judicial sale purchaser. A good faith purchaser, without knowledge of the commencement of the case and for less than present fair equivalent value, of real property located other than in the county in which the case is commenced, under a transfer that the trustee may avoid under this section, has a lien on the property transferred to the extent of any present value given, unless a copy of the petition was so filed before such transfer was so perfected.''

Subsec. (d)(1). Pub. L. 98–353, §464(d), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 303, 349, 502, 522, 546, 550, 551, 749, 764, 901, 926 of this title.

§550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, ''improvement'' includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2601; Pub. L. 98–353, title III, § 465, July 10, 1984, 98 Stat. 379; Pub. L. 103–394, title II, § 202, Oct. 22, 1994, 108 Stat. 4121.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 550(a)(1) of the House amendment has been modified in order to permit recovery from an entity for whose benefit an avoided transfer is made in addition to a recovery from the initial transferee of the transfer. Section 550(c) would still apply, and the trustee is entitled only to a single satisfaction. The liability of a transferee under section 550(a) applies only ''to the extent that a transfer is avoided''. This means that liability is not imposed on a transferee to the extent that a transferee is protected under a provision such as section 548(c) which grants a good faith transferee for value of a transfer that is avoided only as a fraudulent transfer, a lien on the property transferred to the extent of value given.

Section 550(b) of the House amendment is modified to indicate that value includes satisfaction or securing of a present antecedent debt. This means that the trustee may not recover under subsection (a)(2) from a subsequent transferee that takes for ''value'', provided the subsequent transferee also takes in good faith and without knowledge of the transfer avoided.

Section 550(e) of the House amendment is derived from section 550(e) of the Senate amendment.

SENATE REPORT NO. 95–989

Section 550 prescribes the liability of a transferee of an avoided transfer, and enunciates the separation between the concepts of avoiding a transfer and recovering from the transferee. Subsection (a) permits the trustee to recover from the initial transferee of an avoided transfer or from any immediate or mediate transferee of the initial transferee. The words ''to the extent that'' in the lead in to this subsection are designed to incorporate the protection of transferees found in proposed 11 U.S.C. 549(b) and 548(c). Subsection (b) limits the liability of an immediate or mediate transferee of the initial transferee if such secondary transferee takes for value, in good faith and without knowledge of the voidability of the transfer. An immediate or mediate good faith transferee of a protected secondary transferee is also shielded from liability. This subsection is limited to the trustee's right to recover from subsequent transferees under subsection (a)(2). It does not limit the trustee's rights against the initial transferee under subsection (a)(1). The phrase ''good faith'' in this paragraph is intended to prevent a transferee from whom the trustee could recover from transferring the recoverable property to an innocent transferee, and receiving a retransfer from him, that is, ''washing'' the transaction through an innocent third party. In order for the transferee to be excepted from liability under this paragraph, he himself must be a good faith transferee. Subsection (c) is a further limitation on recovery. It specifies that the trustee is entitled to only one satisfactory, under subsection (a), even if more than one transferee is liable.

Subsection (d) protects good faith transferees, either initial or subsequent, to the extent of the lesser of the cost of any improvement the transferee makes in the transferred property and the increase in value of the property as a result of the improvement. Paragraph (2) of the subsection defines improvement to include physical additions or changes to the property, repairs, payment of taxes on the property, payment of a debt secured by a lien on the property, discharge of a lien on the property, and preservation of the property.

Subsection (e) establishes a statute of limitations on avoidance by the Trustee. The limitation is one year after the avoidance of the transfer or the time the case is closed or dismissed, whichever is earlier.

AMENDMENTS

1994—Subsecs. (c) to (f). Pub. L. 103–394 added subsec. (c) and redesignated former subsecs. (c) to (e) as (d) to (f), respectively.

1984—Subsec. (a). Pub. L. 98–353, § 465(a), substituted ''549, 553(b), or 724(a) of this title'' for ''549, or 724(a) of this title''.

Subsec. (d)(1)(A). Pub. L. 98–353, § 465(b)(1), inserted ''or accruing to'' after ''by''.

Subsec. (d)(1)(B). Pub. L. 98–353, § 465(b)(2), substituted ''the value of such property'' for ''value''.

Subsec. (d)(2)(D). Pub. L. 98–353, § 465(b)(3), substituted ''payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and'' for ''payment of any debt secured by a lien on such property.''

Subsec. (d)(2)(E), (F). Pub. L. 98–353, § 465(b)(3), (4), struck out subpar. (E) ''discharge of any lien against such property that is superior or equal to the rights of the trustee; and'' and redesignated subpar. (F) as (E).

Subsec. (e)(1). Pub. L. 98–353, § 465(c), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 349, 502, 522, 541, 901, 926 of this title.

§ 551. Automatic preservation of avoided transfer

Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2602.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 551 is adopted from the House bill and the alternative in the Senate amendment is rejected. The section is clarified to indicate that a transfer avoided or a lien that is void is preserved for the benefit of the estate, but only with respect to property of the estate. This prevents the trustee from asserting an avoided tax lien against after acquired property of the debtor.

SENATE REPORT NO. 95–989

This section is a change from present law. It specifies that any avoided transfer is automatically preserved for the benefit of the estate. Under current law, the court must determine whether or not the transfer should be preserved. The operation of the section is automatic, unlike current law, even though preservation may not benefit the estate in every instance. A preserved lien may be abandoned by the trustee under proposed 11 U.S.C. 554 if the preservation does not benefit the estate. The section as a whole prevents junior lienors from improving their position at the expense of the estate when a senior lien is avoided.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 522, 541, 901 of this title.

§ 552. Postpetition effect of security interest

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b)(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

(2) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2602; Pub. L. 98–353, title III, § 466, July 10, 1984, 98 Stat. 380; Pub. L. 103–394, title II, § 214(a), Oct. 22, 1994, 108 Stat. 4126.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 552(a) is derived from the House bill and the alternative provision in the Senate amendment is rejected. Section 552(b) represents a compromise between the House bill and the Senate amendment. Proceeds coverage, but not after acquired property clauses, are valid under title 11. The provision allows the court to consider the equities in each case. In the course of such consideration the court may evaluate any expenditures by the estate relating to proceeds and any related improvement in position of the secured party. Although this section grants a secured party a security interest in proceeds, product, offspring, rents, or profits, the section is explicitly subject to other sections of title 11. For example, the trustee or debtor in possession may use, sell, or lease proceeds, product, offspring, rents or profits under section 363.

SENATE REPORT NO. 95–989

Under the Uniform Commercial Code, article 9, creditors may take security interests in after-acquired property. Section 552 governs the effect of such a prepetition security interest in postpetition property. It applies to all security interests as defined in section 101(37) of the bankruptcy code, not only to U.C.C. security interests.

As a general rule, if a security agreement is entered into before the commencement of the case, then property that the estate acquires is not subject to the security interest created by a provision in the security agreement extending the security interest to after-acquired property. Subsection (b) provides an important exception consistent with the Uniform Commercial Code. If the security agreement extends to proceeds, product, offspring, rents, or profits of the property in question, then the proceeds would continue to be subject to the security interest pursuant to the terms of the security agreement and provisions of applicable law, except to the extent that where the estate acquires the proceeds at the expense of other creditors holding unsecured claims, the expenditure resulted in an improvement in the position of the secured party.

The exception covers the situation where raw materials, for example, are converted into inventory, or inventory into accounts, at some expense to the estate, thus depleting the fund available for general unsecured

creditors, but is limited to the benefit inuring to the secured party thereby. Situations in which the estate incurs expense in simply protecting collateral are governed by 11 U.S.C. 506(c). In ordinary circumstances, the risk of loss in continued operations will remain with the estate.

HOUSE REPORT NO. 95–595

Under the Uniform Commercial Code, Article 9, creditors may take security interests in after-acquired property. This section governs the effect of such a prepetition security interest in postpetition property. It applies to all security interests as defined in section 101 of the bankruptcy code, not only to U.C.C. security interests.

As a general rule, if a security agreement is entered into before the case, then property that the estate acquires is not subject to the security interest created by the security agreement. Subsection (b) provides the only exception. If the security agreement extends to proceeds, product, offspring, rents, or profits of property that the debtor had before the commencement of the case, then the proceeds, etc., continue to be subject to the security interest, except to the extent that the estate acquired the proceeds to the prejudice of other creditors holding unsecured claims. ''Extends to'' as used here would include an automatically arising security interest in proceeds, as permitted under the 1972 version of the Uniform Commercial Code, as well as an interest in proceeds specifically designated, as required under the 1962 Code or similar statutes covering property not covered by the Code. ''Prejudice'' is not intended to be a broad term here, but is designed to cover the situation where the estate expends funds that result in an increase in the value of collateral. The exception is to cover the situation where raw materials, for example, are converted into inventory, or inventory into accounts, at some expense to the estate, thus depleting the fund available for general unsecured creditors. The term ''proceeds'' is not limited to the technical definition of that term in the U.C.C., but covers any property into which property subject to the security interest is converted.

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394 designated existing provisions as par. (1), struck out ''rents,'' after ''offspring,'' in two places, and added par. (2).

1984—Subsec. (b). Pub. L. 98–353 inserted ''522,'' after ''506(c),'', substituted ''an entity entered'' for ''a secured party enter'', and substituted ''except to any extent'' for ''except to the extent''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 363, 901, 928 of this title; title 26 section 1398.

§ 553. Setoff

(a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that—

(1) the claim of such creditor against the debtor is disallowed;

(2) such claim was transferred, by an entity other than the debtor, to such creditor—

(A) after the commencement of the case; or

(B)(i) after 90 days before the date of the filing of the petition; and

(ii) while the debtor was insolvent; or

(3) the debt owed to the debtor by such creditor was incurred by such creditor—

(A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

(C) for the purpose of obtaining a right of setoff against the debtor.

(b)(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(14),[1] 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—

(A) 90 days before the date of the filing of the petition; and

(B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

(2) In this subsection, ''insufficiency'' means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

(c) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2602; Pub. L. 98–353, title III, §§ 395, 467, July 10, 1984, 98 Stat. 365, 380; Pub. L. 101–311, title I, § 105, June 25, 1990, 104 Stat. 268; Pub. L. 103–394, title II, §§ 205(b), 222(b), title V, § 501(d)(19), Oct. 22, 1994, 108 Stat. 4123, 4129, 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 553 of the House amendment is derived from a similar provision contained in the Senate amendment, but is modified to clarify application of a two-point test with respect to setoffs.

SENATE REPORT NO. 95–989

This section preserves, with some changes, the right of setoff in bankruptcy cases now found in section 68 of the Bankruptcy Act [section 108 of former title 11]. One exception to the right is the automatic stay, discussed in connection with proposed 11 U.S.C. 362. Another is the right of the trustee to use property under section 363 that is subject to a right of setoff.

The section states that the right of setoff is unaffected by the bankruptcy code except to the extent that the creditor's claim is disallowed, the creditor acquired (other than from the debtor) the claim during

[1] See References in Text note below.

the 90 days preceding the case while the debtor was insolvent, the debt being offset was incurred for the purpose of obtaining a right of setoff, while the debtor was insolvent and during the 90-day prebankruptcy period, or the creditor improved his position in the 90-day period (similar to the improvement in position test found in the preference section 547(c)(5)). Only the last exception is an addition to current law.

As under section 547(f), the debtor is presumed to have been insolvent during the 90 days before the case.

REFERENCES IN TEXT

Section 362(b)(14), referred to in subsec. (b)(1), was redesignated section 362(b)(17) by Pub. L. 103–394, title V, § 501(d)(7)(B)(vii)(II), (III), Oct. 22, 1994, 108 Stat. 4144.

AMENDMENTS

1994—Subsec. (a)(1). Pub. L. 103–394, § 501(d)(19)(A), struck out before semicolon at end ''other than under section 502(b)(3) of this title''.

Subsec. (b)(1). Pub. L. 103–394, § 501(d)(19)(B), substituted ''section 362(b)(14),'' for ''section 362(b)(14),,''.

Pub. L. 103–394, § 222(b), which directed the amendment of section 553(b)(1) by inserting ''546(h),'' after ''365(h),'' was executed by making the insertion in section 553(b)(1) of this title to reflect the probable intent of Congress.

Pub. L. 103–394, § 205(b), substituted ''365(h)'' for ''365(h)(2)''.

1990—Subsec. (b)(1). Pub. L. 101–311 substituted ''362(b)(7), 362(b)(14),'' for ''362(b)(7),''.

1984—Subsec. (b)(1). Pub. L. 98–353 inserted '', 362(b)(7),'' after ''362(b)(6)'', and substituted '', 365(h)(2), or 365(i)(2)'' for ''or 365(h)(1)''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 349, 502, 506, 522, 541, 542, 546, 550, 901 of this title; title 15 section 78eee.

§ 554. Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2603; Pub. L. 98–353, title III, § 468, July 10, 1984, 98 Stat. 380; Pub. L. 99–554, title II, § 283(p), Oct. 27, 1986, 100 Stat. 3118.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 554(b) is new and permits a party in interest to request the court to order the trustee to abandon property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

SENATE REPORT NO. 95–989

Under this section the court may authorize the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. Abandonment may be to any party with a possessory interest in the property abandoned. In order to aid administration of the case, subsection (b) deems the court to have authorized abandonment of any property that is scheduled under section 521(1) and that is not administered before the case is closed. That property is deemed abandoned to the debtor. Subsection (c) specifies that if property is neither abandoned nor administered it remains property of the estate.

AMENDMENTS

1986—Subsec. (c). Pub. L. 99–554 substituted ''521(1)'' for ''521(a)(1)''.

1984—Subsecs. (a), (b). Pub. L. 98–353, § 468(a), inserted ''and benefit'' after ''value''.

Subsec. (c). Pub. L. 98–353, § 468(b), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: ''Unless the court orders otherwise, any property that is scheduled under section 521(1) of this title and that is not administered before a case is closed under section 350 of this title is deemed abandoned.''

Subsec. (d). Pub. L. 98–353, § 468(c), struck out ''section (a) or (b) of'' after ''not abandoned under''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 557, 722 of this title.

§ 555. Contractual right to liquidate a securities contract

The exercise of a contractual right of a stockbroker, financial institution, or securities clearing agency to cause the liquidation of a securities contract, as defined in section 741 of this title, because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title unless such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. As used in this section, the term ''contractual right'' includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency.

(Added Pub. L. 97–222, § 6(a), July 27, 1982, 96 Stat. 236; amended Pub. L. 98–353, title III, § 469, July 10, 1984, 98 Stat. 380; Pub. L. 103–394, title V, § 501(b)(6), (d)(20), Oct. 22, 1994, 108 Stat. 4143, 4146.)

REFERENCES IN TEXT

The Securities Investor Protection Act of 1970, referred to in text, is Pub. L. 91–598, Dec. 30, 1970, 84 Stat. 1636, as amended, which is classified generally to chapter 2B–1 (§ 78aaa et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78aaa of Title 15 and Tables.

AMENDMENTS

1994—Pub. L. 103–394 substituted ''section 741 of this title'' for ''section 741(7)'' and struck out ''(15 U.S.C. 78aaa et seq.)'' after ''Act of 1970''.

1984—Pub. L. 98–353 inserted '', financial institution,'' after ''stockbroker''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 556. Contractual right to liquidate a commodities contract or forward contract

The contractual right of a commodity broker or forward contract merchant to cause the liquidation of a commodity contract, as defined in section 761 of this title, or forward contract because of a condition of the kind specified in section 365(e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. As used in this section, the term ''contractual right'' includes a right set forth in a rule or bylaw of a clearing organization or contract market or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

(Added Pub. L. 97–222, § 6(a), July 27, 1982, 96 Stat. 236; amended Pub. L. 101–311, title II, § 205, June 25, 1990, 104 Stat. 270; Pub. L. 103–394, title V, § 501(b)(7), Oct. 22, 1994, 108 Stat. 4143.)

AMENDMENTS

1994—Pub. L. 103–394 substituted ''section 761 of this title'' for ''section 761(4)''.

1990—Pub. L. 101–311 inserted before period at end ''and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

§ 557. Expedited determination of interests in, and abandonment or other disposition of grain assets

(a) This section applies only in a case concerning a debtor that owns or operates a grain storage facility and only with respect to grain and the proceeds of grain. This section does not affect the application of any other section of this title to property other than grain and proceeds of grain.

(b) In this section—

(1) ''grain'' means wheat, corn, flaxseed, grain sorghum, barley, oats, rye, soybeans, other dry edible beans, or rice;

(2) ''grain storage facility'' means a site or physical structure regularly used to store grain for producers, or to store grain acquired from producers for resale; and

(3) ''producer'' means an entity which engages in the growing of grain.

(c)(1) Notwithstanding sections 362, 363, 365, and 554 of this title, on the court's own motion the court may, and on the request of the trustee or an entity that claims an interest in grain or the proceeds of grain the court shall, expedite the procedures for the determination of interests in and the disposition of grain and the proceeds of grain, by shortening to the greatest extent feasible such time periods as are otherwise applicable for such procedures and by establishing, by order, a timetable having a duration of not to exceed 120 days for the completion of the applicable procedure specified in subsection (d) of this section. Such time periods and such timetable may be modified by the court, for cause, in accordance with subsection (f) of this section.

(2) The court shall determine the extent to which such time periods shall be shortened, based upon—

(A) any need of an entity claiming an interest in such grain or the proceeds of grain for a prompt determination of such interest;

(B) any need of such entity for a prompt disposition of such grain;

(C) the market for such grain;

(D) the conditions under which such grain is stored;

(E) the costs of continued storage or disposition of such grain;

(F) the orderly administration of the estate;

(G) the appropriate opportunity for an entity to assert an interest in such grain; and

(H) such other considerations as are relevant to the need to expedite such procedures in the case.

(d) The procedures that may be expedited under subsection (c) of this section include—

(1) the filing of and response to—

(A) a claim of ownership;

(B) a proof of claim;

(C) a request for abandonment;

(D) a request for relief from the stay of action against property under section 362(a) of this title;

(E) a request for determination of secured status;

(F) a request for determination of whether such grain or the proceeds of grain—

(i) is property of the estate;

(ii) must be turned over to the estate; or

(iii) may be used, sold, or leased; and

(G) any other request for determination of an interest in such grain or the proceeds of grain;

(2) the disposition of such grain or the proceeds of grain, before or after determination of interests in such grain or the proceeds of grain, by way of—

(A) sale of such grain;

(B) abandonment;

(C) distribution; or

(D) such other method as is equitable in the case;

(3) subject to sections 701, 702, 703, 1104, 1202, and 1302 of this title, the appointment of a trustee or examiner and the retention and compensation of any professional person required to assist with respect to matters relevant to the determination of interests in or disposition of such grain or the proceeds of grain; and

(4) the determination of any dispute concerning a matter specified in paragraph (1), (2), or (3) of this subsection.

(e)(1) Any governmental unit that has regulatory jurisdiction over the operation or liquidation of the debtor or the debtor's business shall be given notice of any request made or order entered under subsection (c) of this section.

(2) Any such governmental unit may raise, and may appear and be heard on, any issue relating to grain or the proceeds of grain in a case in which a request is made, or an order is entered, under subsection (c) of this section.

(3) The trustee shall consult with such governmental unit before taking any action relating to the disposition of grain in the possession, custody, or control of the debtor or the estate.

(f) The court may extend the period for final disposition of grain or the proceeds of grain under this section beyond 120 days if the court finds that—

(1) the interests of justice so require in light of the complexity of the case; and

(2) the interests of those claimants entitled to distribution of grain or the proceeds of grain will not be materially injured by such additional delay.

(g) Unless an order establishing an expedited procedure under subsection (c) of this section, or determining any interest in or approving any disposition of grain or the proceeds of grain, is stayed pending appeal—

(1) the reversal or modification of such order on appeal does not affect the validity of any procedure, determination, or disposition that occurs before such reversal or modification, whether or not any entity knew of the pendency of the appeal; and

(2) neither the court nor the trustee may delay, due to the appeal of such order, any proceeding in the case in which such order is issued.

(h)(1) The trustee may recover from grain and the proceeds of grain the reasonable and necessary costs and expenses allowable under section 503(b) of this title attributable to preserving or disposing of grain or the proceeds of grain, but may not recover from such grain or the proceeds of grain any other costs or expenses.

(2) Notwithstanding section 326(a) of this title, the dollar amounts of money specified in such section include the value, as of the date of disposition, of any grain that the trustee distributes in kind.

(i) In all cases where the quantity of a specific type of grain held by a debtor operating a grain storage facility exceeds ten thousand bushels, such grain shall be sold by the trustee and the assets thereof distributed in accordance with the provisions of this section.

(Added Pub. L. 98–353, title III, § 352(a), July 10, 1984, 98 Stat. 359; amended Pub. L. 99–554, title II, § 257(p), Oct. 27, 1986, 100 Stat. 3115.)

AMENDMENTS

1986—Subsec. (d)(3). Pub. L. 99–554 inserted reference to section 1202 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE

Section effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as an Effective Date of 1984 Amendment note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 507, 546, 901 of this title.

§ 558. Defenses of the estate

The estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

(Added Pub. L. 98–353, title III, § 470(a), July 10, 1984, 98 Stat. 380.)

EFFECTIVE DATE

Section effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as an Effective Date of 1984 Amendment note under section 101 of this title.

§ 559. Contractual right to liquidate a repurchase agreement

The exercise of a contractual right of a repo participant to cause the liquidation of a repurchase agreement because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title, unless, where the debtor is a stockbroker or securities clearing agency, such order is authorized under the

provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. In the event that a repo participant liquidates one or more repurchase agreements with a debtor and under the terms of one or more such agreements has agreed to deliver assets subject to repurchase agreements to the debtor, any excess of the market prices received on liquidation of such assets (or if any such assets are not disposed of on the date of liquidation of such repurchase agreements, at the prices available at the time of liquidation of such repurchase agreements from a generally recognized source or the most recent closing bid quotation from such a source) over the sum of the stated repurchase prices and all expenses in connection with the liquidation of such repurchase agreements shall be deemed property of the estate, subject to the available rights of setoff. As used in this section, the term ''contractual right'' includes a right set forth in a rule or bylaw, applicable to each party to the repurchase agreement, of a national securities exchange, a national securities association, or a securities clearing agency, and a right, whether or not evidenced in writing, arising under common law, under law merchant or by reason of normal business practice.

(Added Pub. L. 98–353, title III, § 396(a), July 10, 1984, 98 Stat. 366; amended Pub. L. 103–394, title V, § 501(d)(21), Oct. 22, 1994, 108 Stat. 4146.)

REFERENCES IN TEXT

The Securities Investor Protection Act of 1970, referred to in text, is Pub. L. 91–598, Dec. 30, 1970, 84 Stat. 1636, as amended, which is classified generally to chapter 2B–1 (§ 78aaa et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78aaa of Title 15 and Tables.

AMENDMENTS

1994—Pub. L. 103–394 struck out ''(15 U.S.C. 78aaa et seq.)'' after ''Act of 1970''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE

Section effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as an Effective Date of 1984 Amendment note under section 101 of this title.

§ 560. Contractual right to terminate a swap agreement

The exercise of any contractual right of any swap participant to cause the termination of a swap agreement because of a condition of the kind specified in section 365(e)(1) of this title or to offset or net out any termination values or payment amounts arising under or in connection with any swap agreement shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title. As used in this section, the term ''contractual right'' includes a right, whether or not evidenced in writing, arising under common law, under law merchant, or by reason of normal business practice.

(Added Pub. L. 101–311, title I, § 106(a), June 25, 1990, 104 Stat. 268.)

CHAPTER 7—LIQUIDATION

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

SUBCHAPTER II—COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

SUBCHAPTER III—STOCKBROKER LIQUIDATION

SUBCHAPTER IV—COMMODITY BROKER LIQUIDATION

AMENDMENTS

1984—Pub. L. 98–353, title III, § 471, July 10, 1984, 98 Stat. 380, substituted ''Successor'' for ''Succesor'' in item 703.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 103, 109, 303, 321, 326, 327, 330, 341, 346, 347, 362, 365, 502, 508, 521, 524, 547, 1106, 1112, 1129, 1141, 1173, 1174, 1201, 1207, 1208, 1225, 1228, 1301, 1306, 1307, 1325, 1328 of this title; title 7 section 24; title 15 section 78fff–1; title 20 section 1087; title 21 section 356c; title 26 sections 108, 1398, 4980, 6012; title 28 sections 586, 1930; title 29 section 1362.

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title; title 15 section 78fff.

§ 701. Interim trustee

(a)(1) Promptly after the order for relief under this chapter, the United States trustee shall ap-

point one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 or that is serving as trustee in the case immediately before the order for relief under this chapter to serve as interim trustee in the case.

(2) If none of the members of such panel is willing to serve as interim trustee in the case, then the United States trustee may serve as interim trustee in the case.

(b) The service of an interim trustee under this section terminates when a trustee elected or designated under section 702 of this title to serve as trustee in the case qualifies under section 322 of this title.

(c) An interim trustee serving under this section is a trustee in a case under this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2604; Pub. L. 99–554, title II, § 215, Oct. 27, 1986, 100 Stat. 3100.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment deletes section 701(d) of the Senate amendment. It is anticipated that the Rules of Bankruptcy Procedure will require the appointment of an interim trustee at the earliest practical moment in commodity broker bankruptcies, but no later than noon of the day after the date of the filing of the petition, due to the volatility of such cases.

SENATE REPORT NO. 95–989

This section requires the court to appoint an interim trustee. The appointment must be made from the panel of private trustees established and maintained by the Director of the Administrative Office under proposed 28 U.S.C. 604(e).

Subsection (a) requires the appointment of an interim trustee to be made promptly after the order for relief, unless a trustee is already serving in the case, such as before a conversion from a reorganization to a liquidation case.

Subsection (b) specifies that the appointment of an interim trustee expires when the permanent trustee is elected or designated under section 702.

Subsection (c) makes clear that an interim trustee is a trustee in a case under the bankruptcy code.

Subsection (d) provides that in a commodity broker case where speed is essential the interim trustee must be appointed by noon of the business day immediately following the order for relief.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–554 designated existing provisions as par. (1), substituted ''the United States trustee shall appoint'' for ''the court shall appoint'', ''586(a)(1)'' for ''604(f)'', ''that is serving'' for ''that was serving'', and added par. (2).

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 303, 322, 348, 557, 703 of this title.

§ 702. Election of trustee

(a) A creditor may vote for a candidate for trustee only if such creditor—

(1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;

(2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and

(3) is not an insider.

(b) At the meeting of creditors held under section 341 of this title, creditors may elect one person to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section.

(c) A candidate for trustee is elected trustee if—

(1) creditors holding at least 20 percent in amount of the claims of a kind specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section vote; and

(2) such candidate receives the votes of creditors holding a majority in amount of claims specified in subsection (a)(1) of this section that are held by creditors that vote for a trustee.

(d) If a trustee is not elected under this section, then the interim trustee shall serve as trustee in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2604; Pub. L. 97–222, § 7, July 27, 1982, 96 Stat. 237; Pub. L. 98–353, title III, § 472, July 10, 1984, 98 Stat. 380.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts section 702(a)(2) of the Senate amendment. An insubstantial equity interest does not disqualify a creditor from voting for a candidate for trustee.

SENATE REPORT NO. 95–989

Subsection (a) of this section specifies which creditors may vote for a trustee. Only a creditor that holds an allowable, undisputed, fixed, liquidated, unsecured claim that is not entitled to priority, that does not have an interest materially adverse to the interest of general unsecured creditors, and that is not an insider may vote for a trustee. The phrase ''materially adverse'' is currently used in the Rules of Bankruptcy Procedure, rule 207(d). The application of the standard requires a balancing of various factors, such as the nature of the adversity. A creditor with a very small equity position would not be excluded from voting solely because he holds a small equity in the debtor. The Rules of Bankruptcy Procedure also currently provide for temporary allowance of claims, and will continue to do so for the purposes of determining who is eligible to vote under this provision.

Subsection (b) permits creditors at the meeting of creditors to elect one person to serve as trustee in the case. Creditors holding at least 20 percent in amount of the claims specified in the preceding paragraph must request election before creditors may elect a trustee. Subsection (c) specifies that a candidate for trustee is elected trustee if creditors holding at least 20 percent in amount of those claims actually vote, and if the candidate receives a majority in amount of votes actually cast.

Subsection (d) specifies that if a trustee is not elected, then the interim trustee becomes the permanent trustee and serves in the case permanently.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353, § 472(a), inserted ''held'' after ''meeting of creditors''.

Subsec. (c)(1). Pub. L. 98–353, § 472(b)(1), inserted ''of a kind'' after ''claims''.

Subsec. (c)(2). Pub. L. 98–353, § 472(b)(2), substituted ''for a trustee'' for ''for trustee''.

Subsec. (d). Pub. L. 98–353, § 472(c), substituted ''this section'' for ''subsection (c) of this section''.

1982—Subsec. (a)(1). Pub. L. 97–222 substituted ''726(a)(4), 752(a), 766(h), or 766(i)'' for ''or 726(a)(4)''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 322, 546, 557, 701, 703, 705, 1104 of this title.

§ 703. Successor trustee

(a) If a trustee dies or resigns during a case, fails to qualify under section 322 of this title, or is removed under section 324 of this title, creditors may elect, in the manner specified in section 702 of this title, a person to fill the vacancy in the office of trustee.

(b) Pending election of a trustee under subsection (a) of this section, if necessary to preserve or prevent loss to the estate, the United States trustee may appoint an interim trustee in the manner specified in section 701(a).

(c) If creditors do not elect a successor trustee under subsection (a) of this section or if a trustee is needed in a case reopened under section 350 of this title, then the United States trustee—

(1) shall appoint one disinterested person that is a member of the panel of private trustees established under section 586(a)(1) of title 28 to serve as trustee in the case; or

(2) may, if none of the disinterested members of such panel is willing to serve as trustee, serve as trustee in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2605; Pub. L. 98–353, title III, § 473, July 10, 1984, 98 Stat. 381; Pub. L. 99–554, title II, § 216, Oct. 27, 1986, 100 Stat. 3100.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

If the office of trustee becomes vacant during the case, this section makes provision for the selection of a successor trustee. The office might become vacant through death, resignation, removal, failure to qualify under section 322 by posting bond, or the reopening of a case. If it does, creditors may elect a successor in the same manner as they may elect a trustee under the previous section. Pending the election of a successor, the court may appoint an interim trustee in the usual manner if necessary to preserve or prevent loss to the estate. If creditors do not elect a successor, or if a trustee is needed in a reopened case, then the court appoints a disinterested member of the panel of private trustees to serve.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–554 amended subsec. (b) generally, substituting ''the United States trustee may appoint'' for ''the court may appoint'' and ''manner specified in section 701(a)'' for ''manner and subject to the provisions of section 701 of this title''.

Subsec. (c). Pub. L. 99–554 amended subsec. (c) generally, substituting ''this section or'' for ''this section, or'', ''then the United States trustee'' for ''then the court'', designating part of existing provisions as par. (1), and, as so designated, substituting ''586(a)(1)'' for ''604(f)'', ''in the case; or'' for ''in the case.'', and adding par. (2).

1984—Subsec. (b). Pub. L. 98–353 substituted ''and subject to the provisions of section 701 of this title'' for ''specified in section 701(a) of this title. Sections 701(b) and 701(c) of this title apply to such interim trustee''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 322, 557 of this title.

§ 704. Duties of trustee

The trustee shall—

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2605; Pub. L. 98–353, title III, §§ 311(a), 474, July 10, 1984, 98 Stat. 355, 381; Pub. L. 99–554, title II, § 217, Oct. 27, 1986, 100 Stat. 3100.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 704(8) of the Senate amendment is deleted in the House amendment. Trustees should give construc-

tive notice of the commencement of the case in the manner specified under section 549(c) of title 11.

SENATE REPORT NO. 95–989

The essential duties of the trustee are enumerated in this section. Others, or elaborations on these, may be prescribed by the Rules of Bankruptcy Procedure to the extent not inconsistent with those prescribed by this section. The duties are derived from section 47a of the Bankruptcy Act [section 75(a) of former title 11].

The trustee's principal duty is to collect and reduce to money the property of the estate for which he serves, and to close up the estate as expeditiously as is compatible with the best interests of parties in interest. He must be accountable for all property received, and must investigate the financial affairs of the debtor. If a purpose would be served (such as if there are assets that will be distributed), the trustee is required to examine proofs of claims and object to the allowance of any claim that is improper. If advisable, the trustee must oppose the discharge of the debtor, which is for the benefit of general unsecured creditors whom the trustee represents.

The trustee is responsible to furnish such information concerning the estate and its administration as is requested by a party in interest. If the business of the debtor is authorized to be operated, then the trustee is required to file with governmental units charged with the responsibility for collection or determination of any tax arising out of the operation of the business periodic reports and summaries of the operation, including a statement of receipts and disbursements, and such other information as the court requires. He is required to give constructive notice of the commencement of the case in the manner specified under section 342(b).

AMENDMENTS

1986—Par. (8). Pub. L. 99–554, §217(1), inserted ", with the United States trustee," after "with the court" and "the United States trustee or" after "information as".

Par. (9). Pub. L. 99–554, §217(2), inserted "with the United States trustee" after "court".

1984—Par. (1). Pub. L. 98–353, §474, substituted "close such estate" for "close up such estate".

Pars. (3) to (9). Pub. L. 98–353, §311(a), added par. (3) and redesignated former pars. (3) to (8) as (4) to (9), respectively.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1106, 1202, 1302, 1304 of this title; title 29 section 1342.

§ 705. Creditors' committee

(a) At the meeting under section 341(a) of this title, creditors that may vote for a trustee under section 702(a) of this title may elect a committee of not fewer than three, and not more than eleven, creditors, each of whom holds an allowable unsecured claim of a kind entitled to distribution under section 726(a)(2) of this title.

(b) A committee elected under subsection (a) of this section may consult with the trustee or the United States trustee in connection with the administration of the estate, make recommendations to the trustee or the United States trustee respecting the performance of the trustee's duties, and submit to the court or the United States trustee any question affecting the administration of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2605; Pub. L. 99–554, title II, §218, Oct. 27, 1986, 100 Stat. 3100.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 705(a) of the House amendment adopts a provision contained in the Senate amendment that limits a committee of creditors to not more than 11; the House bill contained no maximum limitation.

SENATE REPORT NO. 95–989

This section is derived from section 44b of the Bankruptcy Act [section 72(b) of former title 11] without substantial change. It permits election by general unsecured creditors of a committee of not fewer than 3 members and not more than 11 members to consult with the trustee in connection with the administration of the estate, to make recommendations to the trustee respecting the performance of his duties, and to submit to the court any question affecting the administration of the estate. There is no provision for compensation or reimbursement of its counsel.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–554 inserted "or the United States trustee" in three places.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

§ 706. Conversion

(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

(b) On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests such conversion.

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2606; Pub. L. 99–554, title II, §257(q), Oct. 27, 1986, 100 Stat. 3115; Pub. L. 103–394, title V, §501(d)(22), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 706(a) of the House amendment adopts a provision contained in the Senate amendment indicating that a waiver of the right to convert a case under section 706(a) is unenforceable. The explicit reference in title 11 forbidding the waiver of certain rights is not intended to imply that other rights, such as the right to

file a voluntary bankruptcy case under section 301, may be waived.

Section 706 of the House amendment adopts a similar provision contained in H.R. 8200 as passed by the House. Competing proposals contained in section 706(c) and section 706(d) of the Senate amendment are rejected.

SENATE REPORT NO. 95–989

Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the provision is that the debtor should always be given the opportunity to repay his debts, and a waiver of the right to convert a case is unenforceable.

Subsection (b) permits the court, on request of a party in interest and after notice and a hearing, to convert the case to chapter 11 at any time. The decision whether to convert is left in the sound discretion of the court, based on what will most inure to the benefit of all parties in interest.

Subsection (c) is part of the prohibition against involuntary chapter 13 cases, and prohibits the court from converting a case to chapter 13 without the debtor's consent.

Subsection (d) reinforces section 109 by prohibiting conversion to a chapter unless the debtor is eligible to be a debtor under that chapter.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394 substituted ''1208, or 1307'' for ''1307, or 1208''.

1986—Subsec. (a). Pub. L. 99–554, § 257(q)(1), inserted references to chapter 12 and section 1208 of this title.

Subsec. (c). Pub. L. 99–554, § 257(q)(2), inserted reference to chapter 12.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 1146, 1208, 1231, 1307 of this title.

§ 707. Dismissal

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of ''charitable contribution'' under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2606; Pub. L. 98–353, title III, §§ 312, 475, July 10, 1984, 98 Stat. 355, 381; Pub. L. 99–554, title II, § 219, Oct. 27, 1986, 100 Stat. 3100; Pub. L. 105–183, § 4(b), June 19, 1998, 112 Stat. 518.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 707 of the House amendment indicates that the court may dismiss a case only after notice and a hearing.

SENATE REPORT NO. 95–989

This section authorizes the court to dismiss a liquidation case only for cause, such as unreasonable delay by the debtor that is prejudicial to creditors or nonpayment of any fees and charges required under chapter 123 [§ 1911 et seq.] of title 28. These causes are not exhaustive, but merely illustrative. The section does not contemplate, however, that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal. To permit dismissal on that ground would be to enact a non-uniform mandatory chapter 13, in lieu of the remedy of bankruptcy.

AMENDMENTS

1998—Subsec. (b). Pub. L. 105–183 inserted at end ''In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).''

1986—Subsec. (a)(3). Pub. L. 99–554, § 219(a), added par. (3).

Subsec. (b). Pub. L. 99–554, § 219(b), substituted ''motion or on a motion by the United States trustee, but'' for ''motion and''.

1984—Pub. L. 98–353 designated existing provisions as subsec. (a) and in pars. (1) and (2) substituted ''or'' for ''and'', and added subsec. (b).

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–183 applicable to any case brought under an applicable provision of this title that is pending or commenced on or after June 19, 1998, see section 5 of Pub. L. 105–183, set out as a note under section 544 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section

552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

RULES PROMULGATED BY SUPREME COURT

United States Supreme Court to prescribe general rules implementing the practice and procedure to be followed under subsec. (b) of this section, with section 2075 of Title 28, Judiciary and Judicial Procedure, to apply with respect to such general rules, see section 320 of Pub. L. 98–353, set out as a note under section 2075 of Title 28.

SUBCHAPTER II—COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title; title 15 section 78fff.

§ 721. Authorization to operate business

The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2606.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section is derived from section 2a(5) of the Bankruptcy Act [section 11(a)(5) of former title 11]. It permits the court to authorize the operation of any business of the debtor for a limited period, if the operation is in the best interest of the estate and consistent with orderly liquidation of the estate. An example is the operation of a watch company to convert watch movements and cases into completed watches which will bring much higher prices than the component parts would have brought.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 327, 363, 364 of this title.

§ 722. Redemption

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2606.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 722 of the House amendment adopts the position taken in H.R. 8200 as passed by the House and rejects the alternative contained in section 722 of the Senate amendment.

SENATE REPORT NO. 95–989

This section is new and is broader than rights of redemption under the Uniform Commercial Code. It authorizes an individual debtor to redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a nonpurchase money dischargeable consumer debt. It applies only if the debtor's interest in the property is exempt or has been abandoned.

This right to redeem is a very substantial change from current law. To prevent abuses such as may occur when the debtor deliberately allows the property to depreciate in value, the debtor will be required to pay the fair market value of the goods or the amount of the claim if the claim is less. The right is personal to the debtor and not assignable.

HOUSE REPORT NO. 95–595

This section is new and is broader than rights of redemption under the Uniform Commercial Code. It authorizes an individual debtor to redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt. It applies only if the debtor's interest in the property is exempt or has been abandoned.

The right to redeem extends to the whole of the property, not just the debtor's exempt interest in it. Thus, for example, if a debtor owned a $2,000 car, subject to a $1,200 lien, the debtor could exempt his $800 interest in the car. The debtor is permitted a $1,500 exemption in a car, proposed 11 U.S.C. 522(d)(2). This section permits him to pay the holder of the lien $1,200 and redeem the entire car, not just the remaining $700 of his exemption. The redemption is accomplished by paying the holder of the lien the amount of the allowed claim secured by the lien. The provision amounts to a right of first refusal for the debtor in consumer goods that might otherwise be repossessed. The right of redemption under this section is not waivable.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 723. Rights of partnership trustee against general partners

(a) If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency.

(b) To the extent practicable, the trustee shall first seek recovery of such deficiency from any general partner in such partnership that is not a debtor in a case under this title. Pending determination of such deficiency, the court may order any such partner to provide the estate with indemnity for, or assurance of payment of, any deficiency recoverable from such partner, or not to dispose of property.

(c) Notwithstanding section 728(c) of this title, the trustee has a claim against the estate of each general partner in such partnership that is a debtor in a case under this title for the full amount of all claims of creditors allowed in the case concerning such partnership. Notwithstanding section 502 of this title, there shall not be allowed in such partner's case a claim against such partner on which both such partner and such partnership are liable, except to any extent that such claim is secured only by property of such partner and not by property of such partnership. The claim of the trustee under this subsection is entitled to distribution in such partner's case under section 726(a) of this title the same as any other claim of a kind specified in such section.

(d) If the aggregate that the trustee recovers from the estates of general partners under subsection (c) of this section is greater than any deficiency not recovered under subsection (b) of this section, the court, after notice and a hearing, shall determine an equitable distribution of the surplus so recovered, and the trustee shall distribute such surplus to the estates of the general partners in such partnership according to such determination.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2606; Pub. L. 98–353, title III, § 476, July 10, 1984, 98 Stat. 381; Pub. L. 103–394, title II, § 212, Oct. 22, 1994, 108 Stat. 4125.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 723(c) of the House amendment is a compromise between similar provisions contained in the House bill and Senate amendment. The section makes clear that the trustee of a partnership has a claim against each general partner for the full amount of all claims of creditors allowed in the case concerning the partnership. By restricting the trustee's rights to claims of ''creditors,'' the trustee of the partnership will not have a claim against the general partners for administrative expenses or claims allowed in the case concerning the partnership. As under present law, sections of the Bankruptcy Act [former title 11] applying to codebtors and sureties apply to the relationship of a partner with respect to a partnership debtor. See sections 501(b), 502(e), 506(d)(2), 509, 524(d), and 1301 of title 11.

SENATE REPORT NO. 95–989

This section is a significant departure from present law. It repeals the jingle rule, which, for ease of administration, denied partnership creditors their rights against general partners by permitting general partners' individual creditors to share in their estates first to the exclusion of partnership creditors. The result under this section more closely tracks generally applicable partnership law, without a significant administrative burden.

Subsection (a) specifies that each general partner in a partnership debtor is liable to the partnership's trustee for any deficiency of partnership property to pay in full all administrative expenses and all claims against the partnership.

Subsection (b) requires the trustee to seek recovery of the deficiency from any general partner that is not a debtor in a bankruptcy case. The court is empowered to order that partner to indemnify the estate or not to dispose of property pending a determination of the deficiency. The language of the subsection is directed to cases under the bankruptcy code. However, if, during the early stages of the transition period, a partner in a partnership is proceeding under the Bankruptcy Act [former title 11] while the partnership is proceeding under the bankruptcy code, the trustee should not first seek recovery against the Bankruptcy Act partner. Rather, the Bankruptcy Act partner should be deemed for the purposes of this section and the rights of the trustee to be proceeding under title 11.

Subsection (c) requires the partnership trustee to seek recovery of the full amount of the deficiency from the estate of each general partner that is a debtor in a bankruptcy case. The trustee will share equally with the partners' individual creditors in the assets of the partners' estates. Claims of partnership creditors who may have filed against the partner will be disallowed to avoid double counting.

Subsection (d) provides for the case where the total recovery from all of the bankrupt general partners is greater than the deficiency of which the trustee sought recovery. This case would most likely occur for a partnership with a large number of general partners. If the situation arises, the court is required to determine an equitable redistribution of the surplus to the estate of the general partners. The determination will be based on factors such as the relative liability of each of the general partners under the partnership agreement and the relative rights of each of the general partners in the profits of the enterprise under the partnership agreement.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394 substituted ''to the extent that under applicable nonbankruptcy law such general partner is personally liable for such deficiency'' for ''for the full amount of the deficiency''.

1984—Subsec. (a). Pub. L. 98–353, § 476, substituted provisions that the trustee shall have a claim for the full amount of the deficiency against a general partner who is personally liable with respect to claims concerning partnerships which are allowed in a case under this chapter, for provisions that each general partner in the partnership would be liable to the trustee for the full amount of such deficiency.

Subsec. (c). Pub. L. 98–353, § 476(b), substituted ''such partner's case'' for ''such case'' in two places, ''by property of such partnership'' for ''be property of such partnership'', and ''a kind specified in such section'' for ''the kind specified in such section''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 541 of this title.

§ 724. Treatment of certain liens

(a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.

(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax, or proceeds of such property, shall be distributed—

(1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to such tax lien;

(2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by such tax lien;

(3) third, to the holder of such tax lien, to any extent that such holder's allowed tax claim that is secured by such tax lien exceeds any amount distributed under paragraph (2) of this subsection;

(4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to such tax lien;

(5) fifth, to the holder of such tax lien, to the extent that such holder's allowed claim se-

cured by such tax lien is not paid under paragraph (3) of this subsection; and

(6) sixth, to the estate.

(c) If more than one holder of a claim is entitled to distribution under a particular paragraph of subsection (b) of this section, distribution to such holders under such paragraph shall be in the same order as distribution to such holders would have been other than under this section.

(d) A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2607; Pub. L. 98–353, title III, §477, July 10, 1984, 98 Stat. 381; Pub. L. 99–554, title II, §283(r), Oct. 27, 1986, 100 Stat. 3118; Pub. L. 103–394, title III, §304(h)(4), title V, §501(d)(23), Oct. 22, 1994, 108 Stat. 4134, 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 724 of the House amendment adopts the provision taken in the House bill and rejects the provision taken in the Senate amendment. In effect, a tax claim secured by a lien is treated as a claim between the fifth and sixth priority in a case under chapter 7 rather than as a secured claim.

Treatment of certain liens: The House amendment modifies present law by requiring the subordination of tax liens on both real and personal property to the payment of claims having a priority. This means that assets are to be distributed from the debtor's estate to pay higher priority claims before the tax claims are paid, even though the tax claims are properly secured. Under present law and the Senate amendment only tax liens on personal property, but not on real property, are subordinated to the payment of claims having a priority above the priority for tax claims.

SENATE REPORT NO. 95–989

Subsection (a) of section 724 permits the trustee to avoid a lien that secures a fine, penalty, forfeiture, or multiple, punitive, or exemplary damages claim to the extent that the claim is not compensation for actual pecuniary loss. The subsection follows the policy found in section 57j of the Bankruptcy Act [section 93(j) of former title 11] of protecting unsecured creditors from the debtor's wrongdoing, but expands the protection afforded. The lien is made voidable rather than void in chapter 7, in order to permit the lien to be revived if the case is converted to chapter 11 under which penalty liens are not voidable. To make the lien void would be to permit the filing of a chapter 7, the voiding of the lien, and the conversion to a chapter 11, simply to avoid a penalty lien, which should be valid in a reorganization case.

Subsection (b) governs tax liens. This provision retains the rule of present bankruptcy law (§67(C)(3) of the Bankruptcy Act [section 107(c)(3) of former title 11]) that a tax lien on personal property, if not avoidable by the trustee, is subordinated in payment to unsecured claims having a higher priority than unsecured tax claims. Those other claims may be satisfied from the amount that would otherwise have been applied to the tax lien, and any excess of the amount of the lien is then applied to the tax. Any personal property (or sale proceeds) remaining is to be used to satisfy claims secured by liens which are junior to the tax lien. Any proceeds remaining are next applied to pay any unpaid balance of the tax lien.

Subsection (d) specifies that any statutory lien whose priority is determined in the same manner as a tax lien is to be treated as a tax lien under this section, even if the lien does not secure a claim for taxes. An example is the ERISA [29 U.S.C. 1001 et seq.] lien.

HOUSE REPORT NO. 95–595

Subsection (b) governs tax liens. It is derived from section 67c(3) of the Bankruptcy Act [section 107(c)(3) of former title 11], without substantial modification in result. It subordinates tax liens to administrative expense and wage claims, and solves certain circuity of liens problems that arise in connection with the subordination. The order of distribution of property subject to a tax lien is as follows: First, to holders of liens senior to the tax lien; second, to administrative expenses, wage claims, and consumer creditors that are granted priority, but only to the extent of the amount of the allowed tax claim secured by the lien. In other words, the priority claimants step into the shoes of the tax collector. Third, to the tax claimant, to the extent that priority claimants did not use up his entire claim. Fourth, to junior lien holders. Fifth, to the tax collector to the extent that he was not paid under paragraph (3). Finally, any remaining property goes to the estate. The result of these provisions are to leave senior and junior lienors and holders of unsecured claims undisturbed. If there are any liens that are equal in status to the tax lien, they share pari passu with the tax lien under the distribution provisions of this subsection.

REFERENCES IN TEXT

Section 6323 of the Internal Revenue Code of 1986, referred to in subsec. (d), is classified to section 6323 of Title 26, Internal Revenue Code.

AMENDMENTS

1994—Subsec. (b)(2). Pub. L. 103–394, §304(h)(4), substituted ''507(a)(6), or 507(a)(7)'' for ''or 507(a)(6)''.

Subsec. (d). Pub. L. 103–394, §501(d)(23), substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954 (26 U.S.C. 6323)''.

1986—Subsec. (b)(2). Pub. L. 99–554 inserted reference to section 507(a)(6) of this title.

1984—Subsec. (b). Pub. L. 98–353, §477(a)(1), substituted ''a tax'' for ''taxes'' in provisions preceding par. (1).

Subsec. (b)(2). Pub. L. 98–353, §477(a)(2), substituted ''any holder of a claim of a kind specified'' for ''claims specified'', ''section 507(a)(1)'' for ''sections 507(a)(1)'', and ''or 507(a)(5) of this title'' for ''and 507(a)(5) of this title''.

Subsec. (b)(3). Pub. L. 98–353, §477(a)(3), substituted ''allowed tax claim'' for ''allowed claim''.

Subsec. (c). Pub. L. 98–353, §477(b), substituted ''holder of a claim is entitled'' for ''creditor is entitled'' and ''holders'' for ''creditors'' in two places.

Subsec. (d). Pub. L. 98–353, §477(c), substituted ''the priority of which'' for ''whose priority'' and ''the same as if such lien were a tax lien'' for ''the same as a tax lien''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 303, 349, 502, 522, 550, 551, 764 of this title; title 26 sections 6327, 7437.

§ 725. Disposition of certain property

After the commencement of a case under this chapter, but before final distribution of property of the estate under section 726 of this title, the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2607; Pub. L. 98–353, title III, § 478, July 10, 1984, 98 Stat. 381.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 725 of the House amendment adopts the substance contained in both the House bill and Senate amendment but transfers an administrative function to the trustee in accordance with the general thrust of this legislation to separate the administrative and the judicial functions where appropriate.

SENATE REPORT NO. 95–989

This section requires the court to determine the appropriate disposition of property in which the estate and an entity other than the estate have an interest. It would apply, for example, to property subject to a lien or property co-owned by the estate and another entity. The court must make the determination with respect to property that is not disposed of under another section of the bankruptcy code, such as by abandonment under section 554, by sale or distribution under 363, or by allowing foreclosure by a secured creditor by lifting the stay under section 362. The purpose of the section is to give the court appropriate authority to ensure that collateral or its proceeds is returned to the proper secured creditor, that consigned or bailed goods are returned to the consignor or bailor and so on. Current law is curiously silent on this point, though case law has grown to fill the void. The section is in lieu of a section that would direct a certain distribution to secured creditors. It gives the court greater flexibility to meet the circumstances, and it is broader, permitting disposition of property subject to a co-ownership interest.

AMENDMENTS

1984—Pub. L. 98–353 substituted ''distribution of property of the estate'' for ''distribution''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed before the date on which the trustee commences distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), (7), or (8) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1009,[1] 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

[1] So in original. This title does not contain a section 1009.

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2608; Pub. L. 98–353, title III, § 479, July 10, 1984, 98 Stat. 381; Pub. L. 99–554, title II, §§ 257(r), 283(s), Oct. 27, 1986, 100 Stat. 3115, 3118; Pub. L. 103–394, title II, § 213(b), title III, § 304(h)(5), title V, § 501(d)(24), Oct. 22, 1994, 108 Stat. 4126, 4134, 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 726(a)(4) adopts a provision contained in the Senate amendment subordinating prepetition penalties and penalties arising in the involuntary gap period to the extent the penalties are not compensation for actual pecuniary laws.

The House amendment deletes a provision following section 726(a)(6) of the Senate amendment providing that the term ''claim'' includes interest due owed before the date of the filing of the petition as unnecessary since a right to payment for interest due is a right to payment which is within the definition of ''claim'' in section 101(4) of the House amendment.

SENATE REPORT NO. 95–989

This section is the general distribution section for liquidation cases. It dictates the order in which distribution of property of the estate, which has usually been reduced to money by the trustee under the requirements of section 704(1).

First, property is distributed among priority claimants, as determined by section 507, and in the order prescribed by section 507. Second, distribution is to general unsecured creditors. This class excludes priority creditors and the two classes of subordinated creditors specified below. The provision is written to permit distribution to creditors that tardily file claims if their tardiness was due to lack of notice or knowledge of the case. Though it is in the interest of the estate to encourage timely filing, when tardy filing is not the result of a failure to act by the creditor, the normal subordination penalty should not apply. Third distribution is to general unsecured creditors who tardily file. Fourth distribution is to holders of fine, penalty, forfeiture, or multiple, punitive, or exemplary damage claims. More of these claims are disallowed entirely under present law. They are simply subordinated here.

Paragraph (4) provides that punitive penalties, including prepetition tax penalties, are subordinated to the payment of all other classes of claims, except claims for interest accruing during the case. In effect, these penalties are payable out of the estate's assets only if and to the extent that a surplus of assets would otherwise remain at the close of the case for distribution back to the debtor.

Paragraph (5) provides that postpetition interest on prepetition claims is also to be paid to the creditor in a subordinated position. Like prepetition penalties, such interest will be paid from the estate only if and to the extent that a surplus of assets would otherwise remain for return to the debtor at the close of the case.

This section also specifies that interest accrued on all claims (including priority and nonpriority tax claims) which accrued before the date of the filing of the title 11 petition is to be paid in the same order of distribution of the estate's assets as the principal amount of the related claims.

Any surplus is paid to the debtor under paragraph (6).

Subsection (b) follows current law. It specifies that claims within a particular class are to be paid pro rata. This provision will apply, of course, only when there are inadequate funds to pay the holders of claims of a particular class in full. The exception found in the section, which also follows current law, specifies that liquidation administrative expenses are to be paid ahead of reorganization administrative expenses if the case has been converted from a reorganization case to a liquidation case, or from an individual repayment plan case to a liquidation case.

Subsection (c) governs distributions in cases in which there is community property and other property of the estate. The section requires the two kinds of property to be segregated. The distribution is as follows: First, administrative expenses are to be paid, as the court determines on any reasonable equitable basis, from both kinds of property. The court will divide administrative expenses according to such factors as the amount of each kind of property in the estate, the cost of preservation and liquidation of each kind of property, and whether any particular administrative expenses are attributable to one kind of property or the other. Second, claims are to be paid as provided under subsection (a) (the normal liquidation case distribution rules) in the following order and manner: First, community claims against the debtor or the debtor's spouse are paid from community property, except such as is liable solely for the debts of the debtor.

Second, community claims against the debtor, to the extent not paid under the first provision, are paid from community property that is solely liable for the debts of the debtor. Third, community claims, to the extent they remain unpaid, and all other claims against the debtor, are paid from noncommunity property. Fourth, if any community claims against the debtor or the debtor's spouse remain unpaid, they are paid from whatever property remains in the estate. This would occur if community claims against the debtor's spouse are large in amount and most of the estate's property is property solely liable, under nonbankruptcy law, for debts of the debtor.

The marshalling rules in this section apply only to property of the estate. However, they will provide a guide to the courts in the interpretation of proposed 11 U.S.C. 725, relating to distribution of collateral, in cases in which there is community property. If a secured creditor has a lien on both community and noncommunity property, the marshalling rules here—by analogy would dictate that the creditor be satisfied first out of community property, and then out of separate property.

AMENDMENTS

1994—Subsec. (a)(1). Pub. L. 103–394, § 213(b), inserted before semicolon at end '', proof of which is timely filed under section 501 of this title or tardily filed before the date on which the trustee commences distribution under this section''.

Subsec. (b). Pub. L. 103–394, §§ 304(h)(5), 501(d)(24), substituted '', (7), or (8)'' for ''or (7)'' and ''chapter under section 1009, 1112,'' for ''chapter under section 1112''.

1986—Subsec. (b). Pub. L. 99–554, § 283(s), inserted reference to par. (7) of section 507(a) of this title.

Pub. L. 99–554, § 257(r), inserted reference to section 1208 of this title.

1984—Subsec. (b). Pub. L. 98–353, § 479(a), substituted ''each such particular paragraph'' for ''a particular paragraph'', ''a claim allowed under section 503(b) of this title'' for ''administrative expenses'' in two places, and ''has priority over'' for ''have priority over''.

Subsec. (c)(1). Pub. L. 98–353, § 479(b)(1), substituted ''Claims allowed under section 503 of this title'' for ''Administrative expenses''.

Subsec. (c)(2). Pub. L. 98–353, § 479(b)(2), substituted ''Allowed claims, other than claims allowed under section 503 of this title,'' for ''Claims other than for administrative expenses''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 347, 502, 702, 705, 723, 724, 725, 752, 766 of this title; title 15 section 78fff; title 20 section 1087–2.

§ 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2609; Pub. L. 98–353, title III, § 480, July 10, 1984, 98 Stat. 382; Pub. L. 99–554, title II, §§ 220, 257(s), Oct. 27, 1986, 100 Stat. 3101, 3116.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Sections 727(a) (8) and (9) of the House amendment represent a compromise between provisions contained in section 727(a)(8) of the House bill and Senate amendment. Section 727(a)(8) of the House amendment adopts section 727(a)(8) of the House bill. However, section 727(a)(9) of the House amendment contains a compromise based on section 727(a)(8) of the Senate amendment with respect to the circumstances under which a plan by way of composition under Chapter XIII of the Bankruptcy Act [chapter 13 of former title 11] should be a bar to discharge in a subsequent proceeding under title 11. The paragraph provides that a discharge under section 660 or 661 of the Bankruptcy Act [section 1060 or 1061 of former title 11] or section 1328 of title 11 in a case commenced within 6 years before the date of the filing of the petition in a subsequent case, operates as a bar to discharge unless, first, payments under the plan totaled at least 100 percent of the allowed unsecured claims in the case; or second, payments under the plan totaled at least 70 percent of the allowed unsecured claims in the case and the plan was proposed by the debtor in good faith and was the debtor's best effort.

It is expected that the Rules of Bankruptcy Procedure will contain a provision permitting the debtor to request a determination of whether a plan is the debtor's ''best effort'' prior to confirmation of a plan in a case under chapter 13 of title 11. In determining whether a plan is the debtor's ''best effort'' the court will evaluate several factors. Different facts and circumstances in cases under chapter 13 operate to make any rule of thumb of limited usefulness. The court should balance the debtor's assets, including family income, health insurance, retirement benefits, and other wealth, a sum which is generally determinable, against the foreseeable necessary living expenses of the debtor and the debtor's dependents, which unfortunately is rarely quantifiable. In determining the expenses of the debtor and the debtor's dependents, the court should consider the stability of the debtor's employment, if any, the age of the debtor, the number of the debtor's dependents and their ages, the condition of equipment and tools necessary to the debtor's employment or to the operation of his business, and other foreseeable expenses that the debtor will be required to pay during the period of the plan, other than payments to be made to creditors under the plan.

Section 727(a)(10) of the House amendment clarifies a provision contained in section 727(a)(9) of the House bill and Senate amendment indicating that a discharge may be barred if the court approves a waiver of discharge executed in writing by the debtor after the order for relief under chapter 7.

Section 727(b) of the House amendment adopts a similar provision contained in the Senate amendment modifying the effect of discharge. The provision makes clear that the debtor is discharged from all debts that arose before the date of the order for relief under chapter 7 in addition to any debt which is determined under section 502 as if it were a prepetition claim. Thus, if a case is converted from chapter 11 or chapter 13 to a case under chapter 7, all debts prior to the time of conversion are discharged, in addition to debts determined after the date of conversion of a kind specified in section 502, that are to be determined as prepetition claims. This modification is particularly important with respect to an individual debtor who files a petition under chapter 11 or chapter 13 of title 11 if the case is converted to chapter 7. The logical result of the House amendment is to equate the result that obtains whether the case is converted from another chapter to chapter 7, or whether the other chapter proceeding is dismissed and a new case is commenced by filing a petition under chapter 7.

SENATE REPORT NO. 95–989

This section is the heart of the fresh start provisions of the bankruptcy law. Subsection (a) requires the court to grant a debtor a discharge unless one of nine conditions is met. The first condition is that the debtor is not an individual. This is a change from present law, under which corporations and partnerships may be discharged in liquidation cases, though they rarely are. The change in policy will avoid trafficking in corporate shells and in bankrupt partnerships. ''Individual'' includes a deceased individual, so that if the debtor dies during the bankruptcy case, he will nevertheless be released from his debts, and his estate will not be liable for them. Creditors will be entitled to only one satisfaction—from the bankruptcy estate and not from the probate estate.

The next three grounds for denial of discharge center on the debtor's wrongdoing in or in connection with the bankruptcy case. They are derived from Bankruptcy Act § 14c [section 32(c) of former title 11]. If the debtor, with intent to hinder, delay, or defraud his creditors or an officer of the estate, has transferred, removed, destroyed, mutilated, or concealed, or has permitted any such action with respect to, property of the debtor within the year preceding the case, or property of the estate after the commencement of the case, then the debtor is denied discharge. The debtor is also denied discharge if he has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any books and records from which his financial condition might be ascertained, unless the act or failure to act was justified under all the circumstances of the case. The fourth ground for denial of discharge is the commission of a bankruptcy crime, although the standard of proof is preponderance of the evidence rather than proof beyond a reasonable doubt. These crimes include the making of

a false oath or account, the use or presentation of a false claim, the giving or receiving of money for acting or forbearing to act, and the withholding from an officer of the estate entitled to possession of books and records relating to the debtor's financial affairs.

The fifth ground for denial of discharge is the failure of the debtor to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. The sixth ground concerns refusal to testify. It is a change from present law, under which the debtor may be denied discharge for legitimately exercising his right against self-incrimination. Under this provision, the debtor may be denied discharge if he refuses to obey any lawful order of the court, or if he refuses to testify after having been granted immunity or after improperly invoking the constitutional privilege against self-incrimination.

The seventh ground for denial of discharge is the commission of an act specified in grounds two through six during the year before the debtor's case in connection with another bankruptcy case concerning an insider.

The eighth ground for denial of discharge is derived from §14c(5) of the Bankruptcy Act [section 32(c)(5) of former title 11]. If the debtor has been granted a discharge in a case commenced within 6 years preceding the present bankruptcy case, he is denied discharge. This provision, which is no change from current law with respect to straight bankruptcy, is the 6-year bar to discharge. Discharge under chapter 11 will bar a discharge for 6 years. As under current law, confirmation of a composition wage earner plan under chapter 13 is a basis for invoking the 6-year bar.

The ninth ground is approval by the court of a waiver of discharge.

Subsection (b) specifies that the discharge granted under this section discharges the debtor from all debts that arose before the date of the order for relief. It is irrelevant whether or not a proof of claim was filed with respect to the debt, and whether or not the claim based on the debt was allowed.

Subsection (c) permits the trustee, or a creditor, to object to discharge. It also permits the court, on request of a party in interest, to order the trustee to examine the acts and conduct of the debtor to determine whether a ground for denial of discharge exists.

Subsection (d) requires the court to revoke a discharge already granted in certain circumstances. If the debtor obtained the discharge through fraud, if he acquired and concealed property of the estate, or if he refused to obey a court order or to testify, the discharge is to be revoked.

Subsection (e) permits the trustee or a creditor to request revocation of a discharge within 1 year after the discharge is granted, on the grounds of fraud, and within one year of discharge or the date of the closing of the case, whichever is later, on other grounds.

REFERENCES IN TEXT

The Bankruptcy Act, referred to in subsec. (a)(7), is act July 1, 1898, ch. 541, 30 Stat. 544, as amended, which was classified generally to former Title 11.

Sections 14, 371, and 476 of the Bankruptcy Act, referred to in subsec. (a)(8), are section 14 of act July 1, 1898, ch. 541, 30 Stat. 550, section 371 of act July 1, 1898, ch. 541, as added June 22, 1938, ch. 575, §1, 52 Stat. 912, and section 476 of act July 1, 1898, ch. 541, as added June 22, 1938, ch. 575, §1, 52 Stat. 924, which were classified to sections 32, 771, and 876 of former Title 11.

Sections 660 and 661 of the Bankruptcy Act, referred to in subsec. (a)(9), are sections 660 and 661 of act July 1, 1898, ch. 541, as added June 22, 1938, ch. 575, §1, 52 Stat. 935, 936, which were classified to sections 1060 and 1061 of former Title 11.

AMENDMENTS

1986—Subsec. (a)(9). Pub. L. 99–554, §257(s), inserted reference to section 1228 of this title.

Subsec. (c). Pub. L. 99–554, §220, amended subsec. (c) generally, substituting ''The trustee, a creditor, or the United States trustee may object'' for ''The trustee or a creditor may object'' in par. (1).

Subsec. (d). Pub. L. 99–554, §220, amended subsec. (d) generally, substituting '', a creditor, or the United States trustee,'' for ''or a creditor,'' in provisions preceding par. (1) and ''acquisition of or entitlement to such property'' for ''acquisition of, or entitlement to, such property'' in par. (2).

Subsec. (e). Pub. L. 99–554, §220, amended subsec. (e) generally, substituting ''The trustee, a creditor, or the United States trustee may'' for ''The trustee or a creditor may'' in provisions preceding par. (1), ''section within'' for ''section, within'' and ''discharge is granted'' for ''discharge was granted'' in par. (1), ''section before'' for ''section, before'' in provisions of par. (2) preceding subpar. (A), and ''discharge; and'' for ''discharge; or'' in par. (2)(A).

1984—Subsec. (a)(6)(C). Pub. L. 98–353, §480(a)(1), substituted ''properly'' for ''property''.

Subsec. (a)(7). Pub. L. 98–353, §480(a)(2), inserted '', under this title or under the Bankruptcy Act,'' after ''another case''.

Subsec. (a)(8). Pub. L. 98–353, §480(a)(3), substituted ''371,'' for ''371''.

Subsec. (c)(1). Pub. L. 98–353, §480(b), substituted ''to the granting of a discharge'' for ''to discharge''.

Subsec. (e)(2)(A). Pub. L. 98–353, §480(c), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Effective date and applicability of amendment by section 220 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 523, 524, 1141 of this title; title 12 section 1715z–1a.

§ 728. Special tax provisions

(a) For the purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 1112 or 1208 of this title.

(b) Notwithstanding any State or local law imposing a tax on or measured by income, the trustee shall make tax returns of income for the estate of an individual debtor in a case under this chapter or for a debtor that is a corporation in a case under this chapter only if such estate or corporation has net taxable income for the entire period after the order for relief under this chapter during which the case is pending. If such entity has such income, or if the debtor is a partnership, then the trustee shall make and file a return of income for each taxable period during which the case was pending after the order for relief under this chapter.

(c) If there are pending a case under this chapter concerning a partnership and a case under this chapter concerning a partner in such partnership, a governmental unit's claim for any un-

paid liability of such partner for a State or local tax on or measured by income, to the extent that such liability arose from the inclusion in such partner's taxable income of earnings of such partnership that were not withdrawn by such partner, is a claim only against such partnership.

(d) Notwithstanding section 541 of this title, if there are pending a case under this chapter concerning a partnership and a case under this chapter concerning a partner in such partnership, then any State or local tax refund or reduction of tax of such partner that would have otherwise been property of the estate of such partner under section 541 of this title—

(1) is property of the estate of such partnership to the extent that such tax refund or reduction of tax is fairly apportionable to losses sustained by such partnership and not reimbursed by such partner; and

(2) is otherwise property of the estate of such partner.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2611; Pub. L. 98–353, title III, § 481, July 10, 1984, 98 Stat. 382; Pub. L. 99–554, title II, § 257(t), Oct. 27, 1986, 100 Stat. 3116.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 728 of the House amendment adopts a provision contained in the House bill that was deleted by the Senate amendment.

Liquidations: The House bill contained special tax provisions concerning the treatment of liquidations cases for State and local tax laws. These provisions deal with the taxable years of an individual debtor, return-filing requirements, and rules allocating State and local tax liabilities and refunds between a bankrupt partner and the partnership of which he is a member. The Senate amendment deleted these rules pending consideration of the Federal tax treatment of bankruptcy in the next Congress. The House amendment returns these provisions to the bill in order that they may be studied by the bankruptcy and tax bars who may wish to submit comments to Congress in connection with its consideration of these provisions in the next Congress.

SENATE REPORT NO. 95–989

Section 728 of title 11 applies only to state and local taxation. This provision contains four subsections which embody special tax provisions that apply in a case under chapter 7. Subsection (a) terminates the taxable year of an individual debtor on the date of the order for relief under chapter 7 of title 11. The date of termination of the individual's taxable year is the date on which the estate first becomes a separate taxable entity. If the case was originally filed under chapter 11 of title 11, then the estate would have been made a separate taxable entity on the date of the order for relief under that chapter. In the rare case of a multiple conversion, then the date of the order for relief under the first chapter under which the estate was a separate taxable entity is controlling.

Subsection (b) permits the trustee of the estate of an individual debtor or a corporation in a case under chapter 7 of title 11 to make a tax return only if the estate or corporation has net taxable income for the entire case. If the estate or corporation has net taxable income at the close of the case, then the trustee files an income tax return for each tax year during which the case was pending. The trustee of a partnership debtor must always file returns for each such taxable period.

Subsection (c) sets forth a marshalling rule pertaining to tax claims against a partner and a partnership in a case under chapter 7 of title 11. To the extent that the income tax liability arose from the inclusion of undistributed earnings in the partner's taxable income, the court is required to disallow the tax claim against the partner's estate and to allow such claim against the partnership estate. No burden is placed on the taxing authority; the taxing authority should file a complete proof of claim in each case and the court will execute the marshalling. If the partnership's assets are insufficient to satisfy partnership creditors in full, then section 723(c) of title 11 will apply, notwithstanding this subsection, to allow any unsatisfied tax claims to be asserted by the partnership trustee against the estate of the partner. The marshalling rule under this subsection applies only for purposes of allowance and distribution. Thus the tax claim may be nondischargeable with respect to an individual partner.

Subsection (d) requires the court to apportion any tax refund or reduction of tax between the estate of a partner and the estate of his partnership. The standard of apportionment entitles the partnership estate to receive that part of the tax refund or reduction that is attributable to losses sustained by the partnership that were deducted by the partner but for which the partner never reimbursed the partnership. The partner's estate receives any part not allocated to the partnership estate. The section applies notwithstanding section 541 of title 11, which includes the partner's right to a tax refund or to reduction of tax as property of the partner's estate.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–554 inserted reference to section 1208 of this title.

1984—Subsec. (c). Pub. L. 98–353, § 481(a), substituted ''taxable income'' for ''taxable income,''.

Subsec. (d)(2). Pub. L. 98–353, § 481(b), substituted ''is otherwise property of the estate of such partner'' for ''is property of the estate of such partner otherwise''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 346, 348, 723 of this title.

SUBCHAPTER III—STOCKBROKER LIQUIDATION

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title.

§ 741. Definitions for this subchapter

In this subchapter—

(1) ''Commission'' means Securities and Exchange Commission;

(2) ''customer'' includes—

(A) entity with whom a person deals as principal or agent and that has a claim against such person on account of a security received, acquired, or held by such person in the ordinary course of such person's business as a stockbroker, from or for the securities account or accounts of such entity—

(i) for safekeeping;
(ii) with a view to sale;
(iii) to cover a consummated sale;
(iv) pursuant to a purchase;
(v) as collateral under a security agreement; or
(vi) for the purpose of effecting registration of transfer; and

(B) entity that has a claim against a person arising out of—
(i) a sale or conversion of a security received, acquired, or held as specified in subparagraph (A) of this paragraph; or
(ii) a deposit of cash, a security, or other property with such person for the purpose of purchasing or selling a security;

(3) ''customer name security'' means security—
(A) held for the account of a customer on the date of the filing of the petition by or on behalf of the debtor;
(B) registered in such customer's name on such date or in the process of being so registered under instructions from the debtor; and
(C) not in a form transferable by delivery on such date;

(4) ''customer property'' means cash, security, or other property, and proceeds of such cash, security, or property, received, acquired, or held by or for the account of the debtor, from or for the securities account of a customer—
(A) including—
(i) property that was unlawfully converted from and that is the lawful property of the estate;
(ii) a security held as property of the debtor to the extent such security is necessary to meet a net equity claim of a customer based on a security of the same class and series of an issuer;
(iii) resources provided through the use or realization of a customer's debit cash balance or a debit item includible in the Formula for Determination of Reserve Requirement for Brokers and Dealers as promulgated by the Commission under the Securities Exchange Act of 1934; and
(iv) other property of the debtor that any applicable law, rule, or regulation requires to be set aside or held for the benefit of a customer, unless including such property as customer property would not significantly increase customer property; but

(B) not including—
(i) a customer name security delivered to or reclaimed by a customer under section 751 of this title; or
(ii) property to the extent that a customer does not have a claim against the debtor based on such property;

(5) ''margin payment'' means payment or deposit of cash, a security, or other property, that is commonly known to the securities trade as original margin, initial margin, maintenance margin, or variation margin, or as a mark-to-market payment, or that secures an obligation of a participant in a securities clearing agency;

(6) ''net equity'' means, with respect to all accounts of a customer that such customer has in the same capacity—
(A)(i) aggregate dollar balance that would remain in such accounts after the liquidation, by sale or purchase, at the time of the filing of the petition, of all securities positions in all such accounts, except any customer name securities of such customer; minus
(ii) any claim of the debtor against such customer in such capacity that would have been owing immediately after such liquidation; plus
(B) any payment by such customer to the trustee, within 60 days after notice under section 342 of this title, of any business related claim of the debtor against such customer in such capacity;

(7) ''securities contract'' means contract for the purchase, sale, or loan of a security, including an option for the purchase or sale of a security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any option entered into on a national securities exchange relating to foreign currencies, or the guarantee of any settlement of cash or securities by or to a securities clearing agency;

(8) ''settlement payment'' means a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade; and

(9) ''SIPC'' means Securities Investor Protection Corporation.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2611; Pub. L. 97–222, § 8, July 27, 1982, 96 Stat. 237; Pub. L. 98–353, title III, § 482, July 10, 1984, 98 Stat. 382; Pub. L. 103–394, title V, § 501(d)(25), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 741(6) of the House bill and Senate amendment is deleted by the House amendment since the defined term is used only in section 741(4)(A)(iii). A corresponding change is made in that section.

SENATE REPORT NO. 95–989

Section 741 sets forth definitions for subchapter III of chapter 7.

Paragraph (1) defines ''Commission'' to mean the Securities and Exchange Commission.

Paragraph (2) defines ''customer'' to include anybody that interacts with the debtor in a capacity that concerns securities transactions. The term embraces cash or margin customers of a broker or dealer in the broadest sense.

Paragraph (3) defines ''customer name security'' in a restrictive fashion to include only non-transferable securities that are registered, or in the process of being registered in a customer's own name. The securities must not be endorsed by the customer and the stockbroker must not be able to legally transfer the securities by delivery, by a power of attorney, or otherwise.

Paragraph (4) defines ''customer property'' to include all property of the debtor that has been segregated for customers or property that should have been seg-

regated but was unlawfully converted. Clause (i) refers to customer property not properly segregated by the debtor or customer property converted and then recovered so as to become property of the estate. Unlawfully converted property that has been transferred to a third party is excluded until it is recovered as property of the estate by virtue of the avoiding powers. The concept excludes customer name securities that have been delivered to or reclaimed by a customer and any property properly belonging to the stockholder, such as money deposited by a customer to pay for securities that the stockholder has distributed to such customer.

Paragraph (5) [enacted as (6)] defines ''net equity'' to establish the extent to which a customer will be entitled to share in the single and separate fund. Accounts of a customer are aggregated and offset only to the extent the accounts are held by the customer in the same capacity. Thus, a personal account is separate from an account held as trustee. In a community property state an account held for the community is distinct from an account held as separate property.

The net equity is computed by liquidating all securities positions in the accounts and crediting the account with any amount due to the customer. Regardless of the actual dates, if any, of liquidation, the customer is only entitled to the liquidation value at the time of the filing of the petition. To avoid double counting, the liquidation value of customer name securities belonging to a customer is excluded from net equity. Thus, clause (ii) includes claims against a customer resulting from the liquidation of a security under clause (i). The value of a security on which trading has been suspended at the time of the filing of the petition will be estimated. Once the net liquidation value is computed, any amount that the customer owes to the stockbroker is subtracted including any amount that would be owing after the hypothetical liquidation, such as brokerage fees. Debts owed by the customer to the debtor, other than in a securities related transaction, will not reduce the net equity of the customer. Finally, net equity is increased by any payment by the customer to the debtor actually paid within 60 days after notice. The principal reason a customer would make such a payment is to reclaim customer name securities under §751.

Paragraph (6) defines ''1934 Act'' to mean the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.].

Paragraph (7) [enacted as (9)] defines ''SIPC'' to mean the Securities Investor Protection Corporation.

REFERENCES IN TEXT

The Securities Exchange Act of 1934, referred to in par. (4)(A)(iii), is act June 6, 1934, ch. 404, 48 Stat. 881, as amended, which is classified principally to chapter 2B (§78a et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78a of Title 15 and Tables.

AMENDMENTS

1994—Par. (4)(A)(iii). Pub. L. 103–394 struck out ''(15 U.S.C. 78a et seq.)'' after ''Act of 1934''.

1984—Par. (2)(A). Pub. L. 98–353, §482(1), substituted ''with whom a person deals'' for ''with whom the debtor deals'', ''that has a claim'' for ''that holds a claim'', ''against such person'' for ''against the debtor'', ''held by such person'' for ''held by the debtor'', and ''such person's business as a stockbroker,'' for ''business as a stockbroker''.

Par. (2)(B). Pub. L. 98–353, §482(2)(A), (B), substituted ''has a claim'' for ''holds a claim'' and ''against a person'' for ''against the debtor'' in provisions preceding cl. (i).

Par. (2)(B)(ii). Pub. L. 98–353, §482(2)(C), substituted ''such person'' for ''the debtor''.

Par. (4)(A)(i). Pub. L. 98–353, §482(3), substituted ''from and that is the lawful'' for ''and that is''.

Par. (6)(A)(i). Pub. L. 98–353, §482(4), inserted a comma after ''petition'' and ''any'' after ''except''.

Par. (7). Pub. L. 98–353, §482(5), amended par. (7) generally, inserting provisions relating to options for the purchase or sale of certificates of deposit, or a group or index of securities (including any interest therein or based on the value thereof), or any option entered into on a national securities exchange relating to foreign currencies.

Par. (8). Pub. L. 98–353, §482(6), inserted ''a final settlement payment,''.

1982—Par. (4). Pub. L. 97–222, §8(1), struck out ''at any time'' after ''security, or property,'' in provisions preceding subpar. (A), and inserted ''of a customer'' after ''claim'' in subpar. (A)(ii).

Par. (5). Pub. L. 97–222, §8(3), added par. (5). Former par. (5) redesignated (6).

Par. (6). Pub. L. 97–222, §8(2), (4), redesignated former par. (5) as (6), in provisions preceding subpar. (A), substituted ''all accounts of a customer that such customer has'' for ''the aggregate of all of a customer's accounts that such customer holds'', in subpar. (A)(2) inserted ''in such capacity'', and in subpar. (B) inserted ''in such capacity''. Former par. (6) redesignated (9).

Pars. (7), (8). Pub. L. 97–222, §8(5), added pars. (7) and (8).

Par. (9). Pub. L. 97–222, §8(2), (6), redesignated former par. (6) as (9) and substituted ''Securities'' for ''Security''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 362, 546, 548, 555, 752 of this title; title 12 sections 1787, 1821.

§ 742. Effect of section 362 of this title in this subchapter

Notwithstanding section 362 of this title, SIPC may file an application for a protective decree under the Securities Investor Protection Act of 1970. The filing of such application stays all proceedings in the case under this title unless and until such application is dismissed. If SIPC completes the liquidation of the debtor, then the court shall dismiss the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97–222, §9, July 27, 1982, 96 Stat. 237; Pub. L. 103–394, title V, §501(d)(26), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 742 of the House amendment deletes a sentence contained in the Senate amendment requiring the trustee in an interstate stock-brokerage liquidation to comply with the provisions of subchapter IV of chapter 7 if the debtor is also a commodity broker. The House amendment expands the requirement to require the SIPC trustee to perform such duties, if the debtor is a commodity broker, under section 7(b) of the Securities Investor Protection Act [15 U.S.C. 78ggg(b)]. The requirement is deleted from section 742 since the trustee of an intrastate stockbroker will be bound by the provisions of subchapter IV of chapter 7 if the debtor is also a commodity broker by reason of section 103 of title 11.

SENATE REPORT NO. 95–989

Section 742 indicates that the automatic stay does not prevent SIPC from filing an application for a pro-

tective decree under SIPA. If SIPA does file such an application, then all bankruptcy proceedings are suspended until the SIPC action is completed. If SIPC completes liquidation of the stockbroker then the bankruptcy case is dismissed.

REFERENCES IN TEXT

The Securities Investor Protection Act of 1970, referred to in text, is Pub. L. 91–598, Dec. 30, 1970, 84 Stat. 1636, as amended, which is classified generally to chapter 2B–1 (§ 78aaa et seq.) of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 78aaa of Title 15 and Tables.

AMENDMENTS

1994—Pub. L. 103–394 struck out ''(15 U.S.C. 78aaa et seq.)'' after ''Act of 1970''.

1982—Pub. L. 97–222 substituted ''title'' for ''chapter'' after ''all proceedings in the case under this''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 349 of this title.

§ 743. Notice

The clerk shall give the notice required by section 342 of this title to SIPC and to the Commission.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 99–554, title II, § 283(t), Oct. 27, 1986, 100 Stat. 3118; Pub. L. 103–394, title V, § 501(d)(27), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 743 requires that notice of the order for relief be given to SIPC and to the SEC in every stockbroker case.

AMENDMENTS

1994—Pub. L. 103–394 substituted ''342'' for ''342(a)''.

1986—Pub. L. 99–554, which directed the amendment of this section by striking ''(d)'', rather than ''(a)'', could not be executed because ''(d)'' did not appear in text. See 1994 Amendment note above.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

§ 744. Executory contracts

Notwithstanding section 365(d)(1) of this title, the trustee shall assume or reject, under section 365 of this title, any executory contract of the debtor for the purchase or sale of a security in the ordinary course of the debtor's business, within a reasonable time after the date of the order for relief, but not to exceed 30 days. If the trustee does not assume such a contract within such time, such contract is rejected.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97–222, § 10, July 27, 1982, 96 Stat. 238.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 744 instructs the court to give the trustee a reasonable time, not to exceed 30 days, to assume or reject any executory contract of the stockbroker to buy or sell securities. Any contract not assumed within the time fixed by the court is considered to be rejected.

AMENDMENTS

1982—Pub. L. 97–222 inserted ''but'' after ''relief,''.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 745. Treatment of accounts

(a) Accounts held by the debtor for a particular customer in separate capacities shall be treated as accounts of separate customers.

(b) If a stockbroker or a bank holds a customer net equity claim against the debtor that arose out of a transaction for a customer of such stockbroker or bank, each such customer of such stockbroker or bank shall be treated as a separate customer of the debtor.

(c) Each trustee's account specified as such on the debtor's books, and supported by a trust deed filed with, and qualified as such by, the Internal Revenue Service, and under the Internal Revenue Code of 1986, shall be treated as a separate customer account for each beneficiary under such trustee account.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97–222, § 11, July 27, 1982, 96 Stat. 238; Pub. L. 98–353, title III, § 483, July 10, 1984, 98 Stat. 383; Pub. L. 103–394, title V, § 501(d)(28), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 745(a) indicates that each account held by a customer in a separate capacity is to be considered a separate account. This prevents the offset of accounts held in different capacities.

Subsection (b) indicates that a bank or another stockbroker that is a customer of a debtor is considered to hold its customers accounts in separate capacities. Thus a bank or other stockbroker is not treated as a mutual fund for purposes of bulk investment. This protects unrelated customers of a bank or other stockholder from having their accounts offset.

Subsection (c) effects the same result with respect to a trust so that each beneficiary is treated as the customer of the debtor rather than the trust itself. This eliminates any doubt whether a trustee holds a personal account in a separate capacity from his trustee's account.

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (c), is classified generally to Title 26, Internal Revenue Code.

AMENDMENTS

1994—Subsec. (c). Pub. L. 103–394 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954 (26 U.S.C. 1 et seq.)''.

1984—Subsec. (a). Pub. L. 98–353 inserted ''the debtor for'' after ''by''.

1982—Subsec. (c). Pub. L. 97–222 substituted ''Each'' for ''A''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 746. Extent of customer claims

(a) If, after the date of the filing of the petition, an entity enters into a transaction with the debtor, in a manner that would have made such entity a customer had such transaction occurred before the date of the filing of the petition, and such transaction was entered into by such entity in good faith and before the qualification under section 322 of this title of a trustee, such entity shall be deemed a customer, and the date of such transaction shall be deemed to be the date of the filing of the petition for the purpose of determining such entity's net equity.

(b) An entity does not have a claim as a customer to the extent that such entity transferred to the debtor cash or a security that, by contract, agreement, understanding, or operation of law, is—

(1) part of the capital of the debtor; or

(2) subordinated to the claims of any or all creditors.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97–222, § 12, July 27, 1982, 96 Stat. 238.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 746(a) protects entities who deal in good faith with the debtor after the filing of the petition and before a trustee is appointed by deeming such entities to be customers. The principal application of this section will be in an involuntary case before the order for relief, because § 701(b) requires prompt appointment of an interim trustee after the order for relief.

Subsection (b) indicates that an entity who holds securities that are either part of the capital of the debtor or that are subordinated to the claims of any creditor of the debtor is not a customer with respect to those securities. This subsection will apply when the stockbroker has sold securities in itself to the customer or when the customer has otherwise placed such securities in an account with the stockbroker.

AMENDMENTS

1982—Pub. L. 97–222, § 12(c), substituted ''claims'' for ''claim'' in section catchline.

Subsec. (a). Pub. L. 97–222, § 12(a), substituted ''enters into'' for ''effects, with respect to cash or a security,'', struck out ''with respect to such cash or security'' wherever appearing, and substituted ''the date of the filing of the petition'' for ''such date'', and ''entered into'' for ''effected''.

Subsec. (b). Pub. L. 97–222, § 12(b), substituted ''transferred to the debtor'' for ''has a claim for'' in provisions preceding par. (1), and struck out ''is'' in par. (2).

§ 747. Subordination of certain customer claims

Except as provided in section 510 of this title, unless all other customer net equity claims have been paid in full, the trustee may not pay in full or pay in part, directly or indirectly, any net equity claim of a customer that was, on the date the transaction giving rise to such claim occurred—

(1) an insider;

(2) a beneficial owner of at least five percent of any class of equity securities of the debtor, other than—

(A) nonconvertible stock having fixed preferential dividend and liquidation rights; or

(B) interests of limited partners in a limited partnership;

(3) a limited partner with a participation of at least five percent in the net assets or net profits of the debtor; or

(4) an entity that, directly or indirectly, through agreement or otherwise, exercised or had the power to exercise control over the management or policies of the debtor.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2613; Pub. L. 97–222, § 13, July 27, 1982, 96 Stat. 238.)

HISTORICAL AND REVISION NOTES

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Section 747 subordinates to other customer claims, all claims of a customer who is an insider, a five percent owner of the debtor, or otherwise in control of the debtor.

AMENDMENTS

1982—Pub. L. 97–222 substituted ''the transaction giving rise to such claim occurred'' for ''such claim arose'' in provisions preceding par. (1).

§ 748. Reduction of securities to money

As soon as practicable after the date of the order for relief, the trustee shall reduce to money, consistent with good market practice, all securities held as property of the estate, except for customer name securities delivered or reclaimed under section 751 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2614.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 748 requires the trustee to liquidate all securities, except for customer name securities, of the estate in a manner consistent with good market practice. The trustee should refrain from flooding a thin market with a large percentage of shares in any one issue. If the trustee holds restricted securities or securities in which trading has been suspended, then the trustee must arrange to liquidate such securities in accordance with the securities laws. A private placement may be the only exemption available with the customer of the debtor the best prospect for such a placement. The subsection does not permit such a customer to bid in his net equity as part of the purchase price; a contrary result would permit a customer to receive a greater percentage on his net equity claim than other customers.

§ 749. Voidable transfers

(a) Except as otherwise provided in this section, any transfer of property that, but for such transfer, would have been customer property, may be avoided by the trustee, and such property shall be treated as customer property, if and to the extent that the trustee avoids such transfer under section 544, 545, 547, 548, or 549 of this title. For the purpose of such sections, the property so transferred shall be deemed to have

been property of the debtor and, if such transfer was made to a customer or for a customer's benefit, such customer shall be deemed, for the purposes of this section, to have been a creditor.

(b) Notwithstanding sections 544, 545, 547, 548, and 549 of this title, the trustee may not avoid a transfer made before five days after the order for relief if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is—

(1) a transfer of a securities contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, security, or other property margining or securing such securities contract; or

(2) the liquidation of a securities contract entered into or carried by or through the debtor on behalf of a customer.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2614; Pub. L. 97–222, § 14, July 27, 1982, 96 Stat. 238.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 749 indicates that if the trustee avoids a transfer, property recovered is customer property to any extent it would have been customer property but for the transfer. The section clarifies that a customer who receives a transfer of property of the debtor is a creditor and that property in a customer's account is property of a creditor for purposes of the avoiding powers.

AMENDMENTS

1982—Pub. L. 97–222 substituted ''(a) Except as otherwise provided in this section, any'' for ''Any'', and ''but'' for ''except'', inserted ''such property'', substituted ''or 549'' for ''549, or 724(a)'', and added subsec. (b).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 750. Distribution of securities

The trustee may not distribute a security except under section 751 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2614.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 750 forbids the trustee from distributing a security other than a customer name security. The term ''distribution'' refers to a distribution to customers in satisfaction of net equity claims and is not intended to preclude the trustee from liquidating securities under proposed 11 U.S.C. 748.

§ 751. Customer name securities

The trustee shall deliver any customer name security to or on behalf of the customer entitled to such security, unless such customer has a negative net equity. With the approval of the trustee, a customer may reclaim a customer name security after payment to the trustee, within such period as the trustee allows, of any claim of the debtor against such customer to the extent that such customer will not have a negative net equity after such payment.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2614.)

HISTORICAL AND REVISION NOTES

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Section 751 requires the trustee to deliver a customer name security to the customer entitled to such security unless the customer has a negative net equity. The customer's net equity will be negative when the amount owed by the customer to the stockbroker exceeds the liquidation value of the non-customer name securities in the customer's account. If the customer is a net debtor of the stockbroker, then the trustee may permit the customer to repay debts to the stockbroker so that the customer will no longer be in debt to the stockbroker. If the customer refuses to pay such amount, then the court may order the customer to endorse the security in order that the trustee may liquidate such property.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 741, 748, 750 of this title.

§ 752. Customer property

(a) The trustee shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims and in priority to all other claims, except claims of the kind specified in section 507(a)(1) of this title that are attributable to the administration of such customer property.

(b)(1) The trustee shall distribute customer property in excess of that distributed under subsection (a) of this section in accordance with section 726 of this title.

(2) Except as provided in section 510 of this title, if a customer is not paid the full amount of such customer's allowed net equity claim from customer property, the unpaid portion of such claim is a claim entitled to distribution under section 726 of this title.

(c) Any cash or security remaining after the liquidation of a security interest created under a security agreement made by the debtor, excluding property excluded under section 741(4)(B) of this title, shall be apportioned between the general estate and customer property in the same proportion as the general estate of the debtor and customer property were subject to such security interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2614; Pub. L. 97–222, § 15, July 27, 1982, 96 Stat. 238; Pub. L. 98–353, title III, § 484, July 10, 1984, 98 Stat. 383.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 752(a) requires the trustee to distribute customer property to customers based on the amount of their net equity claims. Customer property is to be distributed in priority to all claims except expenses of administration entitled to priority under § 507(1). It is anticipated that the court will apportion such administrative claims on an equitable basis between the general estate and the customer property of the debtor.

Subsection (b)(1) indicates that in the event customer property exceeds customers net equity claims and administrative expenses, the excess pours over into the general estate. This event would occur if the value of securities increased dramatically after the order for relief but before liquidation by the trustee. Subsection (b)(2) indicates that the unpaid portion of a customer's net equity claim is entitled to share in the general estate as an unsecured claim unless subordinated by the court under proposed 11 U.S.C. 501. A net equity claim of a customer that is subordinated under section 747 is entitled to share in distribution under section 726(a)(2) unless subordinated under section 510 independently of the subordination under section 747.

Subsection (c) provides for apportionment between customer property and the general estate of any equity

of the debtor in property remaining after a secured creditor liquidates a security interest. This might occur if a stockbroker hypothecates securities of his own and of his customers if the value of the hypothecated securities exceeds the debt owed to the secured party. The apportionment is to be made according to the ratio of customer property and general property of the debtor that comprised the collateral. The subsection refers to cash and securities of customers to include any customer property unlawfully converted by the stockbroker in the course of such a transaction. The apportionment is made subject to section 741(4)(B) to insure that property in a customer's account that is owed to the stockbroker will not be considered customer property. This recognizes the right of the stockbroker to withdraw money that has been erroneously placed in a customer's account or that is otherwise owing to the stockbroker.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353, § 484(a), substituted ''customers' allowed'' for ''customers allowed'', ''except claims of the kind'' for ''except claims'', and ''such customer property'' for ''customer property''.

Subsec. (b)(2). Pub. L. 98–353, § 484(b), substituted ''section 726'' for ''section 726(a)''.

1982—Subsec. (c). Pub. L. 97–222 substituted ''Any cash or security remaining after the liquidation of a security interest created under a security agreement made by the debtor, excluding property excluded under section 741(4)(B) of this title, shall be apportioned between the general estate and customer property in the same proportion as the general estate of the debtor and customer property were subject to such security interest'' for ''Subject to section 741(4)(B) of this title, any cash or security remaining after the liquidation of a security interest created under a security agreement made by the debtor shall be apportioned between the general estate and customer property in the proportion that the general property of the debtor and the cash or securities of customers were subject to such security interest''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 702 of this title.

SUBCHAPTER IV—COMMODITY BROKER LIQUIDATION

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title; title 7 section 24; title 15 section 78fff–1.

§ 761. Definitions for this subchapter

In this subchapter—

(1) ''Act'' means Commodity Exchange Act;

(2) ''clearing organization'' means organization that clears commodity contracts made on, or subject to the rules of, a contract market or board of trade;

(3) ''Commission'' means Commodity Futures Trading Commission;

(4) ''commodity contract'' means—

(A) with respect to a futures commission merchant, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade;

(B) with respect to a foreign futures commission merchant, foreign future;

(C) with respect to a leverage transaction merchant, leverage transaction;

(D) with respect to a clearing organization, contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization;

(E) with respect to a commodity options dealer, commodity option;

(5) ''commodity option'' means agreement or transaction subject to regulation under section 4c(b) of the Act;

(6) ''commodity options dealer'' means person that extends credit to, or that accepts cash, a security, or other property from, a customer of such person for the purchase or sale of an interest in a commodity option;

(7) ''contract market'' means board of trade designated as a contract market by the Commission under the Act;

(8) ''contract of sale'', ''commodity'', ''future delivery'', ''board of trade'', and ''futures commission merchant'' have the meanings assigned to those terms in the Act;

(9) ''customer'' means—

(A) with respect to a futures commission merchant—

(i) entity for or with whom such futures commission merchant deals and that holds a claim against such futures commission merchant on account of a commodity contract made, received, acquired, or held by or through such futures commission merchant in the ordinary course of such futures commission merchant's business as a futures commission merchant from or for the commodity futures account of such entity; or

(ii) entity that holds a claim against such futures commission merchant arising out of—

(I) the making, liquidation, or change in the value of a commodity contract of a kind specified in clause (i) of this subparagraph;

(II) a deposit or payment of cash, a security, or other property with such futures commission merchant for the purpose of making or margining such a commodity contract; or

(III) the making or taking of delivery on such a commodity contract;

(B) with respect to a foreign futures commission merchant—

(i) entity for or with whom such foreign futures commission merchant deals and that holds a claim against such foreign futures commission merchant on account of a commodity contract made, received, acquired, or held by or through such foreign futures commission merchant in the ordinary course of such foreign futures commission merchant's business as a foreign futures commission merchant from or for the foreign futures account of such entity; or

(ii) entity that holds a claim against such foreign futures commission merchant arising out of—

(I) the making, liquidation, or change in value of a commodity contract of a kind specified in clause (i) of this subparagraph;

(II) a deposit or payment of cash, a security, or other property with such foreign futures commission merchant for the purpose of making or margining such a commodity contract; or

(III) the making or taking of delivery on such a commodity contract;

(C) with respect to a leverage transaction merchant—

(i) entity for or with whom such leverage transaction merchant deals and that holds a claim against such leverage transaction merchant on account of a commodity contract engaged in by or with such leverage transaction merchant in the ordinary course of such leverage transaction merchant's business as a leverage transaction merchant from or for the leverage account of such entity; or

(ii) entity that holds a claim against such leverage transaction merchant arising out of—

(I) the making, liquidation, or change in value of a commodity contract of a kind specified in clause (i) of this subparagraph;

(II) a deposit or payment of cash, a security, or other property with such leverage transaction merchant for the purpose of entering into or margining such a commodity contract; or

(III) the making or taking of delivery on such a commodity contract;

(D) with respect to a clearing organization, clearing member of such clearing organization with whom such clearing organization deals and that holds a claim against such clearing organization on account of cash, a security, or other property received by such clearing organization to margin, guarantee, or secure a commodity contract in such clearing member's proprietary account or customers' account; or

(E) with respect to a commodity options dealer—

(i) entity for or with whom such commodity options dealer deals and that holds a claim on account of a commodity contract made, received, acquired, or held by or through such commodity options dealer in the ordinary course of such commodity options dealer's business as a commodity options dealer from or for the commodity options account of such entity; or

(ii) entity that holds a claim against such commodity options dealer arising out of—

(I) the making of, liquidation of, exercise of, or a change in value of, a commodity contract of a kind specified in clause (i) of this subparagraph; or

(II) a deposit or payment of cash, a security, or other property with such commodity options dealer for the purpose of making, exercising, or margining such a commodity contract;

(10) ''customer property'' means cash, a security, or other property, or proceeds of such cash, security, or property, received, acquired, or held by or for the account of the debtor, from or for the account of a customer—

(A) including—

(i) property received, acquired, or held to margin, guarantee, secure, purchase, or sell a commodity contract;

(ii) profits or contractual or other rights accruing to a customer as a result of a commodity contract;

(iii) an open commodity contract;

(iv) specifically identifiable customer property;

(v) warehouse receipt or other document held by the debtor evidencing ownership of or title to property to be delivered to fulfill a commodity contract from or for the account of a customer;

(vi) cash, a security, or other property received by the debtor as payment for a commodity to be delivered to fulfill a commodity contract from or for the account of a customer;

(vii) a security held as property of the debtor to the extent such security is necessary to meet a net equity claim based on a security of the same class and series of an issuer;

(viii) property that was unlawfully converted from and that is the lawful property of the estate; and

(ix) other property of the debtor that any applicable law, rule, or regulation requires to be set aside or held for the benefit of a customer, unless including such property as customer property would not significantly increase customer property; but

(B) not including property to the extent that a customer does not have a claim against the debtor based on such property;

(11) ''foreign future'' means contract for the purchase or sale of a commodity for future delivery on, or subject to the rules of, a board of trade outside the United States;

(12) ''foreign futures commission merchant'' means entity engaged in soliciting or accepting orders for the purchase or sale of a foreign future or that, in connection with such a solicitation or acceptance, accepts cash, a security, or other property, or extends credit to margin, guarantee, or secure any trade or contract that results from such a solicitation or acceptance;

(13) ''leverage transaction'' means agreement that is subject to regulation under section 19 of the Commodity Exchange Act, and that is commonly known to the commodities trade as a margin account, margin contract, leverage account, or leverage contract;

(14) ''leverage transaction merchant'' means person in the business of engaging in leverage transactions;

(15) ''margin payment'' means payment or deposit of cash, a security, or other property,

that is commonly known to the commodities trade as original margin, initial margin, maintenance margin, or variation margin, including mark-to-market payments, settlement payments, variation payments, daily settlement payments, and final settlement payments made as adjustments to settlement prices;

(16) ''member property'' means customer property received, acquired, or held by or for the account of a debtor that is a clearing organization, from or for the proprietary account of a customer that is a clearing member of the debtor; and

(17) ''net equity'' means, subject to such rules and regulations as the Commission promulgates under the Act, with respect to the aggregate of all of a customer's accounts that such customer has in the same capacity—

(A) the balance remaining in such customer's accounts immediately after—

(i) all commodity contracts of such customer have been transferred, liquidated, or become identified for delivery; and

(ii) all obligations of such customer in such capacity to the debtor have been offset; plus

(B) the value, as of the date of return under section 766 of this title, of any specifically identifiable customer property actually returned to such customer before the date specified in subparagraph (A) of this paragraph; plus

(C) the value, as of the date of transfer, of—

(i) any commodity contract to which such customer is entitled that is transferred to another person under section 766 of this title; and

(ii) any cash, security, or other property of such customer transferred to such other person under section 766 of this title to margin or secure such transferred commodity contract.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2615; Pub. L. 97–222, §16, July 27, 1982, 96 Stat. 238; Pub. L. 98–353, title III, §485, July 10, 1984, 98 Stat. 383; Pub. L. 103–394, title V, §501(d)(29), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Subchapter IV of chapter 7 represents a compromise between similar chapters in the House bill and Senate amendment. Section 761(2) of the House amendment defines ''clearing organization'' to cover an organization that clears commodity contracts on a contract market or a board of trade; the expansion of the definition is intended to include clearing organizations that clear commodity options. Section 761(4) of the House amendment adopts the term ''commodity contract'' as used in section 761(5) of the Senate amendment but with the more precise substantive definitions contained in section 761(8) of the House bill. The definition is modified to insert ''board of trade'' to cover commodity options. Section 761(5) of the House amendment adopts the definition contained in section 761(6) of the Senate amendment in preference to the definition contained in section 761(4) of the House bill which erroneously included onions. Section 761(9) of the House amendment represents a compromise between similar provisions contained in section 761(10) of the Senate amendment and section 761(9) of the House bill. The compromise adopts the substance contained in the House bill and adopts the terminology of ''commodity contract'' in lieu of ''contractual commitment'' as suggested in the Senate amendment. Section 761(10) of the House amendment represents a compromise between similar sections in the House bill and Senate amendment regarding the definition of ''customer property.'' The definition of ''distribution share'' contained in section 761(12) of the Senate amendment is deleted as unnecessary. Section 761(12) of the House amendment adopts a definition of ''foreign futures commission merchant'' similar to the definition contained in section 761(14) of the Senate amendment. The definition is modified to cover either an entity engaged in soliciting orders or the purchase or sale of a foreign future, or an entity that accepts cash, a security, or other property for credit in connection with such a solicitation or acceptance. Section 761(13) of the House amendment adopts a definition of ''leverage transaction'' identical to the definition contained in section 761(15) of the Senate amendment. Section 761(15) of the House amendment adopts the definition of ''margin payment'' contained in section 761(17) of the Senate amendment. Section 761(17) of the House amendment adopts a definition of ''net equity'' derived from section 761(15) of the House bill.

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Paragraph (1) defines ''Act'' to mean the Commodity Exchange Act [7 U.S.C. 1 et seq.].

Paragraph (2) defines ''clearing organization'' to mean an organization that clears (i.e., matches purchases and sales) commodity futures contracts made on or subject to the rules of a contract market or commodity options transactions made on or subject to the rules of a commodity option exchange. Although commodity option trading on exchanges is currently prohibited, it is anticipated that CFTC may permit such trading in the future.

Paragraphs (3) and (4) define terms ''Commission'' and ''commodity futures contract''.

Paragraph (5) [enacted as (4)] defines ''commodity contract'' to mean a commodity futures contract (§761(4)), a commodity option (§761(6)), or a leverage contract (§761(15)).

Paragraph (b) [probably should be ''(6)'' which was enacted as (5)] defines ''commodity option'' by reference to section 4c(b) of the Commodity Exchange Act [7 U.S.C. 6c(b)].

Paragraphs (7), (8), and (9) [enacted as (6), (7), and (8)] define ''commodity options dealer,'' ''contract market,'' ''contract of sale,'' ''commodity,'' ''future delivery,'' ''board of trade,'' and ''futures commission merchant.''

Paragraph (10) [enacted as (9)] defines the term ''customer'' to mean with respect to a futures commission merchant or a foreign futures commission merchant, the entity for whom the debtor carries a commodity futures contract or foreign future, or with whom such a contract is carried (such as another commodity broker), or from whom the debtor has received, acquired, or holds cash, securities, or other property arising out of or connected with specified transactions involving commodity futures contracts or foreign futures. This section also defines ''customer'' in the context of leverage transaction merchants, clearing organizations, and commodity options dealers. Persons associated with a commodity broker, such as its employees, officers, or partners, may be customers under this definition.

The definition of ''customer'' serves to isolate that class of persons entitled to the protection subchapter IV provides to customers. In addition, section 101(5) defines ''commodity broker'' to mean a futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, with respect to which there is a customer. Accordingly, the definition of customer also serves to designate those entities which must utilize chapter 7 and are precluded from reorganizing under chapter 11.

Paragraph (11) [enacted as (10)] defines ''customer property'' to mean virtually all property or proceeds thereof, received, acquired, or held by or for the account of the debtor for a customer arising out of or in connection with a transaction involving a commodity contract.

Paragraph (12) defines ''distribution share'' to mean the amount to which a customer is entitled under section 765(a).

Paragraphs (13), (14), (15), and (16) [enacted as (11), (12), (13), and (14)] define ''foreign future,'' ''foreign futures commission merchant,'' ''leverage transaction,'' and ''leverage transaction merchant.''

Paragraph (17) [enacted as (15)] defines ''margin payment'' to mean a payment or deposit commonly known to the commodities trade as original margin, initial margin, or variation margin.

Paragraph (18) [enacted as (16)] defines ''member property.''

Paragraph (19) [enacted as (17)] defines ''net equity'' to be the sum of (A) the value of all customer property remaining in a customer's account immediately after all commodity contracts of such customer have been transferred, liquidated, or become identified for delivery and all obligations of such customer to the debtor have been offset (such as margin payments, whether or not called, and brokerage commissions) plus (B) the value of specifically identifiable customer property previously returned to the customer by the trustee, plus (C) if the trustee has transferred any commodity contract to which the customer is entitled or any margin or security for such contract, the value of such contract and margin or security. Net equity, therefore, will be the total amount of customer property to which a customer is entitled as of the date of the filing of the bankruptcy petition, although valued at subsequent dates. The Commission is given authority to promulgate rules and regulations to further refine this definition.

HOUSE REPORT NO. 95–595

Paragraph (8) [enacted as (4)] is a dynamic definition of ''contractual commitment''. The definition will vary depending on the character of the debtor in each case. If the debtor is a futures commission merchant or a clearing organization, then subparagraphs (A) and (D) indicate that the definition means a contract of sale of a commodity for future delivery on a contract market. If the debtor is a foreign futures commission merchant, a leverage transaction merchant, or a commodity options dealer, then subparagraphs (B), (C), and (E) indicate that the definition means foreign future, leverage transaction, or commodity option, respectively.

Paragraph (9) defines ''customer'' in a similar style. It is anticipated that a debtor with multifaceted characteristics will have separate estates for each different kind of customer. Thus, a debtor that is a leverage transaction merchant and a commodity options dealer would have separate estates for the leverage transaction customers and for the options customers, and a general estate for other creditors. Customers for each kind of commodity broker, except the clearing organization, arise from either of two relationships. In subparagraphs (A), (B), (C), and (E), clause (i) treats with customers to the extent of contractual commitments with the debtor in either a broker or a dealer relationship. Clause (ii) treats with customers to the extent of proceeds from contractual commitments or deposits for the purpose of making contractual commitments. The customer of the clearing organization is a member with a proprietary or customers' account.

Paragraph (10) defines ''customer property'' to include all property in customer accounts and property that should have been in those accounts but was diverted through conversion or mistake. Clause (i) refers to customer property not properly segregated by the debtor or customer property converted and then recovered so as to become property of the estate. Clause (vii) is intended to exclude property that would cost more to recover from a third party than the value of the property itself. Subparagraph (B) excludes property in a customer's account that belongs to the commodity broker, such as a contract placed in the account by error, or cash due the broker for a margin payment that the broker has made.

Paragraph (15) [enacted as (17)] defines ''net equity'' to include the value of all contractual commitments at the time of liquidation or transfer less any obligations owed by the customer to the debtor, such as brokerage fees. In addition, the term includes the value of any specifically identifiable property as of the date of return to the customer and the value of any customer property transferred to another commodity broker as of the date of transfer. This definition places the risk of market fluctuations on the customer until commitments leave the estate.

REFERENCES IN TEXT

The Commodity Exchange Act, referred to in pars. (1), (7), (8), and (17), is act Sept. 21, 1922, ch. 369, 42 Stat. 998, as amended, which is classified generally to chapter 1 (§1 et seq.) of Title 7, Agriculture. Sections 4c(b) and 19 of the Act are classified to sections 6c(b) and 23, respectively, of Title 7. For complete classification of this Act to the Code, see section 1 of Title 7 and Tables.

AMENDMENTS

1994—Par. (1). Pub. L. 103–394, §501(d)(29)(A), struck out ''(7 U.S.C. 1 et seq.)'' after ''Act''.

Par. (5). Pub. L. 103–394, §501(d)(29)(B), struck out ''(7 U.S.C. 6c(b))'' after ''Act''.

Par. (13). Pub. L. 103–394, §501(d)(29)(C), struck out ''(7 U.S.C. 23)'' after ''Act''.

1984—Par. (10)(A)(viii). Pub. L. 98–353 substituted ''from and that is the lawful property'' for ''and that is property''.

1982—Par. (2). Pub. L. 97–222, §16(1), inserted ''made'' after ''commodity contracts''.

Par. (4). Pub. L. 97–222, §16(2), substituted ''with respect to'' for ''if the debtor is'' wherever appearing, and substituted ''cleared by such clearing organization, or commodity option traded on, or subject to the rules of, a contract market or board of trade that is cleared by such clearing organization'' for ''cleared by the debtor'' in subpar. (D).

Par. (9). Pub. L. 97–222, §16(3), substituted ''with respect to'' for ''if the debtor is'' wherever appearing, in subpar. (A) substituted ''such futures commission merchant'' for ''the debtor'' wherever appearing and ''such futures commission merchant's'' for ''the debtor's'', in subpar. (B) substituted ''such foreign futures commission merchant'' for ''the debtor'' wherever appearing and ''such foreign futures commission merchant's'' for ''the debtor's'', in subpar. (C) substituted ''such leverage transaction merchant'' for ''the debtor'' wherever appearing and ''such leverage transaction merchant's'' for ''the debtor's'', inserted ''or'' after the semicolon in cl. (i), and substituted ''holds'' for ''hold'' in cl. (ii), in subpar. (D) substituted ''such clearing organization'' for ''the debtor'' wherever appearing, and in subpar. (E) substituted ''such commodity options dealer'' for ''the debtor'' wherever appearing and ''such commodity options dealer's'' for ''the debtor's''.

Par. (10). Pub. L. 97–222, §16(4), struck out ''at any time'' after ''security, or property,'' in provisions preceding subpar. (A).

Par. (12). Pub. L. 97–222, §16(5), inserted a comma after ''property'' and struck out the comma after ''credit''.

Par. (13). Pub. L. 97–222, §16(6), substituted ''section 19 of the Commodity Exchange Act (7 U.S.C. 23)'' for ''section 217 of the Commodity Futures Trading Commission Act of 1974 (7 U.S.C. 15a)''.

Par. (14). Pub. L. 97–222, §16(7), struck out ''that is engaged'' after ''means person''.

Par. (15). Pub. L. 97–222, §16(8), substituted ''mark-to-market payments, settlement payments, variation payments, daily settlement payments, and final settlement payments made as adjustments to settlement prices'' for ''a daily variation settlement payment''.

Par. (16). Pub. L. 97–222, §16(9), struck out ''at any time'' after ''customer property''.

Par. (17). Pub. L. 97–222, §16(10), in provisions preceding subpar. (A) substituted ''has'' for ''holds'', in subpar. (A) inserted ''the'' after ''(A)'' in provisions preceding cl. (i), and ''in such capacity'' after ''customer'' in cl. (ii).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 362, 546, 548, 556 of this title; title 12 section 1821.

§ 762. Notice to the Commission and right to be heard

(a) The clerk shall give the notice required by section 342 of this title to the Commission.

(b) The Commission may raise and may appear and be heard on any issue in a case under this chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2618.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 762 provides that the Commission shall be given such notice as is appropriate of an order for relief in a bankruptcy case and that the Commission may raise and may appear and may be heard on any issue in case involving a commodity broker liquidation.

§ 763. Treatment of accounts

(a) Accounts held by the debtor for a particular customer in separate capacities shall be treated as accounts of separate customers.

(b) A member of a clearing organization shall be deemed to hold such member's proprietary account in a separate capacity from such member's customers' account.

(c) The net equity in a customer's account may not be offset against the net equity in the account of any other customer.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2618; Pub. L. 98–353, title III, §486, July 10, 1984, 98 Stat. 383.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 763 provides for separate treatment of accounts held in separate capacities. A deficit in one account held for a customer may not be offset against the net equity in another account held by the same customer in a separate capacity or held by another customer.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 substituted ''by the debtor for'' for ''by'' and ''treated as'' for ''deemed to be''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 764. Voidable transfers

(a) Except as otherwise provided in this section, any transfer by the debtor of property that, but for such transfer, would have been customer property, may be avoided by the trustee, and such property shall be treated as customer property, if and to the extent that the trustee avoids such transfer under section 544, 545, 547, 548, 549, or 724(a) of this title. For the purpose of such sections, the property so transferred shall be deemed to have been property of the debtor, and, if such transfer was made to a customer or for a customer's benefit, such customer shall be deemed, for the purposes of this section, to have been a creditor.

(b) Notwithstanding sections 544, 545, 547, 548, 549, and 724(a) of this title, the trustee may not avoid a transfer made before five days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is—

(1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract; or

(2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2618; Pub. L. 97–222, §17, July 27, 1982, 96 Stat. 240; Pub. L. 98–353, title III, §487, July 10, 1984, 98 Stat. 383.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 764 of the House amendment is derived from the House bill.

SENATE REPORT NO. 95–989

Section 764 permits the trustee to void any transfer of property that, except for such transfer, would have been customer property, to the extent permitted under section 544, 545, 547, 548, 549, or 724(a).

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Section 764 indicates the extent to which the avoiding powers may be used by the trustee under subchapter IV of chapter 7. If property recovered would have been customer property if never transferred, then subsection (a) indicates that it will be so treated when recovered.

Subsection (b) prohibits avoiding any transaction that occurs before or within five days after the petition if the transaction is approved by the Commission and concerns an open contractual commitment. This enables the Commission to exercise its discretion to protect the integrity of the market by insuring that transactions cleared with other brokers will not be undone on a preference or a fraudulent transfer theory.

Subsection (c) insulates variation margin payments and other deposits from the avoiding powers except to the extent of actual fraud under section 548(a)(1). This facilitates prepetition transfers and protects the ordinary course of business in the market.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 substituted ''any transfer by the debtor'' for ''any transfer''.

1982—Subsec. (a). Pub. L. 97–222, §17(a), substituted ''but'' for ''except'', inserted ''such property'' after

''trustee, and'', and substituted ''shall be'' for ''is'' wherever appearing.

Subsec. (b). Pub. L. 97–222, § 17(b), substituted ''order for relief'' for ''date of the filing of the petition''.

Subsec. (c). Pub. L. 97–222, § 17(c), struck out subsec. (c) which provided that the trustee could not avoid a transfer that was a margin payment to or deposit with a commodity broker or forward contract merchant or was a settlement payment made by a clearing organization and that occurred before the commencement of the case.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 765. Customer instructions

(a) The notice required by section 342 of this title to customers shall instruct each customer—

(1) to file a proof of such customer's claim promptly, and to specify in such claim any specifically identifiable security, property, or commodity contract; and

(2) to instruct the trustee of such customer's desired disposition, including transfer under section 766 of this title or liquidation, of any commodity contract specifically identified to such customer.

(b) The trustee shall comply, to the extent practicable, with any instruction received from a customer regarding such customer's desired disposition of any commodity contract specifically identified to such customer. If the trustee has transferred, under section 766 of this title, such a commodity contract, the trustee shall transmit any such instruction to the commodity broker to whom such commodity contract was so transferred.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2619; Pub. L. 97–222, § 18, July 27, 1982, 96 Stat. 240; Pub. L. 98–353, title III, § 488, July 10, 1984, 98 Stat. 383.)

HISTORICAL AND REVISION NOTES

For Historical and Revision Notes for this section, see Historical and Revision Notes set out under section 766 of this title.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 substituted ''notice required by'' for ''notice under''.

1982—Subsec. (b). Pub. L. 97–222 substituted ''commodity contract'' for ''commitment''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 365 of this title.

§ 766. Treatment of customer property

(a) The trustee shall answer all margin calls with respect to a specifically identifiable commodity contract of a customer until such time as the trustee returns or transfers such commodity contract, but the trustee may not make a margin payment that has the effect of a distribution to such customer of more than that to which such customer is entitled under subsection (h) or (i) of this section.

(b) The trustee shall prevent any open commodity contract from remaining open after the last day of trading in such commodity contract, or into the first day on which notice of intent to deliver on such commodity contract may be tendered, whichever occurs first. With respect to any commodity contract that has remained open after the last day of trading in such commodity contract or with respect to which delivery must be made or accepted under the rules of the contract market on which such commodity contract was made, the trustee may operate the business of the debtor for the purpose of—

(1) accepting or making tender of notice of intent to deliver the physical commodity underlying such commodity contract;

(2) facilitating delivery of such commodity; or

(3) disposing of such commodity if a party to such commodity contract defaults.

(c) The trustee shall return promptly to a customer any specifically identifiable security, property, or commodity contract to which such customer is entitled, or shall transfer, on such customer's behalf, such security, property, or commodity contract to a commodity broker that is not a debtor under this title, subject to such rules or regulations as the Commission may prescribe, to the extent that the value of such security, property, or commodity contract does not exceed the amount to which such customer would be entitled under subsection (h) or (i) of this section if such security, property, or commodity contract were not returned or transferred under this subsection.

(d) If the value of a specifically identifiable security, property, or commodity contract exceeds the amount to which the customer of the debtor is entitled under subsection (h) or (i) of this section, then such customer to whom such security, property, or commodity contract is specifically identified may deposit cash with the trustee equal to the difference between the value of such security, property, or commodity contract and such amount, and the trustee then shall—

(1) return promptly such security, property, or commodity contract to such customer; or

(2) transfer, on such customer's behalf, such security, property, or commodity contract to a commodity broker that is not a debtor under this title, subject to such rules or regulations as the Commission may prescribe.

(e) Subject to subsection (b) of this section, the trustee shall liquidate any commodity contract that—

(1) is identified to a particular customer and with respect to which such customer has not timely instructed the trustee as to the desired disposition of such commodity contract;

(2) cannot be transferred under subsection (c) of this section; or

(3) cannot be identified to a particular customer.

(f) As soon as practicable after the commencement of the case, the trustee shall reduce to

money, consistent with good market practice, all securities and other property, other than commodity contracts, held as property of the estate, except for specifically identifiable securities or property distributable under subsection (h) or (i) of this section.

(g) The trustee may not distribute a security or other property except under subsection (h) or (i) of this section.

(h) Except as provided in subsection (b) of this section, the trustee shall distribute customer property ratably to customers on the basis and to the extent of such customers' allowed net equity claims, and in priority to all other claims, except claims of a kind specified in section 507(a)(1) of this title that are attributable to the administration of customer property. Such distribution shall be in the form of—

(1) cash;

(2) the return or transfer, under subsection (c) or (d) of this section, of specifically identifiable customer securities, property, or commodity contracts; or

(3) payment of margin calls under subsection (a) of this section.

Notwithstanding any other provision of this subsection, a customer net equity claim based on a proprietary account, as defined by Commission rule, regulation, or order, may not be paid either in whole or in part, directly or indirectly, out of customer property unless all other customer net equity claims have been paid in full.

(i) If the debtor is a clearing organization, the trustee shall distribute—

(1) customer property, other than member property, ratably to customers on the basis and to the extent of such customers' allowed net equity claims based on such customers' accounts other than proprietary accounts, and in priority to all other claims, except claims of a kind specified in section 507(a)(1) of this title that are attributable to the administration of such customer property; and

(2) member property ratably to customers on the basis and to the extent of such customers' allowed net equity claims based on such customers' proprietary accounts, and in priority to all other claims, except claims of a kind specified in section 507(a)(1) of this title that are attributable to the administration of member property or customer property.

(j)(1) The trustee shall distribute customer property in excess of that distributed under subsection (h) or (i) of this section in accordance with section 726 of this title.

(2) Except as provided in section 510 of this title, if a customer is not paid the full amount of such customer's allowed net equity claim from customer property, the unpaid portion of such claim is a claim entitled to distribution under section 726 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2619; Pub. L. 97–222, §19, July 27, 1982, 96 Stat. 240; Pub. L. 98–353, title III, §489, July 10, 1984, 98 Stat. 383.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Sections 765 and 766 of the House amendment represent a consolidation and redraft of sections 765, 766, 767, and 768 of the House bill and sections 765, 766, 767, and 768 of the Senate amendment. In particular, section 765(a) of the House amendment is derived from section 765(a) of the House bill and section 767(a) of the Senate amendment. Under section 765(a) of the House amendment customers are notified of the opportunity to immediately file proofs of claim and to identify specifically identifiable securities, property, or commodity contracts. The customer is also afforded an opportunity to instruct the trustee regarding the customer's desires concerning disposition of the customer's commodity contracts. Section 767(b) [probably should be 765(b)] makes clear that the trustee must comply with instructions received to the extent practicable, but in the event the trustee has transferred commodity contracts to a commodity broker, such instructions shall be forwarded to the broker.

Section 766(a) of the House amendment is derived from section 768(c) of the House bill and section 767(f) of the Senate amendment. Section 766(b) of the House amendment is derived from section 765(d) of the House bill, and section 767(g) of the Senate amendment. Section 766(c) of the House amendment is derived from section 768(a) of the House bill and section 767(e) of the Senate amendment. Section 766(d) of the House amendment is derived from section 768(b) of the House bill and the second sentence of section 767(e) of the Senate amendment.

Section 766(e) of the House amendment is derived from section 765(c) of the House bill and sections 767(c) and (d) of the Senate amendment. The provision clarifies that the trustee may liquidate a commodity contract only if the commodity contract cannot be transferred to a commodity broker under section 766(c), cannot be identified to a particular customer, or has been identified with respect to a particular customer, but with respect to which the customer's instructions have not been received.

Section 766(f) of the House amendment is derived from section 766(b) of the House bill and section 767(h) of the Senate amendment. The term ''all securities and other property'' is not intended to include a commodity contract. Section 766(g) of the House amendment is derived from section 766(a) of the House bill. Section 766(h) of the House amendment is derived from section 767(a) of the House bill and section 765(a) of the Senate amendment. In order to induce private trustees to undertake the difficult and risky job of liquidating a commodity broker, the House amendment contains a provision insuring that a pro rata share of administrative claims will be paid. The provision represents a compromise between the position taken in the House bill, subordinating customer property to all expenses of administration, and the position taken in the Senate amendment requiring the distribution of customer property in advance of any expenses of administration. The position in the Senate amendment is rejected since customers, in any event, would have to pay a brokerage commission or fee in the ordinary course of business. The compromise provision requires customers to pay only those administrative expenses that are attributable to the administration of customer property.

Section 766(i) of the House amendment is derived from section 767(b) of the House bill and contains a similar compromise with respect to expenses of administration as the compromise detailed in connection with section 766(h) of the House amendment. Section 766(j) of the House amendment is derived from section 767(c) of the House bill. No counterpart is contained in the Senate amendment. The provision takes account of the rare case where the estate has customer property in excess of customer claims and administrative expenses attributable to those claims. The section also specifies that to the extent a customer is not paid in full out of customer property, that the unpaid claim will be treated the same as any other general unsecured creditor.

Section 768 of the Senate amendment was deleted from the House amendment as unwise. The provision in the Senate amendment would have permitted the trustee to distribute customer property based upon an esti-

mate of value of the customer's account, with no provision for recapture of excessive disbursements. Moreover, the section would have exonerated the trustee from any liability for such an excessive disbursement. Furthermore, the section is unclear with respect to the customer's rights in the event the trustee makes a distribution less than the share to which the customer is entitled. The provision is deleted in the House amendment so that this difficult problem may be handled on a case-by-case basis by the courts as the facts and circumstances of each case require.

Section 769 of the Senate amendment is deleted in the House amendment as unnecessary. The provision was intended to codify *Board of Trade v. Johnson*, 264 U.S. 1 (1924) [Ill.1924, 44 S.Ct. 232]. *Board of Trade against Johnson* is codified in section 363(f) of the House amendment which indicates the only five circumstances in which property may be sold free and clear of an interest in such property of an entity other than the estate.

Section 770 of the Senate amendment is deleted in the House amendment as unnecessary. That section would have permitted commodity brokers to liquidate commodity contracts, notwithstanding any contrary order of the court. It would require an extraordinary circumstance, such as a threat to the national security, to enjoin a commodity broker from liquidating a commodity contract. However, in those circumstances, an injunction must prevail. Failure of the House amendment to incorporate section 770 of the Senate amendment does not imply that the automatic stay prevents liquidation of commodity contracts by commodity brokers. To the contrary, whenever by contract, or otherwise, a commodity broker is entitled to liquidate a position as a result of a condition specified in a contract, other than a condition or default of the kind specified in section 365(b)(2) of title 11, the commodity broker may engage in such liquidation. To this extent, the commodity broker's contract with his customer is treated no differently than any other contract under section 365 of title 11.

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[Section 765] Subsection (a) of this section [enacted as section 766(h)] provides that with respect to liquidation of commodity brokers which are not clearing organizations, the trustee shall distribute customer property to customers on the basis and to the extent of such customers' allowed net equity claims, and in priority to all other claims. This section grants customers' claims first priority in the distribution of the estate. Subsection (b) [enacted as section 766(i)] grants the same priority to member property and other customer property in the liquidation of a clearing organization. A fundamental purpose of these provisions is to ensure that the property entrusted by customers to their brokers will not be subject to the risks of the broker's business and will be available for disbursement to customers if the broker becomes bankrupt.

As a result of section 765, a customer need not trace any funds in order to avoid treatment as a general creditor as was required by the Seventh Circuit in *In re Rosenbaum Grain Corporation*.

Section 766 lists certain transfers which are not voidable by the trustee of a commodity broker. Subsection (a) exempts transfers approved by the Commission by rule or order, either before or after the transfer. It is expected that the Commission will use this power sparingly and only when necessary to effectuate the remedial purposes of this legislation, bearing in mind that the immediate transfer of customer accounts from bankrupt commodity brokers to solvent commodity brokers is one of the primary goals of this subchapter. The committee considered and rejected a provision in subsection (b) that would have exempted payments made to a commodity broker. The Commission may not by rule exempt such transfers. The Commission's prompt attention to the promulgation of such rules and regulations is expected.

Subsection (b) [enacted as section 764(c)] provides for the nonavoidability of margin payments made by a commodity broker, other than a clearing organization. If such payments are made by or to a clearing organization, they are nonavoidable pursuant to subsection (c). All other margin payments made by a commodity broker, other than a clearing organization, are nonavoidable if they meet the conditions set forth in subsection (b). Subsections (b)(1) and (b)(2) parallel the requirements for avoidance of fraudulent transfers and obligations under section 548. Subsection (b)(3) adds a requirement that there be collusion between the transferee and transferor in order for such payments to be voidable. It would be unfair to permit recovery from an innocent commodity broker since such brokers are, for the most part, simply conduits for margin payments and do not retain margin for use in their operations. Subsection (b)(4) would permit recovery of a subsequent transferee only if it had actual knowledge at the time of that subsequent transfer of the scheme to defraud. Again it should be noted that if the transfer is a margin payment and the subsequent transferee is a clearing organization, the transfer is nonavoidable under section 766(c).

Subsection (c) [enacted as section 548(d)(2)] overrules *Seligson v. New York Produce Exchange*, and provides as a matter of law that margin payments made by or to a clearing organization are not voidable.

Section 767 sets forth the procedures to be followed by the trustee. It should be emphasized that many of the duties imposed on the trustee are required to be discharged by the trustee immediately upon his appointment. The earlier these duties are discharged the less potential market disruption can result.

The initial duty of the trustee is to endeavor to transfer to another commodity broker or brokers all identified customer accounts together with the customer property margining such accounts, to the extent the trustee deems appropriate. Although it is preferable for all such accounts to be transferred, exigencies may dictate a partial transfer. The requirement that the value of the accounts and property transferred not exceed the customer's distribution share may necessitate a slight delay until the trustee can submit to the court, for its disapproval, an estimate of each customer's distribution share pursuant to section 768.

Subsection (c) [enacted as section 766(e)] provides that contemporaneously with the estimate of the distribution share and the transfer of identified customer accounts and property, subsection (c) provides that the trustee should make arrangements for the liquidation of all commodity contracts maintained by the debtor that are not identifiable to specific customers. These contracts would, of course, include all such contracts held in the debtor's proprietory account.

At approximately the same time, the trustee should notify each customer of the debtor's bankruptcy and instruct each customer immediately to submit a claim including any claim to a specifically identifiable security or other property, and advise the trustee as to the desired disposition of commodity contracts carried by the debtor for the customer.

This requirement is placed upon the trustee to insure that producers who have hedged their production in the commodities market are allowed the opportunity to preserve their positions. The theory of the commodity market is that it exists for producers and buyers of commodities and not for the benefit of the speculators whose transactions now comprise the overwhelming majority of trades. Maintenance of positions by hedges may require them to put up additional margin payments in the hours and days following the commodity broker bankruptcy, which they may be unable or unwilling to do. In such cases, their positions will be quickly liquidated by the trustee, but they must have the opportunity to make those margin payments before they are summarily liquidated out of the market to the detriment of their growing crop. The failure of the customer to advise the trustee as to disposition of the customer's commodity contract will not delay a transfer of a contract pursuant to subsection (b) so long as the contract can otherwise be identified to the customer.

Nor will the failure of the customer to submit a claim prevent the customer from recovering the net equity in that customer's account, absent a claim the customer cannot participate in the determination of the net equity in the account.

If the customer submits instructions pursuant to subsection (a) after the customer's commodity contracts are transferred to another commodity broker, the trustee must transmit the instruction to the transferee. If the customer's commodity contracts are not transferred before the customer's instructions are received, the trustee must attempt to comply with the instruction, subject to the provisions of section 767(d).

Under subsection (d) [enacted as section 766(e)], the trustee has discretion to liquidate any commodity contract carried by the debtor at any time. This discretion must be exercised with restraint in such cases, consistent with the purposes of this subchapter and good business practices. The committee intends that hedged accounts will be given special consideration before liquidation as discussed in connection with subsection (c).

Subsection (e) [enacted as section 766(c)] instructs the trustee as to the disposition of any security or other property, not disposed of pursuant to subsection (b) or (d), that is specifically identifiable to a customer and to which the customer is entitled. Such security or other property must be returned to the customer or promptly transferred to another commodity broker for the benefit of the customer. If the value of the security or other property retained or transferred, together with any other distribution made by the trustee to or on behalf of the customer, exceeds the customer's distribution share the customer must deposit cash with the trustee equal to that difference before the return or transfer of the security or other property.

Subsection (f) [enacted as section 766(a)] requires the trustee to answer margin calls on specifically identifiable customer commodity contracts, but only to the extent that the margin payment, together with any other distribution made by the trustee to or on behalf of the customer, does not exceed the customer's distribution share.

Subsection (g) [enacted as section 766(b)] requires the trustee to liquidate all commodity futures contracts prior to the close of trading in that contract, or the first day on which notice of intent to deliver on that contract may be tendered, whichever occurs first. If the customer desires that the contract be kept open for delivery, the contract should be transferred to another commodity broker pursuant to subsection (b).

If for some reason the trustee is unable to transfer a contract on which delivery must be made or accepted and is unable to close out such contract, the trustee is authorized to operate the business of the debtor for the purpose of accepting or making tender of notice of intent to deliver the physical commodity underlying the contract, facilitating delivery of the physical commodity or disposing of the physical commodity in the event of a default. Any property received, not previously held, by the trustee in connection with its operation of the business of the debtor for these purposes, is not by the terms of this subchapter specifically included in the definition of customer property.

Finally, subsection (h) [enacted as section 766(f)] requires the trustee to liquidate the debtor's estate as soon as practicable and consistent with good market practice, except for specifically identifiable securities or other property distributable under subsection (e).

Section 768 is an integral part of the commodity broker liquidation procedures outlined in section 767. Prompt action by the trustee to transfer or liquidate customer commodity contracts is necessary to protect customers, the debtor's estate, and the marketplace generally. However, transfers of customer accounts and property valued in excess of the customer's distribution share are prohibited. Since a determination of the customer's distribution share requires a determination of the customer's net equity and the total dollar value of customer property held by or for the account of the debtor, it is possible that the customer's distribution share will not be determined, and thus the customer's contracts and property will not be transferred, on a timely basis. To avoid this problem, and to expedite transfers of customer property, section 768 permits the trustee to make distributions to customers in accordance with a preliminary estimate of the debtor's customer property and each customer's distribution share.

It is acknowledged that the necessity for prompt action may not allow the trustee to assemble all relevant facts before such an estimate is made. However, the trustee is expected to develop as accurate an estimate as possible based on the available facts. Further, in order to permit expeditious action, section 768 does not require that notice be given to customers or other creditors before the court approves or disapproves the estimate. Nor does section 768 require that customer claims be received pursuant to section 767(a) before the trustee may act upon and in accordance with the estimate. If the estimate is inaccurate, the trustee is absolved of liability for a distribution which exceeds the customer's actual distribution share so long as the distribution did not exceed the customer's estimated distribution share. However, a trustee may have a claim back against a customer who received more than its actual distribution share.

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Section 765(a) indicates that a customer must file a proof of claim, including any claim to specifically identifiable property, within such time as the court fixes.

Subsection (c) [of section 765 (enacted as section 766(e))] sets forth the general rule requiring the trustee to liquidate contractual commitments that are either not specifically identifiable or with respect to which a customer has not instructed the trustee during the time fixed by the court. Subsection (d) [enacted as section 766(b)] indicates an exception to the time limits in the rule by requiring the trustee to liquidate any open contractual commitment before the last day of trading or the first day during which delivery may be demanded, whichever first occurs, if transfer cannot be effectuated.

Section 766(a) [enacted as section 766(g)] indicates that the trustee may distribute securities or other property only under section 768. This does not preclude a distribution of cash under section 767(a) or distribution of any excess customer property under section 767(c) to the general estate.

Subsection (b) [enacted as section 766(f)] indicates that the trustee shall liquidate all securities and other property that is not specifically identifiable property as soon as practicable after the commencement of the case and in accordance with good market practice. If securities are restricted or trading has been suspended, the trustee will have to make an exempt sale or file a registration statement. In the event of a private placement, a customer is not entitled to ''bid in'' his net equity claim. To do so would enable him to receive a greater percentage recovery than other customers.

Section 767(a) [enacted as section 766(h)] provides for the trustee to distribute customer property pro rata according to customers' net equity claims. The court will determine an equitable portion of customer property to pay administrative expenses. Paragraphs (2) and (3) indicate that the return of specifically identifiable property constitutes a distribution of net equity.

Subsection (b) [enacted as section 766(i)] indicates that if the debtor is a clearing organization, customer property is to be segregated into customers' accounts and proprietary accounts and distributed accordingly without offset. This protects a member's customers from having their claims offset against the member's proprietary account. Subsection (c)(1) [enacted as section 766(j)(1)] indicates that any excess customer property will pour over into the general estate. This unlikely event would occur only if customers fail to file proofs of claim. Subsection (c)(2) [enacted as section 766(j)(2)] indicates that to the extent customers are not paid in full, they are entitled to share in the general estate as unsecured creditors, unless subordinated by the court under proposed 11 U.S.C. 510.

Section 768(a) [enacted as section 766(c)] requires the trustee to return specifically identifiable property to the extent that such distribution will not exceed a customer's net equity claim. Thus, if the customer owes money to a commodity broker, this will be offset under section 761(15)(A)(ii). If the value of the specifically identifiable property exceeds the net equity claim, then the customer may deposit cash with the trustee to make up the difference after which the trustee may return or transfer the customer's property.

Subsection (c) [enacted as section 766(a)] permits the trustee to answer all margin calls, to the extent of the customer's net equity claim, with respect to any specifically identifiable open contractual commitment. It should be noted that any payment under subsections (a) or (c) will be considered a reduction of the net equity claim under section 767(a). Thus the customer's net equity claim is a dynamic amount that varies with distributions of specifically identifiable property or margin payments on such property. This approach differs from the priority given to specifically identifiable property under subchapter III of chapter 7 by limiting the priority effect to a right to receive specific property as part of, rather than in addition to, a ratable share of customer property. This policy is designed to protect the small customer who is unlikely to have property in specifically identifiable form as compared with the professional trader. The CFTC is authorized to make rules defining specifically identifiable property under section 302 of the bill, in title III.

AMENDMENTS

1984—Subsec. (j)(2). Pub. L. 98–353 substituted ''section 726'' for ''section 726(a)''.

1982—Subsec. (a). Pub. L. 97–222, § 19(a), inserted ''to such customer'' after ''distribution''.

Subsec. (b). Pub. L. 97–222, § 19(b), struck out ''that is being actively traded as of the date of the filing of the petition'' after ''any open commodity contract'' and inserted ''the'' after ''rules of''.

Subsec. (d). Pub. L. 97–222, § 19(c), substituted ''the amount to which the customer of the debtor is entitled under subsection (h) or (i) of this section, then such'' for ''such amount, then the'' and ''the trustee then shall'' for ''the trustee shall''.

Subsec. (h). Pub. L. 97–222, § 19(d), inserted provision that notwithstanding any other provision of this subsection, a customer net equity claim based on a proprietary account, as defined by Commission rule, regulation, or order, may not be paid either in whole or in part, directly or indirectly, out of customer property unless all other customer net equity claims have been paid in full.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 365, 702, 761, 765 of this title; title 7 section 24.

CHAPTER 9—ADJUSTMENT OF DEBTS OF A MUNICIPALITY

SUBCHAPTER I—GENERAL PROVISIONS

SUBCHAPTER II—ADMINISTRATION

SUBCHAPTER III—THE PLAN

AMENDMENTS

1988—Pub. L. 100–597, § 11, Nov. 3, 1988, 102 Stat. 3030, added items 927 to 929 and redesignated former item 927 as 930.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 101, 103, 109, 347, 362, 365, 502, 503 of this title; title 28 section 1930.

SUBCHAPTER I—GENERAL PROVISIONS

§ 901. Applicability of other sections of this title

(a) Sections 301, 344, 347(b), 349, 350(b), 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(1), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 557, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, and 1145 of this title apply in a case under this chapter.

(b) A term used in a section of this title made applicable in a case under this chapter by subsection (a) of this section or section 103(e) of this title has the meaning defined for such term for the purpose of such applicable section, unless such term is otherwise defined in section 902 of this title.

(c) A section made applicable in a case under this chapter by subsection (a) of this section that is operative if the business of the debtor is authorized to be operated is operative in a case under this chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2621; Pub. L. 98–353, title III, §§ 353, 490, July 10, 1984, 98 Stat. 361, 383; Pub. L. 100–597, § 3, Nov. 3, 1988, 102 Stat. 3028.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Chapter 9 of the House amendment represents a compromise between chapter 9 of the House bill and 9 of the Senate amendment. In most respects this chapter follows current law with respect to the adjustment of debts of a municipality. Stylistic changes and minor substantive revisions have been made in order to conform this chapter with other new chapters of the bankruptcy code. There are few major differences between the House bill and the Senate amendment on this issue. Section 901 indicates the applicability of other sections of title 11 in cases under chapter 9. Included are sec-

tions providing for creditors' committees under sections 1102 and 1103.

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Section 901 makes applicable appropriate provisions of other chapters of proposed title 11. The general rule set out in section 103(e) is that only the provisions of chapters 1 and 9 apply in a chapter 9 case. Section 901 is the exception, and specifies other provisions that do apply. They are as follows:

§ 301. Voluntary cases. Application of this section makes clear, as under current chapter IX [chapter 9 of former title 11], that a municipal case can be commenced only by the municipality itself. There are no involuntary chapter 9 cases.

§ 344. Self-incrimination; immunity. Application of this section is of no substantive effect for the administration of the case, but merely provides that the general rules in part V [§ 6001 et seq.] of title 18 govern immunity.

§ 347(b). Unclaimed property. This provision currently appears in section 96(d) of chapter IX [section 416(d) of former title 11].

§ 349. Effect of dismissal. This section governs the effect of a dismissal of a chapter 9 case. It provides in substance that rights that existed before the case that were disturbed by the commencement of the case are reinstated. This section does not concern grounds for dismissal, which are found in section 926.

§ 361. Adequate protection. Section 361 provides the general standard for the protection of secured creditors whose property is used in a case under title 11. Its importance lies in its application to sections 362 and 364.

§ 362. Automatic stay. The automatic stay provisions of the general portions of the title are incorporated into chapter 9. There is an automatic stay provided in current Bankruptcy Act § 85(e) [section 405(e) of former title 11]. The thrust of section 362 is the same as that of section 85(e), but, of course, its application in chapter 9 is modernized and drafted to conform with the stay generally applicable under the bankruptcy code. An additional part of the automatic stay applicable only to municipal cases is included in section 922.

§§ 364(c), 364(d), 364(e). Obtaining credit. This section governs the borrowing of money by a municipality in reorganization. It is narrower than a comparable provision in current law, section 82(b)(2) [section 402(b)(2) of former title 11]. The difference lies mainly in the removal under the bill of the authority of the court to supervise borrowing by the municipality in instances in which none of the special bankruptcy powers are involved. That is, if a municipality could borrow money outside of the bankruptcy court, then it should have the same authority in bankruptcy court, under the doctrine of *Ashton v. Cameron Water District No. 1*, 298 U.S. 513 (1936) [Tex.1936, 56 S.Ct. 892, 80 L.Ed. 1309, 31 Am.Bankr.Rep.N.S. 96, rehearing denied 57 S.Ct. 5, 299 U.S. 619, 81 L.Ed. 457] and *National League of Cities v. Usery*, 426 U.S. 833 (1976) [Dist.Col.1976, 96 S.Ct. 2465, 49 L.Ed.2d 245, on remand 429 F. Supp. 703]. Only when the municipality needs special authority, such as subordination of existing liens, or special priority for the borrowed funds, will the court become involved in the authorization.

§ 365. Executory contracts and unexpired leases. The applicability of section 365 incorporates the general power of a bankruptcy court to authorize the assumption or rejection of executory contracts or unexpired leases found in other chapters of the title. This section is comparable to section 82(b)(1) of current law [section 402(b)(1) of former title 11].

§ 366. Utility service. This section gives a municipality the same authority as any other debtor with respect to continuation of utility service during the proceeding, provided adequate assurance of future payment is provided. No comparable explicit provision is found in current law, although the case law seems to support the same result.

§ 501. Filing of proofs of claims. This section permits filing of proofs of claims in a chapter 9 case. Note, however, that section 924 permits listing of creditors' claims, as under chapter 11 and under section 85(b) of chapter IX [section 405(b) of former title 11].

§ 502. Allowance of claims. This section applies the general allowance rules to chapter 9 cases. This is no change from current law.

§ 503. Administrative expenses. Administrative expenses as defined in section 503 will be paid in a chapter 9 case, as provided under section 89(1) of current law [section 409(1) of former title 11].

§ 504. Sharing of compensation. There is no comparable provision in current law. However, this provision applies generally throughout the proposed law, and will not affect the progress of the case, only the interrelations between attorneys and other professionals that participate in the case.

§ 506. Determination of secured status. Section 506 specifies that claims secured by a lien should be separated, to the extent provided, into secured and unsecured claims. It applies generally. Current law follows this result, though there is no explicit provision.

§ 507(1). Priorities. Paragraph (1) of section 507 requires that administrative expenses be paid first. This rule will apply in chapter 9 cases. It is presently found in section 89(1) [section 409(1) of former title 11]. The two other priorities presently found in section 89 have been deleted. The second for claims arising within 3 months before the case is commenced, is deleted from the statute, but may be within the court's equitable power to award, under the case of *Fosdick v. Schall*, 99 U.S. 235 (1878) [25 L.Ed. 339]. Leaving the provision to the courts permits greater flexibility, as under railroad cases, than an absolute three-month rule. The third priority under current law, for claims which are entitled to priority under the laws of the United States, is deleted because of the proposed amendment to section 3466 of the Revised Statutes [former 31 U.S.C. 191, see 31 U.S.C. 3713(a)] contained in section 321(a) of title III of the bill, which previously has given the United States an absolute first priority in chapter X [chapter 10 of former title 11] and section 77 [section 205 of former title 11] cases. Because the priority rules are regularized and brought together in the bankruptcy laws by this bill, the need for incorporation of priorities elsewhere specified is eliminated.

§ 509. Claims of codebtors. This section provides for the treatment of sureties, guarantors, and codebtors. The general rule of postponement found in the other chapters will apply in chapter 9. This section adopts current law.

§ 510. Subordination of claims. This section permits the court to subordinate, on equitable grounds, any claim, and requires enforcement of contractual subordination agreements, and subordination of securities rescission claims. The section recognizes the inherent equitable power of the court under current law, and the practice followed with respect to contractual provisions.

§ 547. Preferences. Incorporation of section 547 will permit the debtor to recover preferences. This power will be used primarily when those who gave the preferences have been replaced by new municipal officers or when creditors coerced preferential payments. Unlike Bankruptcy Act § 85(h) [section 405(h) of former title 11], the section does not permit the appointment of a trustee for the purpose of pursuing preferences. Moreover, this bill does not incorporate the other avoiding powers of a trustee for chapter 9, found in current section 85(h).

§ 550. Liability of transfers. Incorporation of this section is made necessary by the incorporation of the preference section, and permits recovery by the debtor from a transferee of an avoided preference.

§ 551. Automatic preservation of avoided transfer. Application of section 551 requires preservation of any avoided preference for the benefit of the estate.

§ 552. Postpetition effect of security interest. This section will govern the applicability after the commencement of the case of security interests granted by the debtor before the commencement of the case.

§ 553. Setoff. Under current law, certain setoff is stayed. Application of this section preserves that re-

sult, though the setoffs that are permitted under section 553 are better defined than under present law. Application of this section is necessary to stay the setoff and to provide the offsetting creditor with the protection to which he is entitled under present law.

§ 1122. Classification of claims. This section is derived from current section 88(b) [section 408(b) of former title 11], and is substantially similar.

§ 1123(a)(1)–(4), (b). Contents of plan. The general provisions governing contents of a chapter 11 plan are made applicable here, with two exceptions relating to the rights of stockholders, which are not applicable in chapter 9 cases. This section expands current law by specifying the contents of a plan in some detail. Section 91 of current law [section 411 of former title 11] speaks only in general terms. The substance of the two sections is substantially the same, however.

§ 1124. Impairment of claims. The confirmation standards adopted in chapter 9 are the same as those of chapter 11. This changes current chapter IX [chapter 9 of former title 11], which requires compliance with the fair and equitable rule. The greater flexibility of proposed chapter 11 is carried over into chapter 9, for there appears to be no reason why the confirmation standards for the two chapters should be different, or why the elimination of the fair and equitable rule from corporate reorganizations should not be followed in municipal debt adjustments. The current chapter IX rule is based on the confirmation rules of current chapter X [chapter 10 of former title 11]. The change in the latter suggests a corresponding change in the former. Section 1124 is one part of the new confirmation standard. It defines impairment, for use in section 1129.

§ 1125. Postpetition disclosure and solicitation. The change in the confirmation standard necessitates a corresponding change in the disclosure requirements for solicitation of acceptances of a plan. Under current chapter IX [chapter 9 of former title 11] there is no disclosure requirement. Incorporation of section 1125 will insure that creditors receive adequate information before they are required to vote on a plan.

§ 1126(a), (b), (c), (e), (f), (g). Acceptance of plan. Section 1126 incorporates the current chapter IX [chapter 9 of former title 11] acceptance requirement: two-thirds in amount and a majority in number, Bankruptcy Act § 92 [section 412 of former title 11]. Section 1125 permits exclusion of certain acceptances from the computation if the acceptances were obtained in bad faith or, unlike current law, if there is a conflict of interest motivating the acceptance.

§ 1127(d). Modification of plan. This section governs the change of a creditor's vote on the plan after a modification is proposed. It is derived from current section 92(e) [section 412(e) of former title 11].

§ 1128. Hearing on confirmation. This section requires a hearing on the confirmation of the plan, and permits parties in interest to object. It is the same as Bankruptcy Act §§ 93 and 94(a) [sections 413 and 414(a) of former title 11], though the provision, comparable to section 206 of current chapter X [section 606 of former title 11], permitting a labor organization to appear and be heard on the economic soundness of the plan, has been deleted as more appropriate for the Rules.

§ 1129(a)(2), (3), (8), (b)(1), (2). Confirmation of plan. This section provides the boiler-plate language that the plan be proposed in good faith and that it comply with the provisions of the chapter, and also provides the financial standard for confirmation, which replaces the fair and equitable rule. See § 1124, supra.

§ 1142(b). Execution of plan. Derived from Bankruptcy Act § 96(b) [section 416(b) of former title 11], this section permits the court to order execution and delivery of instruments in order to execute the plan.

§ 1143. Distribution. This section is the same in substance as section 96(d) [section 416(d) of former title 11], which requires presentment or delivery of securities within five years, and bars creditors that do not act within that time.

§ 1144. Revocation of order of confirmation. This section permits the court to revoke the order of confirmation and the discharge if the confirmation of the plan was procured by fraud. There is no comparable provision in current chapter IX [chapter 9 of former title 11].

AMENDMENTS

1988—Subsec. (a). Pub. L. 100–597 inserted ''1129(a)(6),'' after ''1129(a)(3),''.

1984—Subsec. (a). Pub. L. 98–353 inserted ''557,'' after ''553,'' and substituted ''1111(b),'' for ''1111(b)''.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–597 effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 103, 106, 902, 943 of this title.

§ 902. Definitions for this chapter

In this chapter—

(1) ''property of the estate'', when used in a section that is made applicable in a case under this chapter by section 103(e) or 901 of this title, means property of the debtor;

(2) ''special revenues'' means—

(A) receipts derived from the ownership, operation, or disposition of projects or systems of the debtor that are primarily used or intended to be used primarily to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems;

(B) special excise taxes imposed on particular activities or transactions;

(C) incremental tax receipts from the benefited area in the case of tax-increment financing;

(D) other revenues or receipts derived from particular functions of the debtor, whether or not the debtor has other functions; or

(E) taxes specifically levied to finance one or more projects or systems, excluding receipts from general property, sales, or income taxes (other than tax-increment financing) levied to finance the general purposes of the debtor;

(3) ''special tax payer'' means record owner or holder of legal or equitable title to real property against which a special assessment or special tax has been levied the proceeds of which are the sole source of payment of an obligation issued by the debtor to defray the cost of an improvement relating to such real property;

(4) ''special tax payer affected by the plan'' means special tax payer with respect to whose real property the plan proposes to increase the proportion of special assessments or special taxes referred to in paragraph (2) of this section assessed against such real property; and

(5) ''trustee'', when used in a section that is made applicable in a case under this chapter by section 103(e) or 901 of this title, means debtor, except as provided in section 926 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2622; Pub. L. 98–353, title III, § 491, July 10, 1984, 98 Stat. 383; Pub. L. 100–597, § 4, Nov. 3, 1988, 102 Stat. 3028.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 902(2) of the Senate amendment is deleted since the bankruptcy court will have jurisdiction over all cases under chapter 9. The concept of a claim being materially and adversely affected reflected in section 902(1) of the Senate amendment has been deleted and replaced with the new concept of ''impairment'' set forth in section 1124 of the House amendment and incorporated by reference into chapter 9.

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There are six definitions for use in chapter 9. Paragraph (1) defines what claims are included in a chapter 9 case and adopts the definition now found in section 81(1) [section 401(1) of former title 11]. All claims against the petitioner generally will be included, with one significant exception. Municipalities are authorized, under section 103(c) of the Internal Revenue Code of 1954, as amended [title 26], to issue tax-exempt industrial development revenue bonds to provide for the financing of certain projects for privately owned companies. The bonds are sold on the basis of the credit of the company on whose behalf they are issued, and the principal, interest, and premium, if any, are payable solely from payments made by the company to the trustee under the bond indenture and do not constitute claims on the tax revenues or other funds of the issuing municipalities. The municipality merely acts as the vehicle to enable the bonds to be issued on a tax-exempt basis. Claims that arise by virtue of these bonds are not among the claims defined by this paragraph and amounts owed by private companies to the holders of industrial development revenue bonds are not to be included among the assets of the municipality that would be affected by the plan. See Cong. Record, 94th Cong., 1st Sess. H.R. 12073 (statement by Mr. Don Edwards, floor manager of the bill in the House). Paragraph (2) defines the court which means the federal district court or federal district judge before which the case is pending. Paragraph (3) [enacted as (1)] specifies that when the term ''property of the estate'' is used in a section in another chapter made applicable in chapter 9 cases, the term means ''property of the debtor''. Paragraphs (4) and (5) [enacted as (2) and (3)] adopt the definition of ''special taxpayer affected by the plan'' that appears in current sections 81(10) and 81(11) of the Bankruptcy Act [section 401(10) and (11) of former title 11]. Paragraph (6) [enacted as (4)] provides that ''trustee'' means ''debtor'' when used in conjunction with chapter 9.

HOUSE REPORT NO. 95–595

There are only four definitions for use only in chapter 9. The first specifies that when the term ''property of the estate'' is used in a section in another chapter made applicable in chapter 9 cases, the term will mean ''property of the debtor''. Paragraphs (2) and (3) adopt the definition of ''special taxpayer affected by the plan'' that appears in current sections 81(10) and 81(11) [section 401(10) and (11) of former title 11]. Paragraph (4) provides for ''trustee'' the same treatment as provided for ''property of the estate'', specifying that it means ''debtor'' when used in conjunction with chapter 9.

AMENDMENTS

1988—Pars. (2) to (5). Pub. L. 100–597 added par. (2) and redesignated former pars. (2) to (4) as (3) to (5), respectively.

1984—Par. (2). Pub. L. 98–353 substituted ''legal or equitable title to real property against which a special assessment or special tax has been levied'' for ''title, legal or equitable, to real property against which has been levied a special assessment or special tax''.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–597 effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 901 of this title.

§ 903. Reservation of State power to control municipalities

This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—

(1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and

(2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2622; Pub. L. 98–353, title III, § 492, July 10, 1984, 98 Stat. 383.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 903 of the House amendment represents a stylistic revision of section 903 of the Senate amendment. To the extent section 903 of the House bill would have changed present law, such section is rejected.

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Section 903 is derived, with stylistic changes, from section 83 of current Chapter IX [section 403 of former title 11]. It sets forth the primary authority of a State, through its constitution, laws, and other powers, over its municipalities. The proviso in section 83, prohibiting State composition procedures for municipalities, is retained. Deletion of the provision would ''permit all States to enact their own versions of Chapter IX [chapter 9 of former title 11]'', Municipal Insolvency, 50 Am.Bankr.L.J. 55, 65, which would frustrate the constitutional mandate of uniform bankruptcy laws. Constitution of the United States, Art. I, Sec. 8.

This section provides that the municipality can consent to the court's orders in regard to use of its income or property. It is contemplated that such consent will be required by the court for the issuance of certificates of indebtedness under section 364(c). Such consent could extend to enforcement of the conditions attached to the certificates or the municipal services to be provided during the proceedings.

AMENDMENTS

1984—Par. (2). Pub. L. 98–353 struck out ''to'' before ''that does not consent''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 904. Limitation on jurisdiction and powers of court

Notwithstanding any power of the court, unless the debtor consents or the plan so provides,

the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—

(1) any of the political or governmental powers of the debtor;

(2) any of the property or revenues of the debtor; or

(3) the debtor's use or enjoyment of any income-producing property.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2622.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section adopts the policy of section 82(c) of current law [section 402(c) of former title 11]. The only change in this section from section 82(c) is to conform the section to the style and cross-references of S. 2266.

HOUSE REPORT NO. 95–595

This section adopts the policy of section 82(c) of current law [section 402(c) of former title 11]. The *Usery* case underlines the need for this limitation on the court's powers. The only change in this section from section 82(c) is to conform the section to the style and cross-references of H.R. 8200. This section makes clear that the court may not interfere with the choices a municipality makes as to what services and benefits it will provide to its inhabitants.

SUBCHAPTER II—ADMINISTRATION

AMENDMENTS

1984—Pub. L. 98–353, title III, § 493, July 10, 1984, 98 Stat. 383, substituted ''SUBCHAPTER'' for ''SUBCHAPER''.

§ 921. Petition and proceedings relating to petition

(a) Notwithstanding sections 109(d) and 301 of this title, a case under this chapter concerning an unincorporated tax or special assessment district that does not have such district's own officials is commenced by the filing under section 301 of this title of a petition under this chapter by such district's governing authority or the board or body having authority to levy taxes or assessments to meet the obligations of such district.

(b) The chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case.

(c) After any objection to the petition, the court, after notice and a hearing, may dismiss the petition if the debtor did not file the petition in good faith or if the petition does not meet the requirements of this title.

(d) If the petition is not dismissed under subsection (c) of this section, the court shall order relief under this chapter.

(e) The court may not, on account of an appeal from an order for relief, delay any proceeding under this chapter in the case in which the appeal is being taken; nor shall any court order a stay of such proceeding pending such appeal. The reversal on appeal of a finding of jurisdiction does not affect the validity of any debt incurred that is authorized by the court under section 364(c) or 364(d) of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2622; Pub. L. 98–353, title III, § 494, July 10, 1984, 98 Stat. 383.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 905 of the Senate amendment is incorporated as section 921(b) of the House amendment with the difference that the chief judge of the circuit embracing the district in which the case is commenced designates a bankruptcy judge to conduct the case in lieu of a district judge as under present law. It is intended that a municipality may commence a case in any district in which the municipality is located, as under present law. Section 906 of the Senate amendment has been adopted in substance in section 109(c) of the House amendment.

SENATE REPORT NO. 95–989

Section 905 [enacted as section 921(b)] adopts the procedures for selection of the judge for the chapter 9 case as found in current section 82(d) [section 402(d) of former title 11]. It is expected that the large chapter 9 case might take up almost all the judicial time of the presiding judge and involve very complex legal questions. Selection should not be left to chance or the luck of the draw. This provision will insure that calendar demands and levels of experience can be considered in the selection of the judge in a chapter 9 case.

HOUSE REPORT NO. 95–595

Subsection (a) is derived from section 85(a) [section 405(a) of former title 11], second sentence, of current law. There is no substantive change in the law. The subsection permits a municipality that does not have its own officers to be moved into chapter 9 by the action of the body or board that has authority to levy taxes for the municipality.

Subsection (b) permits a party in interest to object to the filing of the petition not later than 15 days after notice. This provision tracks the third sentence of section 85(a) [section 405(a) of former title 11], except that the provision for publication in section 85(a) is left to the Rules (see Rule 9–14), and therefore the determinative date is left less definite.

Subsection (c) permits the court to dismiss a petition not filed in good faith or not filed in compliance with the requirements of the chapter. This provision is the fourth sentence of section 85(a) [section 405(a) of former title 11].

Subsection (d) directs the court to order relief on the petition if it does not dismiss the case under subsection (c).

Subsection (e) contains the fifth and sixth sentences of section 85(a) [section 405(a) of former title 11].

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353, § 494(c), substituted ''109(d)'' for ''109(c)''.

Subsec. (c). Pub. L. 98–353, § 494(a), substituted ''any'' for ''an'', and ''petition if the debtor did not file the petition in good faith'' for ''petition, if the debtor did not file the petition in good faith,''.

Subsec. (d). Pub. L. 98–353, § 494(b), (d), redesignated subsec. (e) as (d) and substituted ''subsection (c)'' for ''subsection (d)''. No former subsec. (d) had been enacted.

Subsecs. (e), (f). Pub. L. 98–353, § 494(b), redesignated subsec. (f) as (e). Former subsec. (e) redesignated (d).

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 922. Automatic stay of enforcement of claims against the debtor

(a) A petition filed under this chapter operates as a stay, in addition to the stay provided by section 362 of this title, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor; and

(2) the enforcement of a lien on or arising out of taxes or assessments owed to the debtor.

(b) Subsections (c), (d), (e), (f), and (g) of section 362 of this title apply to a stay under subsection (a) of this section the same as such subsections apply to a stay under section 362(a) of this title.

(c) If the debtor provides, under section 362, 364, or 922 of this title, adequate protection of the interest of the holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection such creditor has a claim arising from the stay of action against such property under section 362 or 922 of this title or from the granting of a lien under section 364(d) of this title, then such claim shall be allowable as an administrative expense under section 503(b) of this title.

(d) Notwithstanding section 362 of this title and subsection (a) of this section, a petition filed under this chapter does not operate as a stay of application of pledged special revenues in a manner consistent with section 927 of this title to payment of indebtedness secured by such revenues.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2623; Pub. L. 98–353, title III, § 495, July 10, 1984, 98 Stat. 384; Pub. L. 100–597, § 5, Nov. 3, 1988, 102 Stat. 3029.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 95–595

The automatic stay provided under section 362 of title 11 is incomplete for a municipality, because there is the possibility of action by a creditor against an officer or inhabitant of the municipality to collect taxes due the municipality. Section 85(e)(1) of current chapter IX [section 405(e)(1) of former title 11] stays such actions. Section 922 carries over that protection into the proposed chapter 9. Subsection (b) applies the provisions for relief from the stay that apply generally in section 362 to the stay under section 922.

AMENDMENTS

1988—Subsecs. (c), (d). Pub. L. 100–597 added subsecs. (c) and (d).

1984—Subsec. (a)(1). Pub. L. 98–353 substituted ''a judicial'' for ''judicial'', and ''action or proceeding'' for ''proceeding''.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–597 effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 108 of this title.

§ 923. Notice

There shall be given notice of the commencement of a case under this chapter, notice of an order for relief under this chapter, and notice of the dismissal of a case under this chapter. Such notice shall also be published at least once a week for three successive weeks in at least one newspaper of general circulation published within the district in which the case is commenced, and in such other newspaper having a general circulation among bond dealers and bondholders as the court designates.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2623.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 923 of the House amendment represents a compromise with respect to the notice provisions contained in comparable provisions of the House bill and Senate amendment. As a general matter, title 11 leaves most procedural issues to be determined by the Rules of Bankruptcy Procedure. Section 923 of the House amendment contains certain important aspects of procedure that have been retained from present law. It is anticipated that the Rules of Bankruptcy Procedure will adopt rules similar to the present rules for chapter IX of the Bankruptcy Act [chapter 9 of former title 11].

HOUSE REPORT NO. 95–595

The notice provisions in section 923 are significantly more sparse than those provided under section 85(d) of chapter IX [section 405(d) of former title 11]. The exact contours of the notice to be given under chapter 9 are left to the Rules. Because the Rules deal with notice in a municipal case (Rule 9–14), and because section 405(d) of title IV of the bill continues those Rules in effect to the extent not inconsistent with the bill, the notice provisions of current law and Rules would continue to apply.

§ 924. List of creditors

The debtor shall file a list of creditors.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2623.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 924 of the House amendment is derived from section 924 of the House bill with the location of the filing of the list of creditors to be determined by the rules of bankruptcy procedure. The detailed requirements of section 724 [probably should be ''924''] of the Senate bill are anticipated to be incorporated in the rules of bankruptcy procedure.

SENATE REPORT NO. 95–989

This section adopts the provision presently contained in section 85(b) of Chapter IX [section 405(b) of former title 11]. A list of creditors, as complete and accurate as practicable, must be filed with the court.

HOUSE REPORT NO. 95–595

This section directs the debtor to file a list of creditors with the court. A comparable provision is presently contained in section 85(b) of chapter IX [section 405(b) of former title 11]. The Rules, in Rule 9–7, copy the provisions of section 85(b), with additional matter. As noted above, section 405(d) of title IV will continue those Rules in effect. Because the form, time of filing, and nature of the list, are procedural matters that may call for some flexibility, those details have been left to the Rules.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 925 of this title.

§ 925. Effect of list of claims

A proof of claim is deemed filed under section 501 of this title for any claim that appears in the list filed under section 924 of this title, except a claim that is listed as disputed, contingent, or unliquidated.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2623.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 925 of the Senate amendment regarding venue and fees has been deleted.

SENATE REPORT NO. 95–989

Section 926 [enacted as section 925] follows the policy contained in section 88(a) of the present Act [section 408(a) of former title 11], though certain details are left to the Rules. The language of section 926 is the same as that of proposed 11 U.S.C. 1111, which applies in chapter 11 cases. The list of creditors filed under section 924 is given weight as prima facie evidence of the claims listed (except claims that are listed as disputed, contingent, or unliquidated), which are deemed filed under section 501, obviating the need for listed creditors to file proofs of claim.

§ 926. Avoiding powers

(a) If the debtor refuses to pursue a cause of action under section 544, 545, 547, 548, 549(a), or 550 of this title, then on request of a creditor, the court may appoint a trustee to pursue such cause of action.

(b) A transfer of property of the debtor to or for the benefit of any holder of a bond or note, on account of such bond or note, may not be avoided under section 547 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2623; Pub. L. 100–597, § 6, Nov. 3, 1988, 102 Stat. 3029.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 926 of the House amendment is derived from section 928 of the Senate bill. The provision enables creditors to request the court to appoint a trustee to pursue avoiding powers if the debtor refuses to exercise those powers. Section 901 of the House amendment makes a corresponding change to incorporate avoiding powers included in the Senate amendment, but excluded from the House bill.

SENATE REPORT NO. 95–989

This section [928 (enacted as section 926)] adopts current section 85(h) [section 405(h) of former title 11] which provides for a trustee to be appointed for the purpose of pursuing an action under an avoiding power, if the debtor refuses to do so. This section is necessary because a municipality might, by reason of political pressure or desire for future good relations with a particular creditor or class of creditors, make payments to such creditors in the days preceding the petition to the detriment of all other creditors. No change in the elected officials of such a city would automatically occur upon filing of the petition, and it might be very awkward for those same officials to turn around and demand the return of the payments following the filing of the petition. Hence, the need for a trustee for such purpose.

The general avoiding powers are incorporated by reference in section 901 and are broader than under current law. Preference, fraudulent conveyances, and other kinds of transfers will thus be voidable.

Incorporated by reference also is the power to accept or reject executory contracts and leases (section 365). Within the definition of executory contracts are collective bargaining agreements between the city and its employees. Such contracts may be rejected despite contrary State laws. Courts should readily allow the rejection of such contracts where they are burdensome, the rejection will aid in the municipality's reorganization and in consideration of the equities of each case. On the last point, ''[e]quities in favor of the city in chapter 9 will be far more compelling than the equities in favor of the employer in chapter 11. Onerous employment obligations may prevent a city from balancing its budget for some time. The prospect of an unbalanced budget may preclude judicial confirmation of the plan. Unless a city can reject its labor contracts, lack of funds may force cutbacks in police, fire, sanitation, and welfare services, imposing hardships on many citizens. In addition, because cities in the past have often seemed immune to the constraint of ''profitability'' faced by private businesses, their wage contracts may be relatively more onerous than those in the private sector.'' Executory Contracts and Municipal Bankruptcy, 85 Yale L. J. 957, 965 (1976) (footnote omitted). Rejection of the contracts may require the municipalities to renegotiate such contracts by state collective bargaining laws. It is intended that the power to reject collective bargaining agreements will pre-empt state termination provisions, but not state collective bargaining laws. Thus, a city would not be required to maintain existing employment terms during the renegotiation period.

AMENDMENTS

1988—Pub. L. 100–597 designated existing provisions as subsec. (a) and added subsec. (b).

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–597 effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 902 of this title.

§ 927. Limitation on recourse

The holder of a claim payable solely from special revenues of the debtor under applicable nonbankruptcy law shall not be treated as having recourse against the debtor on account of such claim pursuant to section 1111(b) of this title.

(Added Pub. L. 100–597, § 7(2), Nov. 3, 1988, 102 Stat. 3029.)

PRIOR PROVISIONS

A prior section 927 was renumbered section 930 of this title.

EFFECTIVE DATE

Section effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as an Effective Date of 1988 Amendment note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 922 of this title.

§ 928. Post petition effect of security interest

(a) Notwithstanding section 552(a) of this title and subject to subsection (b) of this section, special revenues acquired by the debtor after the commencement of the case shall remain subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

(b) Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be.

(Added Pub. L. 100–597, § 8, Nov. 3, 1988, 102 Stat. 3029.)

EFFECTIVE DATE

Section effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as an Effective Date of 1988 Amendment note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 929. Municipal leases

A lease to a municipality shall not be treated as an executory contract or unexpired lease for the purposes of section 365 or 502(b)(6) of this title solely by reason of its being subject to termination in the event the debtor fails to appropriate rent.

(Added Pub. L. 100–597, § 9, Nov. 3, 1988, 102 Stat. 3030.)

EFFECTIVE DATE

Section effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as an Effective Date of 1988 Amendment note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 930. Dismissal

(a) After notice and a hearing, the court may dismiss a case under this chapter for cause, including—

(1) want of prosecution;

(2) unreasonable delay by the debtor that is prejudicial to creditors;

(3) failure to propose a plan within the time fixed under section 941 of this title;

(4) if a plan is not accepted within any time fixed by the court;

(5) denial of confirmation of a plan under section 943(b) of this title and denial of additional time for filing another plan or a modification of a plan; or

(6) if the court has retained jurisdiction after confirmation of a plan—

(A) material default by the debtor with respect to a term of such plan; or

(B) termination of such plan by reason of the occurrence of a condition specified in such plan.

(b) The court shall dismiss a case under this chapter if confirmation of a plan under this chapter is refused.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2623, § 927; Pub. L. 98–353, title III, § 496, July 10, 1984, 98 Stat. 384; renumbered § 930, Pub. L. 100–597, § 7(1), Nov. 3, 1988, 102 Stat. 3029.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 927(b) of the House amendment is derived from section 927(b) of the Senate bill. The provision requires mandatory dismissal if confirmation of a plan is refused.

The House amendment deletes section 929 of the Senate amendment as unnecessary since the bankruptcy court has original exclusive jurisdiction of all cases under chapter 9.

The House amendment deletes section 930 of the Senate amendment and incorporates section 507(a)(1) by reference.

SENATE REPORT NO. 95–989

Section 927 conforms to section 98 of current law [section 418 of former title 11]. The Section permits dismissal by the court for unreasonable delay by the debtor, failure to propose a plan, failure of acceptance of a plan, or default by the debtor under a conformed plan. Mandatory dismissal is required if confirmation is refused.

HOUSE REPORT NO. 95–595

Section 926 [enacted as section 927] generally conforms to section 98(a) [section 418(a) of former title 11] of current law. Stylistic changes have been made to conform the language with that used in chapter 11, section 1112. The section permits dismissal by the court for unreasonable delay by the debtor that is prejudicial to creditors, failure to propose a plan, failure of confirmation of a plan, or material default by the debtor under a confirmed plan. The only significant change from current law lies in the second ground. Currently, section 98(a)(2) provides for dismissal if a proposed plan is not accepted, and section 98(b) *requires* dismissal if an accepted plan is not confirmed. In order to provide greater flexibility to the court, the debtor, and creditors, the bill allows the court to permit the debtor to propose another plan if the first plan is not confirmed. In that event the debtor need not, as under current law, commence the case all over again. This could provide savings in time and administrative expenses if a plan is denied confirmation.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353 substituted ''confirmation of a plan under this chapter'' for ''confirmation''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SUBCHAPTER III—THE PLAN

§ 941. Filing of plan

The debtor shall file a plan for the adjustment of the debtor's debts. If such a plan is not filed with the petition, the debtor shall file such a plan at such later time as the court fixes.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2624.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 941 gives the debtor the exclusive right to propose a plan, and directs that the debtor propose one either with the petition or within such time as the court directs. The section follows section 90(a) of current law [section 410(a) of former title 11].

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 930 of this title.

§ 942. Modification of plan

The debtor may modify the plan at any time before confirmation, but may not modify the

plan so that the plan as modified fails to meet the requirements of this chapter. After the debtor files a modification, the plan as modified becomes the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2624.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment deletes section 942 of the Senate amendment in favor of incorporating section 1125 by cross-reference. Similarly, the House amendment does not incorporate section 944 or 945 of the Senate amendment since incorporation of several sections in chapter 11 in section 901 is sufficient.

SENATE REPORT NO. 95–989

Section 942 permits the debtor to modify the plan at any time before confirmation, as does section 90(a) of current law [section 410(a) of former title 11].

§ 943. Confirmation

(a) A special tax payer may object to confirmation of a plan.

(b) The court shall confirm the plan if—

(1) the plan complies with the provisions of this title made applicable by sections 103(e) and 901 of this title;

(2) the plan complies with the provisions of this chapter;

(3) all amounts to be paid by the debtor or by any person for services or expenses in the case or incident to the plan have been fully disclosed and are reasonable;

(4) the debtor is not prohibited by law from taking any action necessary to carry out the plan;

(5) except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that on the effective date of the plan each holder of a claim of a kind specified in section 507(a)(1) of this title will receive on account of such claim cash equal to the allowed amount of such claim;

(6) any regulatory or electoral approval necessary under applicable nonbankruptcy law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval; and

(7) the plan is in the best interests of creditors and is feasible.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2624; Pub. L. 98–353, title III, § 497, July 10, 1984, 98 Stat. 384; Pub. L. 100–597, § 10, Nov. 3, 1988, 102 Stat. 3030.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 943(a) of the House amendment makes clear that a special taxpayer may object to confirmation of a plan. Section 943(b) of the House amendment is derived from section 943 of the House bill respecting confirmation of a plan under chapter 9. It must be emphasized that these standards of confirmation are in addition to standards in section 1129 that are made applicable to chapter 9 by section 901 of the House amendment. In particular, if the requirements of sections 1129(a)(8) are not complied with, then the proponent may request application of section 1129(b). The court will then be required to confirm the plan if it complies with the ''fair and equitable'' test and is in the best interests of creditors. The best interests of creditors test does not mean liquidation value as under chapter XI of the Bankruptcy Act [chapter 11 of former title 11]. In making such a determination, it is expected that the court will be guided by standards set forth in *Kelley v. Everglades Drainage District*, 319 U.S. 415 (1943) [Fla.1943, 63 S.Ct. 1141, 87 L.Ed. 1485, rehearing denied 63 S.Ct. 1444, 320 U.S. 214, 87 L.Ed. 1851, motion denied 64 S.Ct 783, 321 U.S. 754, 88 L.Ed. 1054] and *Fano v. Newport Heights Irrigation Dist.*, 114 F.2d 563 (9th Cir. 1940), as under present law, the bankruptcy court should make findings as detailed as possible to support a conclusion that this test has been met. However, it must be emphasized that unlike current law, the fair and equitable test under section 1129(b) will not apply if section 1129(a)(8) has been satisfied in addition to the other confirmation standards specified in section 943 and incorporated by reference in section 901 of the House amendment. To the extent that *American United Mutual Life Insurance Co. v. City of Avon Park*, 311 U.S. 138 (1940) [Fla.1940, 61 S.Ct. 157, 85 L.Ed. 91, 136 A.L.R. 860, rehearing denied 61 S.Ct. 395, 311 U.S. 730, 85 L.Ed. 475] and other cases are to the contrary, such cases are overruled to that extent.

SENATE REPORT NO. 95–989

Section 946 [enacted as section 943] is adopted from current section 94 [section 414 of former title 11]. The test for confirmation is whether or not the plan is fair and equitable and feasible. The fair and equitable test tracts current chapter X [chapter 10 of former title 11] and is known as the strict priority rule. Creditors must be provided, under the plan, the going concern value of their claims. The going concern value contemplates a ''comparison of revenues and expenditures taking into account the taxing power and the extent to which tax increases are both necessary and feasible'' Municipal Insolvency, supra, at p. 64, and is intended to provide more of a return to creditors than the liquidation value if the city's assets could be liquidated like those of a private corporation.

HOUSE REPORT NO. 95–595

In addition to the confirmation requirements incorporated from section 1129 by section 901, this section specifies additional requirements. Paragraph (1) requires compliance with the provisions of the title made applicable in chapter 9 cases. This provision follows section 94(b)(2) [section 414(b)(2) of former title 11]. Paragraph (2) requires compliance with the provisions of chapter 9, as does section 94(b)(2). Paragraph (3) adopts section 94(b)(4), requiring disclosure and reasonableness of all payments to be made in connection with the plan or the case. Paragraph (4), copied from section 92(b)(6) [probably should be ''94(b)(6)'' which was section 414(b)(6) of former title 11], requires that the debtor not be prohibited by law from taking any action necessary to carry out the plan. Paragraph (5) departs from current law by requiring that administrative expenses be paid in full, but not necessarily in cash. Finally, paragraph (6) requires that the plan be in the best interest of creditors and feasible. The best interest test was deleted in section 94(b)(1) of current chapter IX from previous chapter IX [chapter 9 of former title 11] because it was redundant with the fair and equitable rule. However, this bill proposes a new confirmation standard generally for reorganization, one element of which is the best interest of creditors test; see section 1129(a)(7). In that section, the test is phrased in terms of liquidation of the debtor. Because that is not possible in a municipal case, the test here is phrased in its more traditional form, using the words of art ''best interest of creditors.'' The best interest of creditors test here is in addition to the financial standards imposed on the plan by sections 1129(a)(8) and 1129(b), just as those provisions are in addition to the comparable best interest test in chapter 11, 11 U.S.C. 1129(a)(7). The feasibility requirement, added in the revision of chapter IX last year, is retained.

AMENDMENTS

1988—Subsec. (b)(6), (7). Pub. L. 100–597 added par. (6) and redesignated former par. (6) as (7).

1984—Subsec. (b)(4). Pub. L. 98–353, § 497(1), struck out ''to be taken'' after ''necessary''.

Subsec. (b)(5). Pub. L. 98–353, § 497(2), substituted provisions requiring the plan to provide payment of cash in an amount equal to the allowed amount of a claim except to the extent that the holder of a particular claim has agreed to different treatment of such claim, for provisions which required the plan to provide for payment of property of a value equal to the allowed amount of such claim except to the extent that the holder of a particular claim has waived such payment on such claim.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–597 effective Nov. 3, 1988, but not applicable to any case commenced under this title before that date, see section 12 of Pub. L. 100–597, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 347, 930 of this title.

§ 944. Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and any creditor, whether or not—

(1) a proof of such creditor's claim is filed or deemed filed under section 501 of this title;

(2) such claim is allowed under section 502 of this title; or

(3) such creditor has accepted the plan.

(b) Except as provided in subsection (c) of this section, the debtor is discharged from all debts as of the time when—

(1) the plan is confirmed;

(2) the debtor deposits any consideration to be distributed under the plan with a disbursing agent appointed by the court; and

(3) the court has determined—

(A) that any security so deposited will constitute, after distribution, a valid legal obligation of the debtor; and

(B) that any provision made to pay or secure payment of such obligation is valid.

(c) The debtor is not discharged under subsection (b) of this section from any debt—

(1) excepted from discharge by the plan or order confirming the plan; or

(2) owed to an entity that, before confirmation of the plan, had neither notice nor actual knowledge of the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2624.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

[Section 947] Subsection (a) [enacted as section 944(a)] makes the provisions of a confirmed plan binding on the debtor and creditors. It is derived from section 95(a) of chapter 9 [section 415(a) of former title 11].

Subsections (b) and (c) [enacted as section 944(b) and (c)] provide for the discharge of a municipality. The discharge is essentially the same as that granted under section 95(b) of the Bankruptcy Act [section 415(b) of former title 11].

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 524 of this title.

§ 945. Continuing jurisdiction and closing of the case

(a) The court may retain jurisdiction over the case for such period of time as is necessary for the successful implementation of the plan.

(b) Except as provided in subsection (a) of this section, the court shall close the case when administration of the case has been completed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2625; Pub. L. 98–353, title III, § 498, July 10, 1984, 98 Stat. 384.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 948 [enacted as section 945] permits the court to retain jurisdiction over the case to ensure successful execution of the plan. The provision is the same as that found in section 96(e) of Chapter 9 of the present Act [section 416(e) of former title 11].

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 substituted ''implementation'' for ''execution''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 946. Effect of exchange of securities before the date of the filing of the petition

The exchange of a new security under the plan for a claim covered by the plan, whether such exchange occurred before or after the date of the filing of the petition, does not limit or impair the effectiveness of the plan or of any provision of this chapter. The amount and number specified in section 1126(c) of this title include the amount and number of claims formerly held by a creditor that has participated in any such exchange.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2625.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment deletes section 950 of the Senate amendment as unnecessary. The constitutionality of chapter 9 of the House amendment is beyond doubt.

SENATE REPORT NO. 95–989

[Section 949] This section [enacted as section 946], which follows section 97 of current law [section 417 of former title 11], permits an exchange of a security before the case is filed to constitute an acceptance of the plan if the exchange was under a proposal that later becomes the plan.

CHAPTER 11—REORGANIZATION

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Chapter 11 of the House amendment is derived in large part from chapter 11 as contained in the House bill. Unlike chapter 11 of the Senate amendment, chapter 11 of the House amendment does not represent an extension of chapter X of current law [chapter 10 of former title 11] or any other chapter of the Bankruptcy Act [former title 11]. Rather chapter 11 of the House amendment takes a new approach consolidating subjects dealt with under chapters VIII, X, XI, and XII of the Bankruptcy Act [chapters 8, 10, 11, and 12 of former title 11]. The new consolidated chapter 11 contains no special procedure for companies with public debt or equity security holders. Instead, factors such as the standard to be applied to solicitation of acceptances of a plan of reorganization are left to be determined by the court on a case-by-case basis. In order to insure that adequate investigation of the debtor is conducted to determine fraud or wrongdoing on the part of present management, an examiner is required to be appointed in all cases in which the debtor's fixed, liquidated, and unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5 million. This should adequately represent the needs of public security holders in most cases. However, in addition, section 1109 of the House amendment enables both the Securities and Exchange Commission and any party in interest who is creditor, equity security holder, indenture trustee, or any committee representing creditors or equity security holders to raise and appear and be heard on any issue in a case under chapter 11. This will enable the bankruptcy court to evaluate all sides of a position and to determine the public interest. This approach is sharply contrasted to that under chapter X of present law in which the public interest is often determined only in terms of the interest of public security holders. The advisory role of the Securities and Exchange Commission will enable the court to balance the needs of public security holders against equally important public needs relating to the economy, such as employment and production, and other factors such as the public health and safety of the people or protection of the national interest. In this context, the new chapter 11 deletes archaic rules contained in certain chapters of present law such as the requirement of an approval hearing and the prohibition of prepetition solicitation. Such requirements were written in an age before the enactment of the Trust Indenture Act [15 U.S.C. 77aaa et seq.] and the development of securities laws had occurred. The benefits of these provisions have long been outlived but the detriment of the provisions served to frustrate and delay effective reorganization in those chapters of the Bankruptcy Act in which such provisions applied. Chapter 11 thus represents a much needed revision of reorganization laws. A brief discussion of the history of this important achievement is useful to an appreciation of the monumental reform embraced in chapter 11.

Under the existing Bankruptcy Act [former title 11] debtors seeking reorganization may choose among three reorganization chapters, chapter X, chapter XI, and chapter XII [chapters 10, 11, and 12 of former title 11]. Individuals and partnerships may file under chapter XI or, if they own property encumbered by mortgage liens, they may file under chapter XII. A corporation may file under either chapter X or chapter XI, but is ineligible to file under chapter XII. Chapter X was designed to facilitate the pervasive reorganization of corporations whose creditors include holders of publicly issued debt securities. Chapter XI, on the other hand, was designed to permit smaller enterprises to negotiate composition or extension plans with their unsecured creditors. The essential differences between chapters X and XI are as follows. Chapter X mandates that, first, an independent trustee be appointed and assume management control from the officers and directors of the debtor corporation; second, the Securities and Exchange Commission must be afforded an opportunity to participate both as an adviser to the court and as a representative of the interests of public security holders; third, the court must approve any proposed plan of reorganization, and prior to such approval, acceptances of creditors and shareholders may not be solicited; fourth, the court must apply the absolute priority rule; and fifth, the court has the power to affect, and grant the debtor a discharge in respect of, all types of claims, whether secured or unsecured and whether arising by reason of fraud or breach of contract.

The Senate amendment consolidates chapters X, XI, and XII [chapters 10, 11, and 12 of former title 11], but establishes a separate and distinct reorganization procedure for ''public companies.'' The special provisions applicable to ''public companies'' are tantamount to the codification of chapter X of the existing Bankruptcy Act and thus result in the creation of a ''two-track system.'' The narrow definition of the term ''public company'' would require many businesses which could have been rehabilitated under chapter XI to instead use the more cumbersome procedures of chapter X, whether needed or not.

The special provisions of the Senate amendment applicable to a ''public company'' are as follows:

(a) Section 1101(3) defines a ''public company'' as a debtor who, within 12 months prior to the filing of the petition, had outstanding $5 million or more in debt and had not less than 1000 security holders;

(b) Section 1104(a) requires the appointment of a disinterested trustee irrespective of whether creditors support such appointment and whether there is cause for such appointment;

(c) Section 1125(f) prohibits the solicitation of acceptances of a plan of reorganization prior to court ap-

proval of such plan even though the solicitation complies with all applicable securities laws;

(d) Section 1128(a) requires the court to conduct a hearing on any plan of reorganization proposed by the trustee or any other party;

(e) Section 1128(b) requires the court to refer any plans ''worthy of consideration'' to the Securities and Exchange Commission for their examination and report, prior to court approval of a plan; and

(f) Section 1128(c) and section 1130(a)(7) requires the court to approve a plan or plans which are ''fair and equitable'' and comply with the other provisions of chapter 11.

The record of the Senate hearings on S. 2266 and the House hearings on H.R. 8200 is replete with evidence of the failure of the reorganization provisions of the existing Bankruptcy Act [former title 11] to meet the needs of insolvent corporations in today's business environment. Chapter X [chapter 10 of former title 11] was designed to impose rigid and formalized procedures upon the reorganization of corporations and, although designed to protect public creditors, has often worked to the detriment of such creditors. As the House report has noted:

The negative results under chapter X [chapter 10 of former title 11] have resulted from the stilted procedures, under which management is always ousted and replaced by an independent trustee, the courts and the Securities and Exchange Commission examine the plan of reorganization in great detail, no matter how long that takes, and the court values the business, a time consuming and inherently uncertain procedure.

The House amendment deletes the ''public company'' exception, because it would codify the well recognized infirmities of chapter X [chapter 10 of former title 11], because it would extend the chapter X approach to a large number of new cases without regard to whether the rigid and formalized procedures of chapter X are needed, and because it is predicated upon the myth that provisions similar to those contained in chapter X are necessary for the protection of public investors. Bankruptcy practice in large reorganization cases has also changed substantially in the 40 years since the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] was enacted. This change is, in large part, attributable to the pervasive effect of the Federal securities laws and the extraordinary success of the Securities and Exchange Commission in sensitizing both management and members of the bar to the need for full disclosure and fair dealing in transactions involving publicly held securities.

It is important to note that Congress passed the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] prior to enactment of the Trust Indenture Act of 1939 [15 U.S.C. section 77aaa et seq.] and prior to the definition and enforcement of the disclosure requirements of the Securities Act of 1933 [15 U.S.C. 77a et seq.] and the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.]. The judgments made by the 75th Congress in enacting the Chandler Act are not equally applicable to the financial markets of 1978. First of all, most public debenture holders are neither weak nor unsophisticated investors. In most cases, a significant portion of the holders of publicly issued debentures are sophisticated institutions, acting for their own account or as trustees for investment funds, pension funds, or private trusts. In addition, debenture holders, sophisticated, and unsophisticated alike, are represented by indenture trustees, qualified under section 77ggg of the Trust Indenture Act [probably should be ''section 307'' which is 15 U.S.C. 77ggg]. Given the high standard of care to which indenture trustees are bound, they are invariably active and sophisticated participants in efforts to rehabilitate corporate debtors in distress.

It is also important to note that in 1938 when the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] was enacted, public investors commonly held senior, not subordinated, debentures and corporations were very often privately owned. In this environment, the absolute priority rule protected debenture holders from an erosion of their position in favor of equity holders. Today, however, if there are public security holders in a case, they are likely to be holders of subordinated debentures and equity and thus the application of the absolute priority rule under chapter X [chapter 10 of former title 11] leads to the exclusion, rather than the protection, of the public.

The primary problem posed by chapter X [chapter 10 of former title 11] is delay. The modern corporation is a complex and multifaceted entity. Most corporations do not have a significant market share of the lines of business in which they compete. The success, and even the survival, of a corporation in contemporary markets depends on three elements: First, the ability to attract and hold skilled management; second, the ability to obtain credit; and third, the corporation's ability to project to the public an image of vitality. Over and over again, it is demonstrated that corporations which must avail themselves of the provisions of the Bankruptcy Act [former title 11] suffer appreciable deterioration if they are caught in a chapter X proceeding for any substantial period of time.

There are exceptions to this rule. For example, King Resources filed a chapter X [chapter 10 of former title 11] petition in the District of Colorado and it emerged from such proceeding as a solvent corporation. The debtor's new found solvency was not, however, so much attributable to a brilliant rehabilitation program conceived by a trustee, but rather to a substantial appreciation in the value of the debtor's oil and uranium properties during the pendency of the proceedings.

Likewise, Equity Funding is always cited as an example of a successful chapter X [chapter 10 of former title 11] case. But it should be noted that in Equity Funding there was no question about retaining existing management. Rather, Equity Funding involved fraud on a grand scale. Under the House amendment with the deletion of the mandatory appointment of a trustee in cases involving ''public companies,'' a bankruptcy judge, in a case like Equity Funding, would presumably have little difficulty in concluding that a trustee should be appointed under section 1104(6).

While I will not undertake to list the chapter X [chapter 10 of former title 11] failures, it is important to note a number of cases involving corporations which would be ''public companies'' under the Senate amendment which have successfully skirted the shoals of chapter X and confirmed plans of arrangement in chapter XI [chapter 11 of former title 11]. Among these are Daylin, Inc. (''Daylin'') and Colwell Mortgage Investors (''Colwell'').

Daylin filed a chapter XI [chapter 11 of former title 11] petition on February 26, 1975, and confirmed its plan of arrangement on October 20, 1976. The success of its turnaround is best evidenced by the fact that it had consolidated net income of $6,473,000 for the first three quarters of the 1978 fiscal year.

Perhaps the best example of the contrast between chapter XI and chapter X [chapters 11 and 10 of former title 11] is the recent case of *In re Colwell Mortgage Investors.* Colwell negotiated a recapitalization plan with its institutional creditors, filed a proxy statement with the Securities and Exchange Commission, and solicited consents of its creditors and shareholders prior to filing its chapter XI petition. Thereafter, Colwell confirmed its plan of arrangement 41 days after filing its chapter XI petition. This result would have been impossible under the Senate amendment since Colwell would have been a ''public company.''

There are a number of other corporations with publicly held debt which have successfully reorganized under chapter XI [chapter 11 of former title 11]. Among these are National Mortgage Fund (NMF), which filed a chapter XI petition in the northern district of Ohio on June 30, 1976. Prior to commencement of the chapter XI proceeding, NMF filed a proxy statement with the Securities and Exchange Commission and solicited acceptances to a proposed plan of arrangement. The NMF plan was subsequently confirmed on December 14, 1976.

The Securities and Exchange Commission did not file a motion under section 328 of the Bankruptcy Act [section 728 of former title 11] to transfer the case to chapter X [chapter 10 of former title 11] and a transfer motion which was filed by private parties was denied by the court.

While there are other examples of large publicly held companies which have successfully reorganized in chapter XI [chapter 11 of former title 11], including Esgrow, Inc. (C.D.Cal. 73–02510), Sherwood Diversified Services Inc. (S.D.N.Y. 73–B–213), and United Merchants and Manufacturers, Inc. (S.D.N.Y. 77–B–1513), the numerous successful chapter XI cases demonstrate two points: first, the complicated and time-consuming provisions of chapter X [chapter 10 of former title 11] are not always necessary for the successful reorganization of a company with publicly held debt, and second, the more flexible provisions in chapter XI permit a debtor to obtain relief under the Bankruptcy Act [former title 11] in significantly less time than is required to confirm a plan of reorganization under chapter X of the Bankruptcy Act.

One cannot overemphasize the advantages of speed and simplicity to both creditors and debtors. Chapter XI [chapter 11 of former title 11] allows a debtor to negotiate a plan outside of court and, having reached a settlement with a majority in number and amount of each class of creditors, permits the debtor to bind all unsecured creditors to the terms of the arrangement. From the perspective of creditors, early confirmation of a plan of arrangement: first, generally reduces administrative expenses which have priority over the claims of unsecured creditors; second, permits creditors to receive prompt distributions on their claims with respect to which interest does not accrue after the filing date; and third, increases the ultimate recovery on creditor claims by minimizing the adverse effect on the business which often accompanies efforts to operate an enterprise under the protection of the Bankruptcy Act [former title 11].

Although chapter XI [chapter 11 of former title 11] offers the corporate debtor flexibility and continuity of management, successful rehabilitation under chapter XI is often impossible for a number of reasons. First, chapter XI does not permit a debtor to ''affect'' secured creditors or shareholders, in the absence of their consent. Second, whereas a debtor corporation in chapter X [chapter 10 of former title 11], upon the consummation of the plan or reorganization, is discharged from all its debts and liabilities, a corporation in chapter XI may not be able to get a discharge in respect of certain kinds of claims including fraud claims, even in cases where the debtor is being operated under new management. The language of chapter 11 in the House amendment solves these problems and thus increases the utility and flexibility of the new chapter 11, as compared to chapter XI of the existing Bankruptcy Act [chapter 11 of former title 11].

Those who would urge the adoption of a two-track system have two major obstacles to meet. First, the practical experience of those involved in business rehabilitation cases, practitioners, debtors, and bankruptcy judges, has been that the more simple and expeditious procedures of chapter XI [chapter 11 of former title 11] are appropriate in the great majority of cases. While attempts have been made to convince the courts that a chapter X [chapter 10 of former title 11] proceeding is required in every case where public debt is present, the courts have categorically rejected such arguments. Second, chapter X has been far from a success. Of the 991 chapter X cases filed during the period of January 1, 1967, through December 31, 1977, only 664 have been terminated. Of those cases recorded as ''terminated,'' only 140 resulted in consummated plans. This 21 percent success rate suggests one of the reasons for the unpopularity of chapter X.

In summary, it has been the experience of the great majority of those who have testified before the Senate and House subcommittees that a consolidated approach to business rehabilitation is warranted. Such approach is adopted in the House amendment.

Having discussed the general reasons why chapter 11 of the House amendment is sorely needed, a brief discussion of the differences between the House bill, Senate amendment, and the House amendment, is in order. Since chapter 11 of the House amendment rejects the concept of separate treatment for a public company, sections 1101(3), 1104(a), 1125(f), 1128, and 1130(a)(7) of the Senate amendment have been deleted.

AMENDMENTS

1988—Pub. L. 100–334, § 2(c), June 16, 1988, 102 Stat. 613, added item 1114.

1984—Pub. L. 98–353, title III, §§ 514(b), 541(b), July 10, 1984, 98 Stat. 387, 391, added item 1113 and substituted ''Implementation'' for ''Execution'' in item 1142.

1983—Pub. L. 97–449, § 5(a)(1), Jan. 12, 1983, 96 Stat. 2442, substituted ''subtitle IV of title 49'' for ''Interstate Commerce Act'' in item 1166.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 103, 105, 109, 303, 326, 327, 329, 346, 347, 362, 363, 365, 502, 503, 524, 546, 706, 1102, 1203, 1301, 1306, 1307 of this title; title 7 section 2008h; title 20 section 1087; title 21 section 356c; title 26 sections 108, 1398, 6012; title 28 sections 157, 586, 1930; title 29 sections 1341, 1342.

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title.

§ 1101. Definitions for this chapter

In this chapter—

(1) ''debtor in possession'' means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

(2) ''substantial consummation'' means—

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2626.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section contains definitions of three terms that are used in chapter 11. Paragraph (1) defines debtor in possession to mean the debtor, except when a trustee who has qualified in serving in the case.

Paragraph (2), derived from section 229a of current law [section 629(a) of former title 11], defines substantial consummation. Substantial consummation of a plan occurs when transfer of all or substantially all of the property proposed by the plan to be transferred is actually transferred; when the debtor (or its successor) has assumed the business of the debtor or the management of all or substantially all of the property dealt with by the plan; and when distribution under the plan has commenced.

Paragraph (3) defines for purposes of Chapter 11 a public company to mean ''a debtor who, within 12 months prior to the filing of a petition for relief under this chapter, had outstanding liabilities of $5 million or more, exclusive of liabilities for goods, services, or taxes and not less than 1,000 security holders.'' There

are, as noted, special safeguards for public investors related to the reorganization of a public company, as so defined.

Both requirements must be met: liabilities, excluding tax obligations and trade liabilities, must be $5 million or more; and (2) the number of holders of securities, debt or equity, or both, must be not less than 1,000. The amount and number are to be determined as of any time within 12 months prior to the filing of the petition for reorganization.

§ 1102. Creditors' and equity security holders' committees

(a)(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

(3) On request of a party in interest in a case in which the debtor is a small business and for cause, the court may order that a committee of creditors not be appointed.

(b)(1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.

(2) A committee of equity security holders appointed under subsection (a)(2) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest amounts of equity securities of the debtor of the kinds represented on such committee.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2626; Pub. L. 98–353, title III, § 499, July 10, 1984, 98 Stat. 384; Pub. L. 99–554, title II, § 221, Oct. 27, 1986, 100 Stat. 3101; Pub. L. 103–394, title II, § 217(b), Oct. 22, 1994, 108 Stat. 4127.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1102(a) of the House amendment adopts a compromise between the House bill and Senate amendment requiring appointment of a committee of creditors holding unsecured claims by the court; the alternative of creditor committee election is rejected.

Section 1102(b) of the House amendment represents a compromise between the House bill and the Senate amendment by preventing the appointment of creditors who are unwilling to serve on a creditors committee.

SENATE REPORT NO. 95–989

This section provides for the election and appointment of committees. Subsection (c) provides that this section does not apply in case of a public company, as to which a trustee, appointed under section 1104(a) will have responsibility to administer the estate and to formulate a plan as provided in section 1106(a).

There is no need for the election or appointment of committees for which the appointment of a trustee is mandatory. In the case of a public company there are likely to be several committees, each representing a different class of security holders and seeking authority to retain accountants, lawyers, and other experts, who will expect to be paid. If in the case of a public company creditors or stockholders wish to organize committees, they may do so, as authorized under section 1109(a). Compensation and reimbursement will be allowed for contributions to the reorganization pursuant to section 503(b) (3) and (4).

HOUSE REPORT NO. 95–595

This section provides for the appointment of creditors' and equity security holders' committees, which will be the primary negotiating bodies for the formulation of the plan of reorganization. They will represent the various classes of creditors and equity security holders from which they are selected. They will also provide supervision of the debtor in possession and of the trustee, and will protect their constituents' interests.

Subsection (a) requires the court to appoint at least one committee. That committee is to be composed of creditors holding unsecured claims. The court is authorized to appoint such additional committees as are necessary to assure adequate representation of creditors and equity security holders. The provision will be relied upon in cases in which the debtor proposes to affect several classes of debt or equity holders under the plan, and in which they need representation.

Subsection (b) contains precatory language directing the court to appoint the persons holding the seven largest claims against the debtor of the kinds represented on a creditors' committee, or the members of a prepetition committee organized by creditors before the order for relief under chapter 11. The court may continue prepetition committee members only if the committee was fairly chosen and is representative of the different kinds of claims to be represented. The court is restricted to the appointment of persons in order to exclude governmental holders of claims or interests.

Paragraph (2) of subsection (b) requires similar treatment for equity security holders' committees. The seven largest holders are normally to be appointed, but the language is only precatory.

Subsection (c) authorizes the court, on request of a party in interest, to change the size or the membership of a creditors' or equity security holders' committee if the membership of the committee is not representative of the different kinds of claims or interests to be represented. This subsection is intended, along with the nonbinding nature of subsection (b), to afford the court latitude in appointing a committee that is manageable and representative in light of the circumstances of the case.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394 substituted ''Except as provided in paragraph (3), as'' for ''As'' in par. (1) and added par. (3).

1986—Subsec. (a). Pub. L. 99–554, § 221(1), amended subsec. (a) generally, substituting ''chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate'' for ''this chapter, the court shall appoint a committee of creditors holding unsecured claims'' in par. (1) and ''United States trustee'' for ''court'' in par. (2).

Subsec. (c). Pub. L. 99–554, § 221(2), struck out subsec. (c) which read as follows: ''On request of a party in interest and after notice and a hearing, the court may change the membership or the size of a committee appointed under subsection (a) of this section if the membership of such committee is not representative of the different kinds of claims or interests to be represented.''

1984—Subsec. (b)(1). Pub. L. 98–353 substituted ''commencement of the case'' for ''order for relief''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 101, 328, 348, 503, 901, 1103, 1114 of this title.

§ 1103. Powers and duties of committees

(a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

(b) An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

(c) A committee appointed under section 1102 of this title may—

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

(d) As soon as practicable after the appointment of a committee under section 1102 of this title, the trustee shall meet with such committee to transact such business as may be necessary and proper.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2627; Pub. L. 98–353, title III, §§ 324, 500, July 10, 1984, 98 Stat. 358, 384.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section defines the powers and duties of a committee elected or appointed under section 1102.

Under subsection (a) the committee may, if authorized by the court, employ one or more attorneys, accountants, or other agents to represent or perform services for the committee. Normally one attorney should suffice; more than one may be authorized for good cause. The same considerations apply to the services of others, if the need for any at all is demonstrated.

Under subsections (c) and (d) the committee, like any party in interest, may confer with the trustee or debtor regarding the administration of the estate; may advise the court on the need for a trustee under section 1104(b). The committee may investigate matters specified in paragraph (2) of subsection (c), but only if authorized by the court and if no trustee or examiner is appointed.

HOUSE REPORT NO. 95–595

Subsection (a) of this section authorizes a committee appointed under section 1102 to select and authorize the employment of counsel, accountants, or other agents, to represent or perform services for the committee. The committee's selection and authorization is subject to the court's approval, and may only be done at a meeting of the committee at which a majority of its members are present. The subsection provides for the employment of more than one attorney. However, this will be the exception, and not the rule; cause must be shown to depart from the normal standard.

Subsection (b) requires a committee's counsel to cease representation of any other entity in connection with the case after he begins to represent the committee. This will prevent the potential of severe conflicts of interest.

Subsection (c) lists a committee's functions in a chapter 11 case. The committee may consult with the trustee or debtor in possession concerning the administration of the case, may investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business, and the desirability of the continuance of the business, and any other matter relevant to the case or to the formulation of a plan. The committee may participate in the formulation of a plan, advise those it represents of the committee's recommendation with respect to any plan formulated, and collect and file acceptances. These will be its most important functions. The committee may also determine the need for the appointment of a trustee, if one has not previously been appointed, and perform such other services as are in the interest of those represented.

Subsection (d) requires the trustee and each committee to meet as soon as practicable after their appointments to transact such business as may be necessary and proper.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353, §§ 324, 500(a), substituted ''An attorney or accountant'' for ''A person'', substituted ''entity having an adverse interest'' for ''entity'', and inserted provision that representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

Subsec. (c)(3). Pub. L. 98–353, § 500(b)(1), substituted ''determinations'' for ''recommendations'', and ''acceptances or rejections'' for ''acceptances''.

Subsec. (c)(4). Pub. L. 98–353, § 500(b)(2), struck out ''if a trustee or examiner, as the case may be, has not previously been appointed under this chapter in the case'' after ''section 1104 of this title''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section

552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 328, 330, 331, 901, 1114 of this title.

§ 1104. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b) Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

(d) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2627; Pub. L. 99–554, title II, § 222, Oct. 27, 1986, 100 Stat. 3102; Pub. L. 103–394, title II, § 211(a), title V, § 501(d)(30), Oct. 22, 1994, 108 Stat. 4125, 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1104 of the House amendment represents a compromise between the House bill and the Senate amendment concerning the appointment of a trustee or examiner. The method of appointment rather than election, is derived from the House bill; the two alternative standards of appointment are derived with modifications from the Senate amendment, instead of the standard stated in the House bill. For example, if the current management of the debtor gambled away rental income before the filing of the petition, a trustee should be appointed after the petition, whether or not postpetition mismanagement can be shown. However, under no circumstances will cause include the number of security holders of the debtor or the amount of assets or liabilities of the debtor. The standard also applies to the appointment of an examiner in those circumstances in which mandatory appointment, as previously detailed, is not required.

SENATE REPORT NO. 95–989

Subsection (a) provides for the mandatory appointment of a disinterested trustee in the case of a public company, as defined in section 1101(3), within 10 days of the order for relief, or of a successor, in the event of a vacancy, as soon as practicable.

Section 156 of chapter X ([former] 11 U.S.C. 516 [556]) requires the appointment of a disinterested trustee if the debtor's liabilities are $250,000 or over. Section 1104(a) marks a substantial change. The appointment of a trustee is mandatory only for a public company, which under section 1101(3), has $5 million in liabilities, excluding tax and trade obligations, and 1,000 security holders. In view of past experience, cases involving public companies will under normal circumstances probably be relatively few in number but of vast importance in terms of public investor interest.

In case of a nonpublic company, the appointment or election of a trustee is discretionary if the interests of the estate and its security holders would be served thereby. A test based on probable costs and benefits of a trusteeship is not practical. The appointment may be made at any time prior to confirmation of the plan.

In case of a nonpublic company, if no trustee is appointed, the court may under subsection (c) appoint an examiner, if the appointment would serve the interests of the estate and security holders. The purpose of his appointment is specified in section 1106(b).

HOUSE REPORT NO. 95–595

Subsection (a) of this section governs the appointment of trustees in reorganization cases. The court is permitted to order the appointment of one trustee at any time after the commencement of the case if a party in interest so requests. The court may order appointment only if the protection afforded by a trustee is needed and the costs and expenses of a trustee would not be disproportionately higher than the value of the protection afforded.

The protection afforded by a trustee would be needed, for example, in cases where the current management of the debtor has been fraudulent or dishonest, or has grossly mismanaged the company, or where the debtor's management has abandoned the business. A trustee would not necessarily be needed to investigate misconduct of former management of the debtor, because an examiner appointed under this section might well be able to serve that function adequately without displacing the current management. Generally, a trustee would not be needed in any case where the protection afforded by a trustee could equally be afforded by an examiner. Though the device of examiner appears in current chapter X [chapter 10 of former title 11], it is rarely used because of the nearly absolute presumption

in favor of the appointment of a trustee. Its use here will give the courts, debtors, creditors, and equity security holders greater flexibility in handling the affairs of an insolvent debtor, permitting the court to tailor the remedy to the case.

The second test, relating to the costs and expenses of a trustee, is not intended to be a strict cost/benefit analysis. It is included to require the court to have due regard for any additional costs or expenses that the appointment of a trustee would impose on the estate.

Subsection (b) permits the court, at any time after the commencement of the case and on request of a party in interest, to order the appointment of an examiner, if the court has not ordered the appointment of a trustee. The examiner would be appointed to conduct such an investigation of the debtor as is appropriate under the particular circumstances of the case, including an investigation of any allegations of fraud, dishonesty, or gross mismanagement of the debtor of or by current or former management of the debtor. The standards for the appointment of an examiner are the same as those for the appointment of a trustee: the protection must be needed, and the costs and expenses must not be disproportionately high.

By virtue of proposed 11 U.S.C. 1109, an indenture trustee and the Securities and Exchange Commission will be parties in interest for the purpose of requesting the appointment of a trustee or examiner.

Subsection (c) directs that the United States trustee actually select and appoint the trustee or examiner ordered appointed under this section. The United States trustee is required to consult with various parties in interest before selecting and appointing a trustee. He is not bound to select one of the members of the panel of private trustees established under proposed 28 U.S.C. 586(a)(1) which exists only for the purpose of providing trustees for chapter 7 cases. Neither is he precluded from selecting a panel member if the member is qualified to serve as chapter 11 trustee. Appointment by the United States trustee will remove the court from the often criticized practice of appointing an officer that will appear in litigation before the court against an adverse party.

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394, §211(a)(2), added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 103–394, §211(a)(1), redesignated subsec. (b) as (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 103–394, §§211(a)(1), 501(d)(30), redesignated subsec. (c) as (d) and inserted comma after ''interest''.

1986—Subsecs. (a), (b). Pub. L. 99–554, §222(1), (2), inserted ''or the United States trustee'' after ''party in interest''.

Subsec. (c). Pub. L. 99–554, §222(3), substituted ''the United States trustee, after consultation with parties in interest shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve'' for ''the court shall appoint one disinterested person to serve''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 322, 546, 557, 1103, 1106, 1161 of this title.

§ 1105. Termination of trustee's appointment

At any time before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court may terminate the trustee's appointment and restore the debtor to possession and management of the property of the estate and of the operation of the debtor's business.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2628; Pub. L. 98–353, title III, §501, July 10, 1984, 98 Stat. 384; Pub. L. 99–554, title II, §223, Oct. 27, 1986, 100 Stat. 3102.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section authorizes the court to terminate the trustee's appointment and to restore the debtor to possession and management of the property of the estate and to operation of the debtor's business. Section 1104(a) provides that this section does not apply in the case of a public company, for which the appointment of a trustee is mandatory.

HOUSE REPORT NO. 95–595

This section authorizes the court to terminate the trustee's appointment and to restore the debtor to possession and management of the property of the estate, and to operation of the debtor's business. This section would permit the court to reverse its decision to order the appointment of a trustee in light of new evidence.

AMENDMENTS

1986—Pub. L. 99–554 inserted ''or the United States trustee'' after ''party in interest''.

1984—Pub. L. 98–353 substituted ''estate and of the'' for ''estate, and''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1161 of this title.

§ 1106. Duties of trustee and examiner

(a) A trustee shall—

(1) perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable—

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained per-

taining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; and

(7) after confirmation of a plan, file such reports as are necessary or as the court orders.

(b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2628; Pub. L. 98–353, title III, §§311(b)(1), 502, July 10, 1984, 98 Stat. 355, 384; Pub. L. 99–554, title II, §257(c), Oct. 27, 1986, 100 Stat. 3114; Pub. L. 103–394, title II, §211(b), Oct. 22, 1994, 108 Stat. 4125.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) of this section prescribes the trustee's duties. He is required to perform the duties of a trustee in a liquidation case specified in section 704 (2), (4), (6), (7), (8), and (9). These include reporting and informational duties, and accountability for all property received. Paragraph (2) of this subsection requires the trustee to file with the court, if the debtor has not done so, the list of creditors, schedule of assets and liabilities, and statement of affairs required under section 521(1).

Paragraph (3) of S. 1106 requires the trustee to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, and the desirability of the continuance of the business, and any other matter relevant to the case or to the formulation of a plan. Paragraph (4) requires the trustee to report the results of his investigation to the court and to creditors' committees, equity security holders' committees, indenture trustees and any other entity the court designates.

Paragraph (5) requires the trustee to file a plan or to report why a plan cannot be formulated, or to recommend conversion to liquidation or to an individual repayment plan case, or dismissal. It is anticipated that the trustee will consult with creditors and other parties in interest in the formulation of a plan, just as the debtor in possession would.

Paragraph (6) [enacted as (7)] requires final reports by the trustee, as the court orders.

Subsection (b) gives the trustee's investigative duties to an examiner, if one is appointed. The court is authorized to give the examiner additional duties as the circumstances warrant.

Paragraphs (3), (4), and (5) of subsection (a) are derived from sections 165 and 169 of chapter X [sections 565 and 569 of former title 11].

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394 substituted ''1104(d)'' for ''1104(c)''.

1986—Subsec. (a)(5). Pub. L. 99–554 inserted reference to chapter 12.

1984—Subsec. (a)(1). Pub. L. 98–353, §311(b)(1), substituted ''704(5), 704(7), 704(8), and 704(9)'' for ''704(4), 704(6), 704(7) and 704(8)''.

Subsec. (b). Pub. L. 98–353, §502, inserted '', except to the extent that the court orders otherwise,''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

PAYMENT OF CERTAIN BENEFITS TO RETIRED FORMER EMPLOYEES

Pub. L. 99–500, §101(b) [title VI, §608], Oct. 18, 1986, 100 Stat. 1783–39, 1783–74, and Pub. L. 99–591, §101(b) [title VI, §608], Oct. 30, 1986, 100 Stat. 3341–39, 3341–74, as amended by Pub. L. 100–41, May 15, 1987, 101 Stat. 309; Pub. L. 100–99, Aug. 18, 1987, 101 Stat. 716; Pub. L. 100–334, §3(a), June 16, 1988, 102 Stat. 613, provided that:

''(a)(1) Subject to paragraphs (2), (3), (4), and (5), and notwithstanding title 11 of the United States Code, the trustee shall pay benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.

''(2) The level of benefits required to be paid by this subsection may be modified prior to confirmation of a plan under section 1129 of such title if—

''(A) the trustee and an authorized representative of the former employees with respect to whom such benefits are payable agree to the modification of such benefit payments; or

''(B) the court finds that a modification proposed by the trustee meets the standards of section 1113(b)(1)(A) of such title and the balance of the equities clearly favors the modification.

If such benefits are covered by a collective bargaining agreement, the authorized representative shall be the labor organization that is signatory to such collective bargaining agreement unless there is a conflict of interest.

''(3) The trustee shall pay benefits in accordance with this subsection until—

''(A) the dismissal of the case involved; or

''(B) the effective date of a plan confirmed under section 1129 of such title which provides for the continued payment after confirmation of the plan of all such benefits at the level established under paragraph (2) of this subsection, at any time prior to the confirmation of the plan, for the duration of the period the debtor (as defined in such title) has obligated itself to provide such benefits.

''(4) No such benefits paid between the filing of a petition in a case covered by this section and the time a plan confirmed under section 1129 of such title with respect to such case becomes effective shall be deducted or offset from the amount allowed as claims for any benefits which remain unpaid, or from the amount to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future benefits or from any benefit not paid as a result of modifications allowed pursuant to this section.

''(5) No claim for benefits covered by this section shall be limited by section 502(b)(7) of such title.

''(b)(1) Notwithstanding any provision of title 11 of the United States Code, the trustee shall pay an allowable claim of any person for a benefit paid—

''(A) before the filing of the petition under title 11 of the United States Code; and

''(B) directly or indirectly to a retired former employee under a plan, fund, or program described in subsection (a)(1);

if, as determined by the court, such person is entitled to recover from such employee, or any provider of health care to such employee, directly or indirectly, the amount of such benefit for which such person receives no payment from the debtor.

''(2) For purposes of paragraph (1), the term 'provider of health care' means a person who—

''(A) is the direct provider of health care (including a physician, dentist, nurse, podiatrist, optometrist, physician assistant, or ancillary personnel employed under the supervision of a physician); or

''(B) administers a facility or institution (including a hospital, alcohol and drug abuse treatment facility, outpatient facility, or health maintenance organization) in which health care is provided.

''(c) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986 and before the date of the enactment of the Retiree Benefits Bankruptcy Protection Act of 1988 [June 16, 1988].

''(d) This section shall not apply during any period in which a case is subject to chapter 7, title 11, United States Code.''

Similar provisions were contained in Pub. L. 99–656, § 2, Nov. 14, 1986, 100 Stat. 3668, as amended by Pub. L. 100–41, May 15, 1987, 101 Stat. 309; Pub. L. 100–99, Aug. 18, 1987, 101 Stat. 716, and were repealed by Pub. L. 100–334, § 3(b), June 16, 1988, 102 Stat. 614.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1107, 1111, 1202, 1203, 1301 of this title.

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2628; Pub. L. 98–353, title III, § 503, July 10, 1984, 98 Stat. 384.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts section 1107(b) of the Senate amendment which clarifies a point not covered by the House bill.

SENATE REPORT NO. 95–989

This section places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee, and to such other limitations and conditions as the court prescribes cf. *Wolf v. Weinstein*, 372 U.S. 633, 649–650 (1963).

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 substituted ''on a trustee serving in a case'' for ''on a trustee''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 328, 1161 of this title.

§ 1108. Authorization to operate business

Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2629; Pub. L. 98–353, title III, § 504, July 10, 1984, 98 Stat. 384.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts section 1108 of the House bill in preference to the style of an identical substantive provision contained in the Senate amendment. Throughout title 11 references to a ''trustee'' is read to include other parties under various sections of the bill. For example, section 1107 applies to give the debtor in possession all the rights and powers of a trustee in a case under chapter 11; this includes the power of the trustee to operate the debtor's business under section 1108.

SENATE REPORT NO. 95–989

This section permits the debtor's business to continue to be operated, unless the court orders otherwise. Thus, in a reorganization case, operation of the business will be the rule, and it will not be necessary to go to the court to obtain an order authorizing operation.

HOUSE REPORT NO. 95–595

This section does not presume that a trustee will be appointed to operate the business of the debtor. Rather, the power granted to trustee under this section is one of the powers that a debtor in possession acquires by virtue of proposed 11 U.S.C. 1107.

AMENDMENTS

1984—Pub. L. 98–353 inserted '', on request of a party in interest and after notice and a hearing,''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 327, 363, 364 of this title.

§ 1109. Right to be heard

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2629.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1109 of the House amendment represents a compromise between comparable provisions in the House bill and Senate amendment. As previously discussed the section gives the Securities and Exchange Commission the right to appear and be heard and to raise any issue in a case under chapter 11; however, the Securities and Exchange Commission is not a party in interest and the Commission may not appeal from any judgment, order, or decree entered in the case. Under section 1109(b) a party in interest, including the debtor, the trustee, creditors committee, equity securities holders committee, a creditor, an equity security holder, or an indentured trustee, may raise and may appear and be heard on any issue in a case under chapter 11. Section 1109(c) of the Senate amendment has been moved to subchapter IV pertaining to Railroad Reorganizations.

SENATE REPORT NO. 95–989

Subsection (a) provides, in unqualified terms, that any creditor, equity security holder, or an indenture trustee shall have the right to be heard as a party in interest under this chapter in person, by an attorney, or by a committee. It is derived from section 206 of chapter X ([former] 11 U.S.C. 606).

Subsection (b) provides that the Securities and Exchange Commission may appear by filing an appearance in a case of a public company and may appear in other cases if authorized or requested by the court. As a party in interest in either case, the Commission may raise and be heard on any issue. The Commission may not appeal from a judgment, order, or decree in a case, but may participate in any appeal by any other party in interest. This is the present law under section 208 of chapter X ([former] 11 U.S.C. 608).

HOUSE REPORT NO. 95–595

Section 1109 authorizes the Securities and Exchange Commission and any indenture trustee to intervene in the case at any time on any issue. They may raise an issue or may appear and be heard on an issue that is raised by someone else. The section, following current law, denies the right of appeal to the Securities and Exchange Commission. It does not, however, prevent the Commission from joining or participating in an appeal taken by a true party in interest. The Commission is merely prevented from initiating the appeal in any capacity.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 901 of this title.

§ 1110. Aircraft equipment and vessels

(a)(1) The right of a secured party with a security interest in equipment described in paragraph (2) or of a lessor or conditional vendor of such equipment to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract is not affected by section 362, 363, or 1129 or by any power of the court to enjoin the taking of possession unless—

(A) before the date that is 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after the date of the order under such security agreement, lease, or conditional sale contract; and

(B) any default, other than a default of a kind specified in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

(i) that occurs before the date of the order is cured before the expiration of such 60-day period; and

(ii) that occurs after the date of the order is cured before the later of—

(I) the date that is 30 days after the date of the default; or

(II) the expiration of such 60-day period.

(2) Equipment is described in this paragraph if it is—

(A) an aircraft, aircraft engine, propeller, appliance, or spare part (as defined in section 40102 of title 49) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a citizen of the United States (as defined in section 40102 of title 49) holding an air carrier operating certificate issued by the Secretary of Transportation pursuant to chapter 447 of title 49 for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo; or

(B) a documented vessel (as defined in section 30101(1) of title 46) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission.

(3) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1).

(c) With respect to equipment first placed in service on or prior to the date of enactment of this subsection, for purposes of this section—

(1) the term ''lease'' includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

(2) the term ''security interest'' means a purchase-money equipment security interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2629; Pub. L. 103–272, § 5(c), July 5, 1994, 108 Stat. 1373; Pub. L. 103–394, title II, § 201(a), Oct. 22, 1994, 108 Stat. 4119.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1110 of the House amendment adopts an identical provision contained in the House bill without modifications contained in the Senate amendment. This section protects a limited class of financiers of aircraft and vessels and is intended to be narrowly construed to prevent secured parties or lessors from gaining the protection of the section unless the interest of such lessor or secured party is explicitly enumerated therein. It should be emphasized that under section 1110(a) a debtor in possession or trustee is given 60 days after the order for relief in a case under chapter 11, to have an opportunity to comply with the provisions of section 1110(a).

During this time the automatic stay will apply and may not be lifted prior to the expiration of the 60-day period. Under section 1110(b), the debtor and secured party or lessor are given an opportunity to extend the 60-day period, but no right to reduce the period is intended. It should additionally be noted that under section 1110(a) the trustee or debtor in possession is not required to assume the executory contract or unexpired lease under section 1110; rather, if the trustee or debtor in possession complies with the requirements of section 1110(a), the trustee or debtor in possession is entitled to retain the aircraft or vessels subject to the normal requirements of section 365. The discussion regarding aircraft and vessels likewise applies with respect to railroad rolling stock in a railroad reorganization under section 1168.

SENATE REPORT NO. 95–989

This section, to a large degree, preserves the protection given lessors and conditional vendors of aircraft to a certificated air carrier or of vessels to a certificated water carrier under section 116(5) and 116(6) of present Chapter X [section 516(5) and (6) of former title 11]. It is modified to conform with the consolidation of Chapters X and XI [chapters 10 and 11 of former title 11] and with the new chapter 11 generally. It is also modified to give the trustee in a reorganization case an opportunity to continue in possession of the equipment in question by curing defaults and by making the required lease or purchase payments. This removes the absolute veto power over a reorganization that lessors and conditional vendors have under present law, while entitling them to protection of their investment.

The section overrides the automatic stay or any power of the court to enjoin taking of possession of certain leased, conditionally sold, or liened equipment, unless, the trustee agrees to perform the debtor's obligations and cures all prior defaults (other than defaults under ipso facto or bankruptcy clauses) within 60 days after the order for relief. The trustee and the equipment financer are permitted to extend the 60-day period by agreement. During the first 60 days, the automatic stay will apply to prevent foreclosure unless the creditor gets relief from the stay.

The effect of this section will be the same if the debtor has granted the security interest to the financer or if the debtor is leasing equipment from a financer that has leveraged the lease and leased the equipment subject to a security interest of a third party.

REFERENCES IN TEXT

The date of enactment of this subsection, referred to in subsec. (c), is the date of enactment of Pub. L. 103–394, which added subsec. (c) and was approved Oct. 22, 1994.

AMENDMENTS

1994—Pub. L. 103–394 amended section generally. Prior to amendment, section read as follows:

''(a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, or vessels of the United States, as defined in section 30101 of title 46, that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier operating under a certificate of convenience and necessity issued by the Secretary of Transportation, or a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, as the case may be, to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless—

''(1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and

''(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—

''(A) that occurred before such date is cured before the expiration of such 60-day period; and

''(B) that occurs after such date is cured before the later of—

''(i) 30 days after the date of such default; and

''(ii) the expiration of such 60-day period.

''(b) The trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.''

Subsec. (a). Pub. L. 103–272 substituted ''section 40102(a) of title 49'' for ''section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301)'', ''section 30101 of title 46'' for ''subsection B(4) of the Ship Mortgage Act, 1920 (46 U.S.C. 911(4))'', and ''Secretary of Transportation'' for ''Civil Aeronautics Board''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, with this section, as amended by section 201 of Pub. L. 103–394, applicable with respect to any lease, as defined by subsec. (c) of this section, entered into in connection with a settlement of any proceeding in any case pending under this title on Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

AIRCRAFT EQUIPMENT SETTLEMENT LEASES

Pub. L. 103–7, Mar. 17, 1993, 107 Stat. 36, provided that:

''SECTION 1. SHORT TITLE.

''This Act may be cited as the 'Aircraft Equipment Settlement Leases Act of 1993'.

''SEC. 2. TREATMENT OF AIRCRAFT EQUIPMENT SETTLEMENT LEASES WITH THE PENSION BENEFIT GUARANTY CORPORATION.

''In the case of any settlement of liability under title IV of the Employee Retirement Income Security Act of

1974 [29 U.S.C. 1301 et seq.] entered into by the Pension Benefit Guaranty Corporation and one or more other parties, if—

''(1) such settlement was entered into before, on, or after the date of the enactment of this Act [Mar. 17, 1993],

''(2) at least one party to such settlement was a debtor under title 11 of the United States Code, and

''(3) an agreement that is entered into as part of such settlement provides that such agreement is to be treated as a lease,

then such agreement shall be treated as a lease for purposes of section 1110 of such title 11.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 348 of this title.

§ 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2630.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

A discussion of section 1111(b) of the House amendment is best considered in the context of confirmation and will therefore, be discussed in connection with section 1129.

SENATE REPORT NO. 95–989

This section dispenses with the need for every creditor and equity security holder to file a proof of claim or interest in a reorganization case. Usually the debtor's schedules are accurate enough that they will suffice to determine the claims or interests allowable in the case. Thus, the section specifies that any claim or interest included on the debtor's schedules is deemed filed under section 501. This does not apply to claims or interests that are scheduled as disputed, contingent, or unliquidated.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 901, 927, 1129 of this title.

§ 1112. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—

(1) the debtor is not a debtor in possession;

(2) the case originally was commenced as an involuntary case under this chapter; or

(3) the case was converted to a case under this chapter other than on the debtor's request.

(b) Except as provided in subsection (c) of this section, on request of a party in interest or the United States trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—

(1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;

(2) inability to effectuate a plan;

(3) unreasonable delay by the debtor that is prejudicial to creditors;

(4) failure to propose a plan under section 1121 of this title within any time fixed by the court;

(5) denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;

(7) inability to effectuate substantial consummation of a confirmed plan;

(8) material default by the debtor with respect to a confirmed plan;

(9) termination of a plan by reason of the occurrence of a condition specified in the plan; or

(10) nonpayment of any fees or charges required under chapter 123 of title 28.

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—

(1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

(e) Except as provided in subsections (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time

as the court may allow, the information required by paragraph (1) of section 521, including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2630; Pub. L. 98–353, title III, § 505, July 10, 1984, 98 Stat. 384; Pub. L. 99–554, title II, §§ 224, 256, Oct. 27, 1986, 100 Stat. 3102, 3114; Pub. L. 103–394, title II, § 217(c), Oct. 22, 1994, 108 Stat. 4127.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1112 of the House amendment represents a compromise between the House bill and Senate amendment with respect to the factors constituting cause for conversion of a case to chapter 7 or dismissal. The House amendment combines two separate factors contained in section 1112(b)(1) and section 1112(b)(2) of the Senate amendment. Section 1112(b)(1) of the House amendment permits the court to convert a case to a case under chapter 7 or to dismiss the case if there is both a continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; requiring both factors to be present simultaneously represents a compromise from the House bill which eliminated both factors from the list of causes enumerated.

Sections 1112(c) and 1112(d) of the House amendment is derived from the House bill which differs from the Senate amendment only as a matter of style.

SENATE REPORT NO. 95–989

This section brings together all of the conversion and dismissal rules for chapter 11 cases. Subsection (a) gives the debtor an absolute right to convert a voluntarily commenced chapter 11 case in which the debtor remains in possession to a liquidation case.

Subsection (b) gives wide discretion to the court to make an appropriate disposition of the case sua sponte or upon motion of a party in interest, or the court is permitted to convert a reorganization case to a liquidation case or to dismiss the case, whichever is in the best interest of creditors and the estate, but only for cause. Cause may include the continuing loss to or dimunition [sic] of the estate of an insolvent debtor, the absence of a reasonable likelihood of rehabilitation, the inability to effectuate a plan, unreasonable delay by the debtor that is prejudicial to creditors, failure to file a plan within the appropriate time limits, denial of confirmation and any opportunity to modify or propose a new plan, revocation of confirmation and denial of confirmation of a modified plan, inability to effectuate substantial consummation of a confirmed plan, material default by the debtor under the plan, and termination of the plan by reason of the occurrence of a condition specified in the plan. This list is not exhaustive. The court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases. The power of the court to act sua sponte should be used sparingly and only in emergency situations.

Subsection (c) prohibits the court from converting a case concerning a farmer or an eleemosynary institution to a liquidation case unless the debtor consents.

Subsection (d) prohibits conversion of a reorganization case to a chapter 13 case unless the debtor requests conversion and his discharge has not been granted or has been revoked.

Subsection (e) reinforces section 109 by prohibiting conversion of a chapter 11 case to a case under another chapter proceedings under which the debtor is not permitted to proceed.

AMENDMENTS

1994—Subsec. (b). Pub. L. 103–394 inserted ''or bankruptcy administrator'' after ''United States trustee''.

1986—Subsec. (b). Pub. L. 99–554, § 224(1)(A), inserted ''or the United States trustee'' after ''party in interest''.

Subsec. (b)(10). Pub. L. 99–554, § 224(1)(B)–(D), added par. (10).

Subsec. (d). Pub. L. 99–554, § 256, inserted reference to chapter 12 and added par. (3).

Subsecs. (e), (f). Pub. L. 99–554, § 224(2), (3), added subsec. (e) and redesignated former subsec. (e) as (f).

1984—Subsec. (a)(2). Pub. L. 98–353, § 505(a)(1), substituted ''originally was commenced as an involuntary case'' for ''is an involuntary case originally commenced''.

Subsec. (a)(3). Pub. L. 98–353, § 505(a)(2), substituted ''other than on'' for ''on other than''.

Subsec. (b)(5). Pub. L. 98–353, § 505(b)(1), inserted ''a request made for'' before ''additional''.

Subsec. (b)(8). Pub. L. 98–353, § 505(b)(2), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 224 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 256 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 365, 706, 726, 728, 1208, 1307 of this title.

§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section ''trustee'' shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits

and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

(Added Pub. L. 98–353, title III, § 541(a), July 10, 1984, 98 Stat. 390.)

REFERENCES IN TEXT

The Railway Labor Act, referred to in subsec. (a), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended. Title I of the Railway Labor Act is classified principally to subchapter I (§ 151 et seq.) of chapter 8 of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

EFFECTIVE DATE

Section 541(c) of Pub. L. 98–353 provided that: ''The amendments made by this section [enacting this section] shall become effective upon the date of enactment of this Act [July 10, 1984]; provided that this section shall not apply to cases filed under title 11 of the United States Code which were commenced prior to the date of enactment of this section.''

§ 1114. Payment of insurance benefits to retired employees

(a) For purposes of this section, the term ''retiree benefits'' means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

(b)(1) For purposes of this section, the term ''authorized representative'' means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(13) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing,

determines that different representation of such persons is appropriate.

(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.

(e)(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section ''trustee'' shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,

after which such benefits as modified shall continue to be paid by the trustee.

(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): *Provided, however*, That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3): *Provided further*, That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

(3) The implementation of such interim changes does not render the motion for modification moot.

(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear

and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

(2) The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within ninety days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(*l*) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

(Added Pub. L. 100–334, §2(a), June 16, 1988, 102 Stat. 610.)

EFFECTIVE DATE

Section 4 of Pub. L. 100–334 provided that:

''(a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act [enacting this section, amending section 1129 of this title, enacting provisions set out as a note under section 101 of this title, and amending and repealing provisions set out as notes under section 1106 of this title] shall take effect on the date of the enactment of this Act [June 16, 1988].

''(b) APPLICATION OF AMENDMENTS.—The amendments made by section 2 [enacting this section and amending section 1129 of this title] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act [June 16, 1988].''

PAYMENT OF CERTAIN BENEFITS TO RETIRED FORMER EMPLOYEES

For payment of benefits by bankruptcy trustee to retired employees in enumerated circumstances with respect to cases commenced under this chapter in which a plan for reorganization had not been confirmed by the court and in which any such benefit was still being paid on October 2, 1986, and in cases that became subject to this chapter after October 2, 1986, and before June 16, 1988, see section 101(b) [title VI, §608] of Pub. L. 99–500, and Pub. L. 99–591, as amended, set out as a note under section 1106 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1129 of this title.

SUBCHAPTER II—THE PLAN

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title.

§ 1121. Who may file a plan

(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if—

(1) a trustee has been appointed under this chapter;

(2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or

(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

(d) On request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

(e) In a case in which the debtor is a small business and elects to be considered a small business—

(1) only the debtor may file a plan until after 100 days after the date of the order for relief under this chapter;

(2) all plans shall be filed within 160 days after the date of the order for relief; and

(3) on request of a party in interest made within the respective periods specified in paragraphs (1) and (2) and after notice and a hearing, the court may—

(A) reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and

(B) increase the 100-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2631; Pub. L. 98–353, title III, §506, July 10, 1984, 98 Stat. 385; Pub. L. 99–554, title II, §283(u), Oct. 27, 1986, 100 Stat. 3118; Pub. L. 103–394, title II, §217(d), Oct. 22, 1994, 108 Stat. 4127.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1121 of the House amendment is derived from section 1121 of the House bill; section 1121(c)(1) will be

satisfied automatically in a case under subchapter IV of title 11.

SENATE REPORT NO. 95–989

Subsection (a) permits the debtor to file a reorganization plan with a petition commencing a voluntary case or at any time during a voluntary or involuntary case.

Subsection (b) gives the debtor the exclusive right to file a plan during the first 120 days of the case. There are exceptions, however, enumerated in subsection (c). If a trustee has been appointed, if the debtor does not meet the 120-day deadline, or if the debtor fails to obtain the required consent within 180 days after the filing of the petition, any party in interest may propose a plan. This includes the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, and an indenture trustee. The list is not exhaustive. In the case of a public company, a trustee is appointed within 10 days of the petition. In such a case, for all practical purposes, any party in interest may file a plan.

Subsection (d) permits the court, for cause, to increase or reduce the 120-day and 180-day periods specified. Since, the debtor has an exclusive privilege for 6 months during which others may not file a plan, the granted extension should be based on a showing of some promise of probable success. An extension should not be employed as a tactical device to put pressure on parties in interest to yield to a plan they consider unsatisfactory.

AMENDMENTS

1994—Subsec. (e). Pub. L. 103–394 added subsec. (e).

1986—Subsec. (d). Pub. L. 99–554 inserted reference to subsection (b) of this section.

1984—Subsec. (c)(3). Pub. L. 98–353, § 506(a), substituted ''of claims or interests that is'' for ''the claims or interests of which are''.

Subsec. (d). Pub. L. 98–353, § 506(b), inserted ''made within the respective periods specified in subsection (c) of this section''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 307, 348, 1106, 1112, 1125 of this title; title 28 section 158.

§ 1122. Classification of claims or interests

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2631.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section codifies current case law surrounding the classification of claims and equity securities. It requires classification based on the nature of the claims or interests classified, and permits inclusion of claims or interests in a particular class only if the claim or interest being included is substantially similar to the other claims or interests of the class.

Subsection (b), also a codification of existing practice, contains an exception. The plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 901, 1123, 1127, 1222, 1322 of this title.

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of

any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2631; Pub. L. 98–353, title III, § 507, July 10, 1984, 98 Stat. 385; Pub. L. 103–394, title II, § 206, title III, §§ 304(h)(6), 305(a), title V, § 501(d)(31), Oct. 22, 1994, 108 Stat. 4123, 4134, 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1123 of the House amendment represents a compromise between similar provisions in the House bill and Senate amendment. The section has been clarified to clearly indicate that both secured and unsecured claims, or either of them, may be impaired in a case under title 11. In addition assumption or rejection of an executory contract under a plan must comply with section 365 of title 11. Moreover, section 1123(a)(1) has been substantively modified to permit classification of certain kinds of priority claims. This is important for purposes of confirmation under section 1129(a)(9).

Section 1123(a)(5) of the House amendment is derived from a similar provision in the House bill and Senate amendment but deletes the language pertaining to ''fair upset price'' as an unnecessary restriction. Section 1123 is also intended to indicate that a plan may provide for any action specified in section 1123 in the case of a corporation without a resolution of the board of directors. If the plan is confirmed, then any action proposed in the plan may be taken notwithstanding any otherwise applicable nonbankruptcy law in accordance with section 1142(a) of title 11.

SENATE REPORT NO. 95–989

Subsection (a) specifies what a plan of reorganization must contain. The plan must designate classes of claims and interests, and specify, by class, the claims or interests that are unimpaired under the plan. Priority claims are not required to be classified because they may not have arisen when the plan is filed. The plan must provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a different, but not better, treatment of his claim or interest.

Paragraph (3) applies to claims, not creditors. Thus, if a creditor is undersecured, and thus has a secured claim and an unsecured claim, this paragraph will be applied independently to each of his claims.

Paragraph (4) of subsection (a) is derived from section 216 of chapter X [section 616 of former title 11] with some modifications. It requires the plan to provide adequate means for the plans execution. These means may include retention by the debtor of all or any part of the property of the estate, transfer of all or any part of the property of the estate to one or more entities, whether organized pre- or postconfirmation, merger or consolidation of the debtor with one or more persons, sale and distribution of all or any part of the property of the estate, satisfaction or modification of any lien, cancellation or modification of any indenture or similar instrument, curing or waiving of any default, extension of maturity dates or change in interest rates of securities, amendment of the debtor's charter, and issuance of securities.

Subparagraph (C), as it applies in railroad cases, has the effect of overruling *St. Joe Paper Co. v. Atlantic Coast Line R. R.*, 347 U.S. 298 (1954). It will allow the trustee or creditors to propose a plan of merger with another railroad without the consent of the debtor, and the debtor will be bound under proposed 11 U.S.C. 1141(a). See Hearings, pt. 3, at 1616. ''Similar instrument'' referred to in subparagraph (F) might include a deposit with an agent for distribution, other than an indenture trustee, such as an agent under an agreement in a railroad conditional sale or lease financing agreement.

Paragraphs (5) and (6) and subsection (b) are derived substantially from Section 216 of Chapter X ([former] 11 U.S.C. 616). Paragraph (5) requires the plan to prohibit the issuance of nonvoting equity securities, and to provide for an appropriate distribution of voting power among the various classes of equity securities. Paragraph (6) requires that the plan contain only provisions that are consistent with the interests of creditors and equity security holders, and with public policy with respect to the selection of officers, directors, and trustees, and their successors.

Subsection (b) specifies the matters that the plan may propose. The plan may impair or leave unimpaired any claim or interest. The plan may provide for the assumption or rejection of executory contracts or unexpired leases not previously rejected under section 365. The plan may also provide for the treatment of claims by the debtor against other entities that are not settled before the confirmation of the plan. The plan may propose settlement or adjustment of any claim or equity security belonging to the estate, or may propose retention and enforcement of such claim or interest by the debtor or by an agent appointed for that purpose.

The plan may also propose the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of the sale among creditors and equity security holders. This would be a liquidating plan. The subsection permits the plan to include any other appropriate provision not inconsistent with the applicable provisions of the bankruptcy code.

Subsection (c) protects an individual debtor's exempt property by prohibiting its use, sale, or lease under a plan proposed by someone other than the debtor, unless the debtor consents.

AMENDMENTS

1994—Subsec. (a)(1). Pub. L. 103–394, §§304(h)(6), 501(d)(31), substituted ''507(a)(8) of this title,'' for ''507(a)(7) of this title''.

Subsec. (b)(5), (6). Pub. L. 103–394, §206, added par. (5) and redesignated former par. (5) as (6).

Subsec. (d). Pub. L. 103–394, §305(a), added subsec. (d).

1984—Subsec. (a). Pub. L. 98–353, §507(a)(1), in provisions preceding par. (1) substituted ''Notwithstanding any otherwise applicable nonbankruptcy law, a'' for ''A''.

Subsec. (a)(1). Pub. L. 98–353, §507(a)(2), inserted a comma after ''classes of claims'' and substituted ''507(a)(7) of this title,'' for ''507(a)(6) of this title''.

Subsec. (a)(3). Pub. L. 98–353, §507(a)(3), struck out ''shall'' before ''specify the treatment''.

Subsec. (a)(5). Pub. L. 98–353, §507(a)(4), substituted ''implementation'' for ''execution''.

Subsec. (a)(5)(G). Pub. L. 98–353, §507(a)(5), inserted ''of'' after ''waiving''.

Subsec. (b)(2). Pub. L. 98–353, §507(b), substituted ''rejection, or assignment'' for ''or rejection'', and ''under such section'' for ''under section 365 of this title''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by sections 206, 304(h)(6), and 501(d)(31) of Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, and amendment by section 305(a) of Pub. L. 103–394 effective Oct. 22, 1994, and applicable only to agreements entered into after Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 901, 1124, 1127, 1172 of this title.

§ 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; and

(D) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2633; Pub. L. 98–353, title III, §508, July 10, 1984, 98 Stat. 385; Pub. L. 103–394, title II, §213(d), Oct. 22, 1994, 108 Stat. 4126.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1124 of the House amendment is derived from a similar provision in the House bill and Senate amendment. The section defines the new concept of ''impairment'' of claims or interests; the concept differs significantly from the concept of ''materially and adversely affected'' under the Bankruptcy Act [former title 11]. Section 1124(3) of the House amendment provides that a holder of a claim or interest is not impaired, if the plan provides that the holder will receive the allowed amount of the holder's claim, or in the case of an interest with a fixed liquidation preference or redemption price, the greater of such price. This adopts the position contained in the House bill and rejects the contrary standard contained in the Senate amendment.

Section 1124(3) of the House amendment rejects a provision contained in section 1124(3)(B)(iii) of the House bill which would have considered a class of interest not to be impaired by virtue of the fact that the plan provided cash or property for the value of the holder's interest in the debtor.

The effect of the House amendment is to permit an interest not to be impaired only if the interest has a fixed liquidation preference or redemption price. Therefore, a class of interests such as common stock, must either accept a plan under section 1129(a)(8), or the plan must satisfy the requirements of section 1129(b)(2)(C) in order for a plan to be confirmed.

A compromise reflected in section 1124(2)(C) of the House amendment indicates that a class of claims is not impaired under the circumstances of section 1124(2) if damages are paid to rectify reasonable reliance engaged in by the holder of a claim or interest arising from the prepetition breach of a contractual provision, such as an ipso facto or bankruptcy clause, or law. Where the rights of third parties are concerned, such as in the case of lease premises which have been rerented to a third party, it is not intended that there will be adequate damages to compensate the third party.

SENATE REPORT NO. 95–989

The basic concept underlying this section is not new. It rests essentially on Section 107 of Chapter X ([former] 11 U.S.C. 507), which states that creditors or stockholders or any class thereof ''shall be deemed to be 'affected' by a plan only if their or its interest shall be materially and adversely affected thereby.''

This section is designated to indicate when contractual rights of creditors or interest holders are not materially affected. It specifies three ways in which the plan may leave a claim or interest unimpaired.

First, the plan may propose not to alter the legal, equitable, or contractual rights to which the claim or interest entitled its holder.

Second, a claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain. Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

Third, a claim or interest is unimpaired if the plan provides for their payment in cash. In the case of a debt liability, the cash payment is for the allowed amount of the claim, which does not include a redemption premium. If it is an equity security with a fixed liquidation preference, such as a preferred stock, the allowed amount is such liquidation preference, with no redemption premium. With respect to any other equity security, such as a common stock, cash payment must be equal to the ''value of such holder's interest in the debtor.''

Section 1124 does not include payment ''in property'' other than cash. Except for a rare case, claims or interests are not by their terms payable in property, but a plan may so provide and those affected thereby may accept or reject the proposed plan. They may not be forced to accept a plan declaring the holders' claims or interests to be ''unimpaired.''

HOUSE REPORT NO. 95–595

This section is new. It is designed to indicate when contractual rights of creditors or interest holders are not materially affected. The section specifies three ways in which the plan may leave a claim or interest unimpaired.

First, the plan may propose not to alter the legal, equitable, or contractual rights to which the claim or interest entitled its holder.

Second, the plan is permitted to reinstate a claim or interest and thus leave it unimpaired. Reinstatement consists of curing any default (other than a default under an ipso facto or bankruptcy clause) and reinstatement of the maturity of the claim or interest. Further, the plan may not otherwise alter any legal, equitable, or contractual right to which the claim or interest entitles its holder.

Third, the plan may leave a claim or interest unimpaired by paying its amount in full other than in securities of the debtor, an affiliate of the debtor participating in a joint plan, or a successor to the debtor. These securities are excluded because determination of their value would require a valuation of the business being reorganized. Use of them to pay a creditor or equity security holder without his consent may be done only under section 1129(b) and only after a valuation of the debtor. Under this paragraph, the plan must pay the allowed amount of the claim in full, in cash or other property, or, in the case of an equity security, must pay the greatest of any fixed liquidation preference to which the terms of the equity security entitle its holder, any fixed price at which the debtor, under the terms of the equity security may redeem such equity security, and the value, as of the effective date of the plan, of the holder's interest in the debtor. The value of the holder's interest need not be determined precisely by valuing the debtor's business if such value is clearly below redemption or liquidation preference values. If such value would require a full-scale valuation of the business, then such interest should be treated as impaired. But, if the debtor corporation is clearly insolvent, then the value of the common stock holder's interest in the debtor is zero, and offering them nothing under the plan of reorganization will not impair their rights.

''Value, as of the effective date of the plan,'' as used in paragraph (3) and in proposed 11 U.S.C. 1179(a)(7)(B), 1129(a)(9), 1129(b), 1172(2), 1325(a)(4), 1325(a)(5)(B), and 1328(b), indicates that the promised payment under the plan must be discounted to present value as of the effective date of the plan. The discounting should be based only on the unpaid balance of the amount due under the plan, until that amount, including interest, is paid in full.

AMENDMENTS

1994—Par. (3). Pub. L. 103–394 struck out par. (3) which read as follows: ''provides that, on the effective date of the plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to—

''(A) with respect to a claim, the allowed amount of such claim; or

''(B) with respect to an interest, if applicable, the greater of—

''(i) any fixed liquidation preference to which the terms of any security representing such interest entitle the holder of such interest; or

''(ii) any fixed price at which the debtor, under the terms of such security, may redeem such security from such holder.''

1984—Par. (2)(A). Pub. L. 98–353, § 508(1), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''cures any such default, other than a default of a kind specified in section 365(b)(2) of this title, that occurred before or after the commencement of the case under this title;''.

Par. (3)(B)(i). Pub. L. 98–353, § 508(2), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 901 of this title.

§ 1125. Postpetition disclosure and solicitation

(a) In this section—

(1) ''adequate information'' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and

(2) ''investor typical of holders of claims or interests of the relevant class'' means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure re-

quired by this section as holders of claims or interests in such class generally have.

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

(c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

(d) Whether a disclosure statement required under subsection (b) of this section contains adequate information is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation, but an agency or official whose duty is to administer or enforce such a law, rule, or regulation may be heard on the issue of whether a disclosure statement contains adequate information. Such an agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.

(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

(f) Notwithstanding subsection (b), in a case in which the debtor has elected under section 1121(e) to be considered a small business—

(1) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

(2) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement as long as the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed at least 10 days prior to the date of the hearing on confirmation of the plan; and

(3) a hearing on the disclosure statement may be combined with a hearing on confirmation of a plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2633; Pub. L. 98–353, title III, § 509, July 10, 1984, 98 Stat. 385; Pub. L. 103–394, title II, § 217(e), Oct. 22, 1994, 108 Stat. 4127.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1125 of the House amendment is derived from section 1125 of the House bill and Senate amendment except with respect to section 1125(f) of the Senate amendment. It will not be necessary for the court to consider the report of the examiner prior to approval of a disclosure statement. The investigation of the examiner is to proceed on an independent basis from the procedure of the reorganization under chapter 11. In order to ensure that the examiner's report will be expeditious and fair, the examiner is precluded from serving as a trustee in the case or from representing a trustee if a trustee is appointed, whether the case remains in chapter 11 or is converted to chapter 7 or 13.

SENATE REPORT NO. 95–989

This section extends disclosure requirements in connection with solicitations to all cases under chapter 11. Heretofore this subject was dealt with by the Bankruptcy Act [former title 11] mainly in the special contexts of railroad reorganizations and chapter X [chapter 10 of former title 11] cases.

Subsection (a) defines (1) the subject matter of disclosure as ''adequate information'' and relates the standard of adequacy to an (2) ''investor typical of holders or claims or interests of the relevant class.'' ''Investor'' is used broadly here, for it will almost always include a trade creditor or other creditors who originally had no investment intent or interest. It refers to the investment-type decision by those called upon to accept a plan to modify their claims or interests, which typically will involve acceptance of new securities or of a cash payment in lieu thereof.

Both the kind and form of information are left essentially to the judicial discretion of the court, guided by the specification in subparagraph (a)(1) that it be of a kind and in sufficient detail that a reasonable and typical investor can make an informed judgment about the plan. The information required will necessarily be governed by the circumstances of the case.

Reporting and audit standards devised for solvent and continuing businesses do not necessarily fit a debtor in reorganization. Subsection (a)(1) expressly incorporates consideration of the nature and history of the debtor and the condition of its books and records into the determination of what is reasonably practicable to supply. These factors are particularly pertinent to historical data and to discontinued operations of no future relevance.

A plan is necessarily predicated on knowledge of the assets and liabilities being dealt with and on factually supported expectations as to the future course of the business sufficient to meet the feasibility standard in section 1130(a)(11) of this title. It may thus be necessary to provide estimates or judgments for that purpose. Yet it remains practicable to describe, in such detail as may be relevant and needed, the basis for the plan and the data on which supporters of the plan rely.

Subsection (b) establishes the jurisdiction of the court over this subject by prohibiting solicitation of acceptance or rejection of a plan after the commencement of the case, unless the person solicited receives, before or at the time of the solicitation, a written disclosure statement approved by the court, after notice and hearing, as containing adequate information. As under present law, determinations of value, by appraisal or otherwise, are not required if not needed to accomplish the purpose specified in subsection (a)(1).

Subsection (c) requires that the same disclosure statement be transmitted to each member of a class. It recognizes that the information needed for an informed judgment about the plan may differ among classes. A class whose rights under the plan center on a particular fund or asset would have no use for an extensive description of other matters that could not affect them.

Subsection (d) relieves the court of the need to follow any otherwise applicable Federal or state law in deter-

mining the adequacy of the information contained in the disclosure statement submitted for its approval. It authorizes an agency or official, Federal or state, charged with administering cognate laws so preempted to advise the court on the adequacy of proposed disclosure statement. But they are not authorized to appeal the court's decision.

Solicitations with respect to a plan do not involve just mere requests for opinions. Acceptance of the plan vitally affects creditors and shareholders, and most frequently the solicitation involves an offering of securities in exchange for claims or interests. The present bankruptcy statute [former title 11] has exempted such offerings under each of its chapters from the registration and disclosure requirements of the Securities Act of 1933 [15 U.S.C. 77a et seq.], an exemption also continued by section 1145(a)(2) of this title. The extension of the disclosure requirements to all chapter 11 cases justifies the coordinate extension of these exemptions. By the same token, no valid purpose is served not to exempt from the requirements of similar state laws in a matter under the exclusive jurisdiction of the Federal bankruptcy laws.

Subsection (e) exonerates any person who, in good faith and in compliance with this title, solicits or participates in the offer, issuance, sale or purchase, under the plan, of a security from any liability, on account of such solicitation or participation, for violation of any law, rule, or regulation governing the offer, issuance, sale, or purchase of securities. This exoneration is coordinate with the exemption from Federal or State registration or licensing requirements provided by section 1145 of this title.

In the nonpublic case, the court, when approving the disclosure statement, has before it the texts of the plan, a proposed disclosure document, and such other information the plan proponents and other interested parties may present at the hearing. In the final analysis the exoneration which subsection (e) grants must depend on the good faith of the plan proponents and of those who participate in the preparation of the disclosure statement and in the solicitation. Subsection (e) does not affect civil or criminal liability for defects and inadequacies that are beyond the limits of the exoneration that good faith provides.

Section 1125 applies to public companies as well, subject to the qualifications of subsection (f). In case of a public company no solicitations of acceptance is permitted unless authorized by the court upon or after approval of the plan pursuant to section 1128(c). In addition to the documents specified in subsection (b), subsection (f) requires transmission of the opinion and order of the court approving the plan and, if filed, the advisory report of the Securities and Exchange Commission or a summary thereof prepared by the Commission.

HOUSE REPORT NO. 95–595

This section is new. It is the heart of the consolidation of the various reorganization chapters found in current law. It requires disclosure before solicitation of acceptances of a plan or reorganization.

Subsection (a) contains two definitions. First, ''adequate information'' is defined to mean information of a kind, and insufficient detail, as far as is reasonably practical in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. Second, ''investor typical of holders of claims or interests of the relevant class'' is defined to mean an investor having a claim or interest of the relevant class, having such a relationship with the debtor as the holders of other claims or interests of the relevant class have, and having such ability to obtain information from sources other than the disclosure statement as holders of claims or interests of the relevant class have, and having such ability to obtain information from sources other than the disclosure statement as holders of claims or interests of the relevant class have. That is, the hypothetical investor against which the disclosure is measured must not be an insider if other members of the class are not insiders, and so on. In other words, the adequacy of disclosure is measured against the typical investor, not an extraordinary one.

The Supreme Court's rulemaking power will not extend to rulemaking that will prescribe what constitutes adequate information. That standard is a substantive standard. Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case, such as the cost of preparation of the statements, the need for relative speed in solicitation and confirmation, and, of course, the need for investor protection. There will be a balancing of interests in each case. In reorganization cases, there is frequently great uncertainty. Therefore the need for flexibility is greatest.

Subsection (b) is the operative subsection. It prohibits solicitation of acceptances or rejections of a plan after the commencement of the case unless, at the time of the solicitation or before, there is transmitted to the solicitee the plan or a summary of the plan, and a written disclosure statement approved by the court as containing adequate information. The subsection permits approval of the statement without the necessity of a valuation of the debtor or an appraisal of the debtor's assets. However, in some cases, a valuation or appraisal will be necessary to develop adequate information. The court will be able to determine what is necessary in light of the facts and circumstances of each particular case.

Subsection (c) requires that the same disclosure statement go to all members of a particular class, but permits different disclosure to different classes.

Subsection (d) excepts the disclosure statements from the requirements of the securities laws (such as section 14 of the 1934 Act [15 U.S.C. 78n] and section 5 of the 1933 Act [15 U.S.C. 77e]), and from similar State securities laws (blue sky laws, for example). The subsection permits an agency or official whose duty is to administer or enforce such laws (such as the Securities and Exchange Commission or State Corporation Commissioners) to appear and be heard on the issue of whether a disclosure statement contains adequate information, but the agencies and officials are not granted the right of appeal from an adverse determination in any capacity. They may join in an appeal by a true party in interest, however.

Subsection (e) is a safe harbor provision, and is necessary to make the exemption provided by subsection (d) effective. Without it, a creditor that solicited an acceptance or rejection in reliance on the court's approval of a disclosure statement would be potentially liable under antifraud sections designed to enforce the very sections of the securities laws from which subsection (d) excuses compliance. The subsection protects only persons that solicit in good faith and in compliance with the applicable provisions of the reorganization chapter. It provides protection from legal liability as well as from equitable liability based on an injunctive action by the SEC or other agency or official.

AMENDMENTS

1994—Subsec. (f). Pub. L. 103–394 added subsec. (f).

1984—Subsec. (a)(1). Pub. L. 98–353, § 509(a)(1), inserted '', but adequate information need not include such information about any other possible or proposed plan''.

Subsec. (a)(2)(B). Pub. L. 98–353, § 509(a)(2), inserted ''the'' after ''with''.

Subsec. (a)(2)(C). Pub. L. 98–353, § 509(a)(3), inserted ''of'' after ''holders''.

Subsec. (d). Pub. L. 98–353, § 509(b), inserted ''required under subsection (b) of this section'' and '', or otherwise seek review of,''.

Subsec. (e). Pub. L. 98–353, § 509(c), inserted ''acceptance or rejection of a plan'' after ''solicits'', and ''solicitation of acceptance or rejection of a plan or'' after ''governing''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 901, 1126, 1127, 1145 of this title; title 28 section 586.

§ 1126. Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2634; Pub. L. 98–353, title III, § 510, July 10, 1984, 98 Stat. 386.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1126 of the House amendment deletes section 1126(e) as contained in the House bill. Section 105 of the bill constitutes sufficient power in the court to designate exclusion of a creditor's claim on the basis of a conflict of interest. Section 1126(f) of the House amendment adopts a provision contained in section 1127(f) of the Senate bill indicating that a class that is not impaired under a plan is deemed to have accepted a plan and solicitation of acceptances from such class is not required.

SENATE REPORT NO. 95–989

Subsection (a) of this section permits the holder of a claim or interest allowed under section 502 to accept or reject a proposed plan of reorganization. The subsection also incorporates a provision now found in section 199 of chapter X [section 599 of former title 11] that authorizes the Secretary of the Treasury to accept or reject a plan on behalf of the United States when the United States is a creditor or equity security holder.

Subsection (b) governs acceptances and rejections of plans obtained before commencement of a reorganization for a nonpublic company. Paragraph (3) expressly states that subsection (b) does not apply to a public company.

Prepetition solicitation is a common practice under chapter XI [chapter 11 of former title 11] today, and chapter IX [chapter 9 of former title 11] current makes explicit provision for it. Section 1126(b) counts a prepetition acceptance or rejection toward the required amounts and number of acceptances only if the solicitation of the acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation. If there is not any such applicable law, rule, or regulation, then the acceptance or rejection is counted only if it was solicited after disclosure of adequate information, to the holder, as defined in section 1125(a)(1). This permits the court to ensure that the requirements of section 1125 are not avoided by prepetition solicitation.

Subsection (c) specifies the required amount and number of acceptances for a class of creditors. A class of creditors has accepted a plan if at least two-thirds in amount and more than one-half in number of the allowed claims of the class that are voted are cast in favor of the plan. The amount and number are computed on the basis of claims actually voted for or against the plan, not as under chapter X [chapter 10 of former title 11] on the basis of the allowed claims in the class. Subsection (f) excludes from all these calculations claims not voted in good faith, and claims procured or solicited not in good faith or not in accordance with the provisions of this title.

Subsection (c) requires that the same disclosure statement be transmitted to each member of a class. It recognizes that the information needed for an informed judgment about the plan may differ among classes. A class whose rights under the plan center on a particular fund or asset would have no use for an extensive description of other matters that could not affect them.

Subsection (d) relieves the court of the need to follow any otherwise applicable Federal or state law in determining the adequacy of the information contained in the disclosure statement submitted for its approval. It

authorizes an agency or official, Federal or state, charged with administering cognate laws so pre-empted to advise the court on the adequacy of proposed disclosure statement. But they are not authorized to appeal the court's decision.

Solicitations with respect to a plan do not involve just mere requests for opinions. Acceptance of the plan vitally affects creditors and shareholders, and most frequently the solicitation involves an offering of securities in exchange for claims or interests. The present Bankruptcy Act [former title 11] has exempted such offerings under each of its chapters from the registration and disclosure requirements of the Securities Act of 1933 [15 U.S.C. 77a et seq.], an exemption also continued by section 1145 of this title. The extension of the disclosure requirements to all chapter 11 cases is justified by the integration of the separate chapters into the single chapter 11. By the same token, no valid purpose is served by failing to provide exemption from the requirements of similar state laws in a matter under the exclusive jurisdiction of the Federal bankruptcy laws.

Under subsection (d), with respect to a class of equity securities, it is sufficient for acceptance of the plan if the amount of securities voting for the plan is at least two-thirds of the total actually voted.

Subsection (e) provides that no acceptances are required from any class whose claims or interests are unimpaired under the plan or in the order confirming the plan.

Subsection (g) provides that any class denied participation under the plan is conclusively deemed to have rejected the plan. There is obviously no need to submit a plan for a vote by a class that is to receive nothing. But under subsection (g) the excluded class is like a class that has not accepted, and is a dissenting class for purposes of confirmation under section 1130.

AMENDMENTS

1984—Subsec. (b)(2). Pub. L. 98–353, §510(a), substituted ''1125(a)'' for ''1125(a)(1)''.

Subsec. (d). Pub. L. 98–353, §510(b), inserted a comma after ''such interests''.

Subsec. (f). Pub. L. 98–353, §510(c), substituted '', and each holder of a claim or interest of such class, are conclusively presumed'' for ''is deemed'', ''solicitation'' for ''solicititation'', and ''interests'' for ''interest''.

Subsec. (g). Pub. L. 98–353, §510(d), substituted ''receive or retain any property'' for ''any payment or compensation''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 901, 946 of this title.

§ 1127. Modification of plan

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2635; Pub. L. 98–353, title III, §511, July 10, 1984, 98 Stat. 386.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1127(a) of the House amendment adopts a provision contained in the House bill permitting only the proponent of a plan to modify the plan and rejecting the alternative of open modification contained in the Senate amendment.

SENATE REPORT NO. 95–989

Under subsection (a) the proponent may file a proposal to modify a plan prior to confirmation. In the case of a public company the modifying proposal may be filed prior to approval.

Subsection (b) provides that a party in interest eligible to file a plan may file instead of a plan a proposal to modify a plan filed by another. Under subsection (c) a party in interest objecting to some feature of a plan may submit a proposal to modify the plan to meet the objection.

After a plan has been confirmed, but before its substantial consummation, a plan may be modified by leave of court, which subsection (d) provides shall be granted for good cause. Subsection (e) provides that a proposal to modify a plan is subject to the disclosure requirements of section 1125 and as provided in subsection (f). It provides that a creditor or stockholder who voted for or against a plan is deemed to have accepted or rejected the modifying proposal. But if the modification materially and adversely affects any of their interests, they must be afforded an opportunity to change their vote in accordance with the disclosure and solicitation requirements of section 1125.

Under subsection (g) a plan, if modified prior to confirmation, shall be confirmed if it meets the requirements of section 1130.

HOUSE REPORT NO. 95–595

Subsection (a) permits the proponent of a plan to modify it at any time before confirmation, subject, of course, to the requirements of sections 1122 and 1123, governing classification and contents of a plan. After the proponent of a plan files a modification with the court, the plan as modified becomes the plan, and is to be treated the same as an original plan.

Subsection (b) permits modification of a plan after confirmation under certain circumstances. The modification must be proposed before substantial consummation of the plan. The requirements of sections 1122 and 1123 continue to apply. The plan as modified under this subsection becomes the plan only if the court confirms the plan as modified under section 1129 and the circumstances warrant the modification.

Subsection (c) requires the proponent of a modification to comply with the disclosure provisions of section 1125. Of course, if the modification were sufficiently minor, the court might determine that additional disclosure was not required under the circumstances.

Subsection (d) simplifies modification procedure by deeming any creditor or equity security holder that has already accepted or rejected the plan to have accepted or rejected the modification, unless, within the time fixed by the court, the creditor or equity security holder changes this previous acceptance or rejection.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353, § 511(a), inserted ''of a plan'' after ''After the proponent'', and ''of such plan'' after ''modification''.

Subsec. (b). Pub. L. 98–353, § 511(b), substituted ''circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title'' for ''the court, after notice and a hearing, confirms such plan, as modified, under section 1129 of this title, and circumstances warrant such modification''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 901, 1129 of this title.

§ 1128. Confirmation hearing

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) A party in interest may object to confirmation of a plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2635.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

[Section 1129 (enacted as section 1128)] Subsection (a) requires that there be a hearing in every case on the confirmation of the plan. Notice is required.

Subsection (b) permits any party in interest to object to the confirmation of the plan. The Securities and Exchange Commission and indenture trustees, as parties in interest under section 1109, may object to confirmation of the plan.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 901 of this title; title 28 section 586.

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is im-

paired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2635; Pub. L. 98–353, title III, § 512, July 10, 1984, 98 Stat. 386; Pub. L. 99–554, title II, §§ 225, 283(v), Oct. 27, 1986, 100 Stat. 3102, 3118; Pub. L. 100–334, § 2(b), June 16, 1988, 102 Stat. 613; Pub. L. 103–394, title III, § 304(h)(7), title V, § 501(d)(32), Oct. 22, 1994, 108 Stat. 4134, 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1129 of the House amendment relates to confirmation of a plan in a case under chapter 11. Section 1129(a)(3) of the House amendment adopts the position taken in the Senate amendment and section 1129(a)(5) takes the position adopted in the House bill. Section 1129(a)(7) adopts the position taken in the House bill in order to insure that the dissenting members of an accepting class will receive at least what they would otherwise receive under the best interest of creditors test; it also requires that even the members of a class that has rejected the plan be protected by the best interest of creditors test for those rare cramdown cases where a class of creditors would receive more on liquidation than under reorganization of the debtor. Section 1129(a)(7)(C) is discussed in connection with section 1129(b) and section 1111(b). Section 1129(a)(8) of the House amendment adopts the provision taken in the House bill which permits confirmation of a plan as to a particular class without resort to the fair and equitable test if the class has accepted a plan or is unimpaired under the plan.

Section 1129(a)(9) represents a compromise between a similar provision contained in the House bill and the Senate amendment. Under subparagraph (A) claims entitled to priority under section 507(a)(1) or (2) are entitled to receive cash on the effective date of the plan

equal to the amount of the claim. Under subparagraph (B) claims entitled to priority under section 507(a)(3), (4), or (5), are entitled to receive deferred cash payments of a present value as of the effective date of the plan equal to the amount of the claims if the class has accepted the plan or cash payments on the effective date of the plan otherwise. Tax claims entitled to priority under section 507(a)(6) of different governmental units may not be contained in one class although all claims of one such unit may be combined and such unit may be required to take deferred cash payments over a period not to exceed 6 years after the date of assessment of the tax with the present value equal to the amount of the claim.

Section 1129(a)(10) is derived from section 1130(a)(12) of the Senate amendment.

Section 1129(b) is new. Together with section 1111(b) and section 1129(a)(7)(C), this section provides when a plan may be confirmed, notwithstanding the failure of an impaired class to accept the plan under section 1129(a)(8). Before discussing section 1129(b) an understanding of section 1111(b) is necessary. Section 1111(b)(1), the general rule that a secured claim is to be treated as a recourse claim in chapter 11 whether or not the claim is nonrecourse by agreement or applicable law. This preferred status for a nonrecourse loan terminates if the property securing the loan is sold under section 363 or is to be sold under the plan.

The preferred status also terminates if the class of which the secured claim is a part elects application of section 1111(b)(2). Section 1111(b)(2) provides that an allowed claim is a secured claim to the full extent the claim is allowed rather than to the extent of the collateral as under section 506(a). A class may elect application of paragraph (2) only if the security is not of inconsequential value and, if the creditor is a recourse creditor, the collateral is not sold under section 363 or to be sold under the plan. Sale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k) of the House amendment.

As previously noted, section 1129(b) sets forth a standard by which a plan may be confirmed notwithstanding the failure of an impaired class to accept the plan.

Paragraph (1) makes clear that this alternative confirmation standard, referred to as ''cram down,'' will be called into play only on the request of the proponent of the plan. Under this cramdown test, the court must confirm the plan if the plan does not discriminate unfairly, and is ''fair and equitable,'' with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. The requirement of the House bill that a plan not ''discriminate unfairly'' with respect to a class is included for clarity; the language in the House report interpreting that requirement, in the context of subordinated debentures, applies equally under the requirements of section 1129(b)(1) of the House amendment.

Although many of the factors interpreting ''fair and equitable'' are specified in paragraph (2), others, which were explicated in the description of section 1129(b) in the House report, were omitted from the House amendment to avoid statutory complexity and because they would undoubtedly be found by a court to be fundamental to ''fair and equitable'' treatment of a dissenting class. For example, a dissenting class should be assured that no senior class receives more than 100 percent of the amount of its claims. While that requirement was explicitly included in the House bill, the deletion is intended to be one of style and not one of substance.

Paragraph (2) provides guidelines for a court to determine whether a plan is fair and equitable with respect to a dissenting class. It must be emphasized that the fair and equitable requirement applies only with respect to dissenting classes. Therefore, unlike the fair and equitable rule contained in chapter X [chapter 10 of former title 11] and section 77 of the Bankruptcy Act [section 205 of former title 11] under section 1129(b)(2), senior accepting classes are permitted to give up value to junior classes as long as no dissenting intervening class receives less than the amount of its claims in full. If there is no dissenting intervening class and the only dissent is from a class junior to the class to which value have been given up, then the plan may still be fair and equitable with respect to the dissenting class, as long as no class senior to the dissenting class has received more than 100 percent of the amount of its claims.

Paragraph (2) contains three subparagraphs, each of which applies to a particular kind of class of claims or interests that is impaired and has not accepted the plan. Subparagraph (A) applies when a class of secured claims is impaired and has not accepted the plan. The provision applies whether or not section 1111(b) applies. The plan may be crammed down notwithstanding the dissent of a secured class only if the plan complies with clause (i), (ii), or (iii).

Clause (i) permits cramdown if the dissenting class of secured claims will retain its lien on the property whether the property is retained by the debtor or transferred. It should be noted that the lien secures the allowed secured claim held by such holder. The meaning of ''allowed secured claim'' will vary depending on whether section 1111(b)(2) applies to such class.

If section 1111(b)(2) applies then the ''electing'' class is entitled to have the entire allowed amount of the debt related to such property secured by a lien even if the value of the collateral is less than the amount of the debt. In addition, the plan must provide for the holder to receive, on account of the allowed secured claims, payments, either present or deferred, of a principal face amount equal to the amount of the debt and of a present value equal to the value of the collateral.

For example, if a creditor loaned $15,000,000 to a debtor secured by real property worth $18,000,000 and the value of the real property had dropped to $12,000,000 by the date when the debtor commenced a proceeding under chapter 11, the plan could be confirmed notwithstanding the dissent of the creditor as long as the lien remains on the collateral to secure a $15,000,000 debt, the face amount of present or extended payments to be made to the creditor under the plan is at least $15,000,000, and the present value of the present or deferred payments is not less than $12,000,000. The House report accompanying the House bill described what is meant by ''present value''.

Clause (ii) is self explanatory. Clause (iii) requires the court to confirm the plan notwithstanding the dissent of the electing secured class if the plan provides for the realization by the secured class of the indubitable equivalents of the secured claims. The standard of ''indubitable equivalents'' is taken from *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935) (Learned Hand, Jr.).

Abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence, as would a lien on similar collateral. However, present cash payments less than the secured claim would not satisfy the standard because the creditor is deprived of an opportunity to gain from a future increase in value of the collateral. Unsecured notes as to the secured claim or equity securities of the debtor would not be the indubitable equivalent. With respect to an oversecured creditor, the secured claim will never exceed the allowed claim.

Although the same language applies, a different result pertains with respect to a class of secured claims to which section 1111(b)(2) does not apply. This will apply to all claims secured by a right of setoff. The court must confirm the plan notwithstanding the dissent of such a class of secured claims if any of three alternative requirements is met. Under clause (i) the plan may be confirmed if the class retains a right of setoff or a lien securing the allowed secured claims of the class and the holders will receive payments of a present value equal to the allowed amount of their secured claims. Contrary to electing classes of secured creditors who retain a lien under subparagraph (A)(i)(I)

to the extent of the entire claims secured by such lien, nonelecting creditors retain a lien on collateral only to the extent of their allowed secured claims and not to the extent of any deficiency, and such secured creditors must receive present or deferred payments with a present value equal to the allowed secured claim, which in turn is only the equivalent of the value of the collateral under section 506(a).

Any deficiency claim of a nonelecting class of secured claims is treated as an unsecured claim and is not provided for under subparagraph (A). The plan may be confirmed under clause (ii) if the plan proposes to sell the property free and clear of the secured party's lien as long as the lien will attach to the proceeds and will receive treatment under clause (i) or (iii). Clause (iii) permits confirmation if the plan provides for the realization by the dissenting nonelecting class of secured claims of the indubitable equivalent of the secured claims of such class.

Contrary to an ''electing'' class to which section 1111(b)(2) applies, the nonelecting class need not be protected with respect to any future appreciation in value of the collateral since the secured claim of such a class is never undersecured by reason of section 506(a). Thus the lien secures only the value of interest of such creditor in the collateral. To the extent deferred payments exceed that amount, they represent interest. In the event of a subsequent default, the portion of the face amount of deferred payments representing unaccrued interest will not be secured by the lien.

Subparagraph (B) applies to a dissenting class of unsecured claims. The court must confirm the plan notwithstanding the dissent of a class of impaired unsecured claims if the plan provides for such claims to receive property with a present value equal to the allowed amount of the claims. Unsecured claims may receive any kind of ''property,'' which is used in its broadest sense, as long as the present value of the property given to the holders of unsecured claims is equal to the allowed amount of the claims. Some kinds of property, such as securities, may require difficult valuations by the court; in such circumstances the court need only determine that there is a reasonable likelihood that the property given the dissenting class of impaired unsecured claims equals the present value of such allowed claims.

Alternatively, under clause (ii), the court must confirm the plan if the plan provides that holders of any claims or interests junior to the interests of the dissenting class of impaired unsecured claims will not receive any property under the plan on account of such junior claims or interests. As long as senior creditors have not been paid more than in full, and classes of equal claims are being treated so that the dissenting class of impaired unsecured claims is not being discriminated against unfairly, the plan may be confirmed if the impaired class of unsecured claims receives less than 100 cents on the dollar (or nothing at all) as long as no class junior to the dissenting class receives anything at all. Such an impaired dissenting class may not prevent confirmation of a plan by objection merely because a senior class has elected to give up value to a junior class that is higher in priority than the impaired dissenting class of unsecured claims as long as the above safeguards are met.

Subparagraph (C) applies to a dissenting class of impaired interests. Such interests may include the interests of general or limited partners in a partnership, the interests of a sole proprietor in a proprietorship, or the interest of common or preferred stockholders in a corporation. If the holders of such interests are entitled to a fixed liquidation preference or fixed redemption price on account of such interests then the plan may be confirmed notwithstanding the dissent of such class of interests as long as it provides the holders property of a present value equal to the greatest of the fixed redemption price, or the value of such interests. In the event there is no fixed liquidation preference or redemption price, then the plan may be confirmed as long as it provides the holders of such interests property of a present value equal to the value of such interests. If the interests are ''under water'' then they will be valueless and the plan may be confirmed notwithstanding the dissent of that class of interests even if the plan provides that the holders of such interests will not receive any property on account of such interests.

Alternatively, under clause (ii), the court must confirm the plan notwithstanding the dissent of a class of interests if the plan provides that holders of any interests junior to the dissenting class of interests will not receive or retain any property on account of such junior interests. Clearly, if there are no junior interests junior to the class of dissenting interests, then the condition of clause (ii) is satisfied. The safeguards that no claim or interest receive more than 100 percent of the allowed amount of such claim or interest and that no class be discriminated against unfairly will insure that the plan is fair and equitable with respect to the dissenting class of interests.

Except to the extent of the treatment of secured claims under subparagraph (A) of this statement, the House report remains an accurate description of confirmation of section 1129(b). Contrary to the example contained in the Senate report, a senior class will not be able to give up value to a junior class over the dissent of an intervening class unless the intervening class receives the full amount, as opposed to value, of its claims or interests.

One last point deserves explanation with respect to the admittedly complex subject of confirmation. Section 1129(a)(7)(C) in effect exempts secured creditors making an election under section 1111(b)(2) from application of the best interest of creditors test. In the absence of an election the amount such creditors receive in a plan of liquidation would be the value of their collateral plus any amount recovered on the deficiency in the case of a recourse loan. However, under section 1111(b)(2), the creditors are given an allowed secured claim to the full extent the claim is allowed and have no unsecured deficiency. Since section 1129(b)(2)(A) makes clear that an electing class need receive payments of a present value only equal to the value of the collateral, it is conceivable that under such a ''cram down'' the electing creditors would receive nothing with respect to their deficiency. The advantage to the electing creditors is that they have a lien securing the full amount of the allowed claim so that if the value of the collateral increases after the case is closed, the deferred payments will be secured claims. Thus it is both reasonable and necessary to exempt such electing class from application of section 1129(a)(7) as a logical consequence of permitting election under section 1111(b)(2).

Section 1131 of the Senate amendment is deleted as unnecessary in light of the protection given a secured creditor under section 1129(b) of the House amendment.

Payment of taxes in reorganizations: Under the provisions of section 1141 as revised by the House amendment, an individual in reorganization under chapter 11 will not be discharged from any debt, including prepetition tax liabilities, which are nondischargeable under section 523. Thus, an individual debtor whose plan of reorganization is confirmed under chapter 11 will remain liable for prepetition priority taxes, as defined in section 507, and for tax liabilities which receive no priority but are nondischargeable under section 523, including no return, late return, and fraud liabilities.

In the case of a partnership or a corporation in reorganization under chapter 11 of title 11, section 1141(d)(1) of the House amendment adopts a provision limiting the taxes that must be provided for in a plan before a plan can be confirmed to taxes which receive priority under section 507. In addition, the House amendment makes dischargeable, in effect, tax liabilities attributable to no return, late return, or fraud situations. The amendment thus does not adopt a shareholder continuity test such as was contained in section 1141(d)(2)(A)(iii) of the Senate amendment. However, the House amendment amends section 1106, relating to duties of the trustee, to require the trustee to furnish, on request of a tax authority and without personal li-

ability, information available to the trustee concerning potential prepetition tax liabilities for unfiled returns of the debtor. Depending on the condition of the debtor's books and records, this information may include schedules and files available to the business. The House amendment also does not prohibit a tax authority from disallowing any tax benefit claimed after the reorganization if the item originated in a deduction, credit, or other item improperly reported before the reorganization occurred. It may also be appropriate for the Congress to consider in the future imposing civil or criminal liability on corporate officers for preparing a false or fraudulent tax return. The House amendment also contemplates that the Internal Revenue Service will monitor the relief from liabilities under this provision and advise the Congress if, and to the extent, any significant tax abuse may be resulting from the provision.

Medium of payment of taxes: Federal, State, and local taxes incurred during the administration period of the estate, and during the ''gap'' period in an involuntary case, are to be paid solely in cash. Taxes relating to third priority wages are to be paid, under the general rules, in cash on the effective date of the plan, if the class has not accepted the plan, in an amount equal to the allowed amount of the claim. If the class has accepted the plan, the taxes must be paid in cash but the payments must be made at the time the wages are paid which may be paid in deferred periodic installments having a value, on the effective date of the plan, equal to the allowed amount of the tax claims. Prepetition taxes entitled to sixth priority under section 507(a)(6) also must be paid in cash, but the plan may also permit the debtor whether a corporation, partnership, or an individual, to pay the allowed taxes in installments over a period not to exceed 6 years following the date on which the tax authority assesses the tax liability, provided the value of the deferred payments representing principal and interest, as of the effective date of the plan, equals the allowed amount of the tax claim.

The House amendment also modifies the provisions of both bills dealing with the time when tax liabilities of a debtor in reorganization may be assessed by the tax authority. The House amendment follows the Senate amendment in deleting the limitation in present law under which a priority tax assessed after a reorganization plan is confirmed must be assessed within 1 year after the date of the filing of the petition. The House amendment specifies broadly that after the bankruptcy court determines the liability of the estate for a prepetition tax or for an administration period tax, the governmental unit may thereafter assess the tax against the estate, debtor, or successor to the debtor. The party to be assessed will, of course, depend on whether the case is under chapter 7, 11, or 13, whether the debtor is an individual, partnership, or a corporation, and whether the court is determining an individual debtor's personal liability for a nondischargeable tax. Assessment of the tax may only be made, however, within the limits of otherwise applicable law, such as the statute of limitations under the tax law.

Tax avoidance purpose: The House bill provided that no reorganization plan may be approved if the principal purpose of the plan is the avoidance of taxes. The Senate amendment modified the rule so that the bankruptcy court need make a determination of tax avoidance purpose only if it is asked to do so by the appropriate tax authority. Under the Senate amendment, if the tax authority does not request the bankruptcy court to rule on the purpose of the plan, the tax authority would not be barred from later asserting a tax avoidance motive with respect to allowance of a deduction or other tax benefit claimed after the reorganization. The House amendment adopts the substance of the Senate amendment, but does not provide a basis by which a tax authority may collaterally attack confirmation of a plan of reorganization other than under section 1144.

SENATE REPORT NO. 95–989

[Section 1130 (enacted as section 1129)] Subsection (a) enumerates the requirement governing confirmation of a plan. The court is required to confirm a plan if and only if all of the requirements are met.

Paragraph (1) requires that the plan comply with the applicable provisions of chapter 11, such as sections 1122 and 1123, governing classification and contents of plan.

Paragraph (2) requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.

Paragraph (3) requires that the plan have been proposed in good faith, and not by any means forbidden by law.

Paragraph (4) is derived from section 221 of chapter X [section 621 of former title 11]. It requires that any payment made or promised by the proponent, the debtor, or person issuing securities or acquiring property under the plan, for services or for costs and expenses in, or in connection with the case, or in connection with the plan and incident to the case, be disclosed to the court. In addition, any payment made before confirmation must have been reasonable, and any payment to be fixed after confirmation must be subject to the approval of the court as reasonable.

Paragraph (5) is also derived from section 221 of chapter X [section 621 of former title 11]. It requires the plan to disclose the identity and affiliations of any individual proposed to serve, after confirmation, as a director, officer, or voting trustee of the reorganized debtor. The appointment to or continuance in one of these offices by the individual must be consistent with the interests of creditors and equity security holders and with public policy. The plan must also disclose the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation to be paid to the insider.

Paragraph (6) permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation of the plan has approved any rate change provided for in the plan. As an alternative, the rate change may be conditioned on such approval.

Paragraph (7) provides that in the case of a public company the court shall confirm the plan if it finds the plan to be fair and equitable and the plan either (1) has been accepted by classes of claims or interests as provided in section 1126, or (2), if not so accepted, satisfies the requirements of subsection (b) of this section.

Paragraphs (8) and (9) apply only in nonpublic cases. Paragraph (8) does not apply the fair and equitable standards in two situations. The first occurs if there is unanimous consent of all affected holders of claims and interests. It is also sufficient for purposes of confirmation if each holder of a claim or interest receives or retains consideration of a value, as of the effective date of the plan, that is not less than each would have or receive if the debtor were liquidated under chapter 7 of this title. This standard adapts the test of ''best interest of creditors'' as interpreted by the courts under chapter XI [chapter 11 of former title 11]. It is given broader application in chapter 11 of this title since a plan under chapter 11 may affect not only unsecured claims but secured claims and stock as well.

Under paragraph (9)(A), if a class of claims or interests has not accepted the plan, the court will confirm the plan if, for the dissenting class and any class of equal rank, the negotiated plan provides in value no less than under a plan that is fair and equitable. Such review and determination are not required for any other classes that accepted the plan.

Paragraph (9)(A) would permit a senior creditor to adjust his participation for the benefit of stockholders. In such a case, junior creditors, who have not been satisfied in full, may not object if, absent the ''give-up'', they are receiving all that a fair and equitable plan would give them. To illustrate, suppose the estate is valued at $1.5 million and claims and stock are:

	Claims and stock (millions)	*Equity (millions)*
(1) Senior debt	$1.2	$1.2
(2) Junior debt	.5	.3
(3) Stock	(1)	–
Total	1.7	1.5

[1] No value.

Under the plan, the senior creditor gives up $100,000 in value for the benefit of stockholders as follows:

	Millions
(1) Senior debt	$1.1
(2) Junior debt	.3
(3) Stock	.1
Total	1.5

If the junior creditors dissent, the court may nevertheless confirm the plan since under the fair and equitable standard they had an equity of only $300,000 and the allocation to equity security holders did not affect them.

Paragraph (9)(A) provides a special alternative with respect to secured claims. A plan may be confirmed against a dissenting class of secured claims if the plan or order of confirmation provides for the realization of their security (1) by the retention of the property subject to such security; (2) by a sale of the property and transfer of the claim to the proceeds of sale if the secured creditors were permitted to bid at the sale and set off against the purchase price up to the allowed amount of their claims; or (3) by such other method that will assure them the realization of the indubitable equivalent of the allowed amount of their secured claims. The indubitable equivalent language is intended to follow the strict approach taken by Judge Learned Hand in *In Re Murel Holding Corp.* 75, F.2d 941 (2nd Cir. 1935).

Paragraph (9)(B) provides that, if a class of claims or interests is excluded from participation under the plan, the court may nevertheless confirm the plan if it determines that no class on a parity with or junior to such participates under the plan. In the previous illustration, no confirmation would be permitted if the negotiated plan would grant a participation to stockholders but nothing for junior creditors. As noted elsewhere, by reason of section 1126(g), an excluded class is a dissenting class under section 1130.

Paragraph (10) states that, to be confirmed, the plan must provide that each holder of a claim under section 507 will receive property, as therein noted, of a value equal to the allowed amount of the claim. There are two exceptions: (A) The holder thereof may agree to a different settlement in part or in whole; (B) where a debtor's business is reorganized under chapter 11, this provision requires that taxes entitled to priority (including administrative claims or taxes) must be paid in cash not later than 120 days after the plan is confirmed, unless the Secretary of the Treasury agrees to other terms or kinds of payment. The bill, as introduced, required full payment in cash within 60 days after the plan is confirmed.

Paragraph (11) requires a determination regarding feasibility of the plan. It is a slight elaboration of the law that has developed in the application of the word ''feasible'' in Chapter X of the present Act [chapter 10 of former title 11].

Paragraph (12) requires that at least one class must accept the plan, but any claims or interests held by insiders are not to be included for purposes of determining the number and amount of acceptances.

Subsection (b) provides that if, in the case of a public company, the plan meets the requirements of subsection (a) (except paragraphs (8) and (9) which do not apply to such a company), the court is to confirm the plan if the plan or the order of confirmation provides adequate protection for the realization of the value of the claims or interests of each class not accepting the plan. The intent is to incorporate inclusively, as a guide to the meaning of subsection (a) the provisions of section 216(7) ([former] 11 U.S.C. 616(7)) with respect to claims and section 216(8) ([former] 11 U.S.C. 616(8)) with respect to equity security interests.

Under subsection (c) the court may confirm only one plan, unless the order of confirmation has been revoked under section 1144. If the requirements for confirmation are met with respect to more than one plan, the court shall consider the preferences of creditors and stockholders in deciding which plan to confirm.

Subsection (d) provides that the bankruptcy court may not confirm a plan of reorganization if its principal purpose is the avoidance of taxes or the avoidance of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). This rules modifies a similar provision of present law (section 269 of the Bankruptcy Act [section 669 of former title 11]).

HOUSE REPORT NO. 95–595

Paragraph (7) [of subsec. (a)] incorporates the former ''best interest of creditors'' test found in chapter 11, but spells out precisely what is intended. With respect to each class, the holders of the claims or interests of that class must receive or retain under the plan on account of those claims or interest property of a value, as of the effective date of the plan, that is not less than the amount that they would so receive or retain if the debtor were liquidated under chapter 7 on the effective date of the plan.

In order to determine the hypothetical distribution in a liquidation, the court will have to consider the various subordination provisions of proposed 11 U.S.C. 510, 726(a)(3), 726(a)(4), and the postponement provisions of proposed 11 U.S.C. 724. Also applicable in appropriate cases will be the rules governing partnership distributions under proposed 11 U.S.C. 723, and distributions of community property under proposed 11 U.S.C. 726(c). Under subparagraph (A), a particular holder is permitted to accept less than liquidation value, but his acceptance does not bind the class.

Property under subparagraph (B) may include securities of the debtor. Thus, the provision will apply in cases in which the plan is confirmed under proposed 11 U.S.C. 1129(b).

Paragraph (8) is central to the confirmation standards. It requires that each class either have accepted the plan or be unimpaired.

Paragraph (9) augments the requirements of paragraph (8) by requiring payment of each priority claim in full. It permits payments over time and payment other than in cash, but payment in securities is not intended to be permitted without consent of the priority claimant even if the class has consented. It also permits a particular claimant to accept less than full payment.

Subsection (b) permits the court to confirm a plan notwithstanding failure of compliance with paragraph (8) of subsection (a). The plan must comply with all other paragraphs of subsection (a), including paragraph (9). This subsection contains the so-called cramdown. It requires simply that the plan meet certain standards of fairness to dissenting creditors or equity security holders. The general principle of the subsection permits confirmation notwithstanding nonacceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule. The dissenting class must be paid in full before any junior class may share under the plan. If it is paid in full, then junior classes may share. Treatment of classes of secured creditors is slightly different because they do not fall in the priority ladder, but the principle is the same.

Specifically, the court may confirm a plan over the objection of a class of secured claims if the members of that class are unimpaired or if they are to receive under the plan property of a value equal to the allowed amount of their secured claims, as determined under proposed 11 U.S.C. 506(a). The property is to be valued as of the effective date of the plan, thus recognizing the time-value of money. As used throughout this sub-

section, ''property'' includes both tangible and intangible property, such as a security of the debtor or a successor to the debtor under a reorganization plan.

The court may confirm over the dissent of a class of unsecured claims, including priority claims, only if the members of the class are unimpaired, if they will receive under the plan property of a value equal to the allowed amount of their unsecured claims, or if no class junior will share under the plan. That is, if the class is impaired, then they must be paid in full or, if paid less than in full, then no class junior may receive anything under the plan. This codifies the absolute priority rule from the dissenting class on down.

With respect to classes of equity, the court may confirm over a dissent if the members of the class are unimpaired, if they receive their liquidation preference or redemption rights, if any, or if no class junior shares under the plan. This, too, is a codification of the absolute priority rule with respect to equity. If a partnership agreement subordinates limited partners to general partners to any degree, then the general principles of paragraph (3) of this subsection would apply to prevent the general partners from being squeezed out.

One requirement applies generally to all classes before the court may confirm under this subsection. No class may be paid more than in full.

The partial codification of the absolute priority rule here is not intended to deprive senior creditor of compensation for being required to take securities in the reorganized debtor that are of an equal priority with the securities offered to a junior class. Under current law, seniors are entitled to compensation for their loss of priority, and the increased risk put upon them by being required to give up their priority will be reflected in a lower value of the securities given to them than the value of comparable securities given to juniors that have not lost a priority position.

Finally, the proponent must request use of this subsection. The court may not confirm notwithstanding nonacceptance unless the proponent requests and the court may then confirm only if subsection (b) is complied with. The court may not rewrite the plan.

A more detailed explanation follows:

The test to be applied by the court is set forth in the various paragraphs of section 1129(b). The elements of the test are new[,] departing from both the absolute priority rule and the best interests of creditors tests found under the Bankruptcy Act [former title 11]. The court is not permitted to alter the terms of the plan. It must merely decide whether the plan complies with the requirements of section 1129(b). If so, the plan is confirmed, if not the plan is denied confirmation.

The procedure followed is simple. The court examines each class of claims or interests designated under section 1123(a)(1) to see if the requirements of section 1129(b) are met. If the class is a class of secured claims, then paragraph (1) contains two tests that must be complied with in order for confirmation to occur. First, under subparagraph (A), the court must be able to find that the consideration given under the plan on account of the secured claim does not exceed the allowed amount of the claim. This condition is not prescribed as a matter of law under section 1129(a), because if the secured claim is compensated in securities of the debtor, a valuation of the business would be necessary to determine the value of the consideration. While section 1129(a) does not contemplate a valuation of the debtor's business, such a valuation will almost always be required under section 1129(b) in order to determine the value of the consideration to be distributed under the plan. Once the valuation is performed, it becomes a simple matter to impose the criterion that no claim will be paid more than in full.

Application of the test under subparagraph (A) also requires a valuation of the consideration ''as of the effective date of the plan''. This contemplates a present value analysis that will discount value to be received in the future; of course, if the interest rate paid is equivalent to the discount rate used, the present value and face future value will be identical. On the other hand, if no interest is proposed to be paid, the present value will be less than the face future value. For example, consider an allowed secured claim of $1,000 in a class by itself. One plan could propose to pay $1,000 on account of this claim as of the effective date of the plan. Another plan could propose to give a note with a $1,000 face amount due five years after the effective date of the plan on account of this claim. A third plan could propose to give a note in a face amount of $1,000 due five years from the effective date of the plan plus six percent annual interest commencing on the effective date of the plan on account of this claim. The first plan clearly meets the requirements of subparagraph (A) because the amount received on account of the second claim has an equivalent present value as of the effective date of the plan equal to the allowed amount of such claim.

The second plan also meets the requirements of subparagraph (A) because the present value of the five years note as of the effective date of the plan will never exceed the allowed amount of the secured claim; the higher the discount rate, the less present value the note will have. Whether the third plan complies with subparagraph (A) depends on whether the discount rate is less than six percent. Normally, the interest rate used in the plan will be prima facie evidence of the discount rate because the interest rate will reflect an arms length determination of the risk of the security involved and feasibility considerations will tend to understate interest payments. If the court found the discount rate to be greater than or equal to the interest rate used in the plan, then subparagraph (A) would be complied with because the value of the note as of the effective date of the plan would not exceed the allowed amount of the second claim. If, however, the court found the discount rate to be less than the interest rate proposed under the plan, then the present value of the note would exceed $1,000 and the plan would fail of confirmation. On the other hand, it is important to recognize that the future principal amount of a note in excess of the allowed amount of a secured claim may have a present value less than such allowed amount, if the interest rate under the plan is correspondingly less than the discount rate.

Even if the requirements of subparagraph (A) are complied with, the class of secured claims must satisfy one of the three clauses in paragraph (B) in order to pass muster. It is sufficient for confirmation if the class has accepted the plan, or if the claims of the class are unimpaired, or if each holder of a secured claim in the class will receive property of a value as of the effective date of the plan equal to the allowed amount of such claim (unless he has agreed to accept less). It is important to note that under section 506(a), the allowed amount of the secured claim will not include any extent to which the amount of such claim exceeds the value of the property securing such claim. Thus, instead of focusing on secured creditors or unsecured creditors, the statute focuses on secured claims and unsecured claims.

After the court has applied paragraph (1) to each class of secured claims, it then applies paragraph (2) to each class of unsecured claims. Again two separate components must be tested. Subparagraph (A) is identical with the test under section 1129(b)(1)(A) insofar as the holder of an unsecured claim is not permitted to receive property of a value as of the effective date of the plan on account of such claim that is greater than the allowed amount of such claim. In addition, subparagraph (B) requires compliance with one of four conditions. The conditions in clauses (i)–(iii) mirror the conditions of acceptance unimpairment, or full value found in connection with secured claims in section 1129(b)(1)(B).

The condition contained in section 1129(b)(2)(B)(iv) provides another basis for confirming the plan with respect to a class of unsecured claims. It will be of greatest use when an impaired class that has not accepted the plan is to receive less than full value under the plan. The plan may be confirmed under clause (iv) in

those circumstances if the class is not unfairly discriminated against with respect to equal classes and if junior classes will receive nothing under the plan. The second criterion is the easier to understand. It is designed to prevent a senior class from giving up consideration to a junior class unless every intermediate class consents, is paid in full, or is unimpaired. This gives intermediate creditors a great deal of leverage in negotiating with senior or secured creditors who wish to have a plan that gives value to equity. One aspect of this test that is not obvious is that whether one class is senior, equal, or junior to another class is relative and not absolute. Thus from the perspective of trade creditors holding unsecured claims, claims of senior and subordinated debentures may be entitled to share on an equal basis with the trade claims. However, from the perspective of the senior unsecured debt, the subordinated debentures are junior.

This point illustrates the lack of precision in the first criterion which demands that a class not be unfairly discriminated against with respect to equal classes. From the perspective of unsecured trade claims, there is no unfair discrimination as long as the total consideration given all other classes of equal rank does not exceed the amount that would result from an exact aliquot distribution. Thus if trade creditors, senior debt, and subordinate debt are each owed $100 and the plan proposes to pay the trade debt $15, the senior debt $30, and the junior debt $0, the plan would not unfairly discriminate against the trade debt nor would any other allocation of consideration under the plan between the senior and junior debt be unfair as to the trade debt as long as the aggregate consideration is less than $30. The senior debt could take $25 and give up $5 to the junior debt and the trade debt would have no cause to complain because as far as it is concerned the junior debt is an equal class.

However, in this latter case the senior debt would have been unfairly discriminated against because the trade debt was being unfairly over-compensated; of course the plan would also fail unless the senior debt was unimpaired, received full value, or accepted the plan, because from its perspective a junior class received property under the plan. Application of the test from the perspective of senior debt is best illustrated by the plan that proposes to pay trade debt $15, senior debt $25, and junior debt $0. Here the senior debt is being unfairly discriminated against with respect to the equal trade debt even though the trade debt receives less than the senior debt. The discrimination arises from the fact that the senior debt is entitled to the rights of the junior debt which in this example entitle the senior debt to share on a 2:1 basis with the trade debt.

Finally, it is necessary to interpret the first criterion from the perspective of subordinated debt. The junior debt is subrogated to the rights of senior debt once the senior debt is paid in full. Thus, while the plan that pays trade debt $15, senior debt $25, and junior debt $0 is not unfairly discriminatory against the junior debt, a plan that proposes to pay trade debt $55, senior debt $100, and junior debt $1, would be unfairly discriminatory. In order to avoid discriminatory treatment against the junior debt, at least $10 would have to be received by such debt under those facts.

The criterion of unfair discrimination is not derived from the fair and equitable rule or from the best interests of creditors test. Rather it preserves just treatment of a dissenting class from the class's own perspective.

If each class of secured claims satisfies the requirements of section 1129(b)(1) and each class of unsecured claims satisfies the requirements of section 1129(b)(2), then the court must still see if each class of interests satisfies section 1129(b)(3) before the plan may be confirmed. Again, two separate criteria must be met. Under subparagraph (A) if the interest entitles the holder thereof to a fixed liquidation preference or if such interest may be redeemed at a fixed price, then the holder of such interest must not receive under the plan on account of such interest property of a value as of the effective date of the plan greater than the greater of these two values of the interest. Preferred stock would be an example of an interest likely to have liquidation preference or redemption price.

If an interest such as most common stock or the interest of a general partnership has neither a fixed liquidation preference nor a fixed redemption price, then the criterion in subparagraph (A) is automatically fulfilled. In addition subparagraph (B) contains five clauses that impose alternative conditions of which at least one must be satisfied in order to warrant confirmation. The first two clauses contain requirements of acceptance or unimpairment similar to the first two clauses in paragraphs (1)(B) and (2)(B). Clause (iii) is similar to the unimpairment test contained in section 1124(3)(B), except that it will apply to cover the issuance securities of the debtor of a value as of the effective date of the plan equal to the greater of any fixed liquidation preference or redemption price. The fourth clause allows confirmation if junior interests are not compensated under the plan and the fifth clause allows confirmation if there are no junior interests. These clauses recognized that as long as senior classes receive no more than full payment, the objection of a junior class will not defeat confirmation unless a class junior to it is receiving value under the plan and the objecting class is impaired. While a determination of impairment may be made under section 1124(3)(B)(iii) without a precise valuation of the business when common stock is clearly under water, once section 1129(b) is used, a more detailed valuation is a necessary byproduct. Thus, if no property is given to a holder of an interest under the plan, the interest should be clearly worthless in order to find unimpairment under section 1124(3)(B)(iii) and section 1129(a)(8); otherwise, since a class of interests receiving no property is deemed to object under section 1126(g), the more precise valuation of section 1129(b) should be used.

If all of the requirements of section 1129(b) are complied with, then the court may confirm the plan subject to other limitations such as those found in section 1129(a) and (d).

Subsection (c) of section 1129 governs confirmation when more than one plan meets the requirements of the section. The court must consider the preferences of creditors and equity security holders in determining which plan to confirm.

Subsection (d) requires the court to deny confirmation if the principal purpose of the plan is the avoidance of taxes (through use of sections 346 and 1146, and applicable provisions of State law or the Internal Revenue Code [title 26] governing bankruptcy reorganizations) or the avoidance of section 5 of the Securities Act of 1933 [15 U.S.C. 77e] (through use of section 1145).

REFERENCES IN TEXT

Section 5 of the Securities Act of 1933, referred to in subsec. (d), is classified to section 77e of Title 15, Commerce and Trade.

AMENDMENTS

1994—Subsec. (a)(4). Pub. L. 103–394, §501(d)(32)(A)(i), substituted period for semicolon at end.

Subsec. (a)(9)(B). Pub. L. 103–394, §304(h)(7)(i), substituted '', 507(a)(6), or 507(a)(7)'' for ''or 507(a)(6)''.

Subsec. (a)(9)(C). Pub. L. 103–394, §304(h)(7)(ii), substituted ''507(a)(8)'' for ''507(a)(7)''.

Subsec. (a)(12). Pub. L. 103–394, §501(d)(32)(A)(ii), inserted ''of title 28'' after ''section 1930''.

Subsec. (d). Pub. L. 103–394, §501(d)(32)(B), struck out ''(15 U.S.C. 77e)'' after ''Act of 1933''.

1988—Subsec. (a)(13). Pub. L. 100–334 added par. (13).

1986—Subsec. (a)(7). Pub. L. 99–554, §283(v)(1), struck out ''of'' after ''to''.

Subsec. (a)(9)(B). Pub. L. 99–554, §283(v)(2), inserted reference to section 507(a)(6).

Subsec. (a)(9)(C). Pub. L. 99–554, §283(v)(3), substituted ''507(a)(7)'' for ''507(a)(6)''.

Subsec. (a)(12). Pub. L. 99–554, § 225, added par. (12).

1984—Subsec. (a)(1), (2). Pub. L. 98–353, § 512(a)(1), (2), substituted ''title'' for ''chapter''.

Subsec. (a)(4). Pub. L. 98–353, § 512(a)(3), amended par. (4) generally. Prior to amendment, par. (4) read as follows: ''(A) Any payment made or promised by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, has been disclosed to the court; and (B)(i) any such payment made before confirmation of the plan is reasonable; or (ii) if such payment is to be fixed after confirmation of the plan, such payment is subject to the approval of the court as reasonable.''

Subsec. (a)(5)(A)(ii). Pub. L. 98–353, § 512(a)(4), substituted ''; and'' for the period at the end.

Subsec. (a)(5)(B). Pub. L. 98–353, § 512(a)(5), substituted ''the'' for ''The''.

Subsec. (a)(6). Pub. L. 98–353, § 512(a)(6), inserted ''governmental'' after ''Any''.

Subsec. (a)(7). Pub. L. 98–353, § 512(a)(7)(A), substituted ''of each impaired class of claims or interests'' for ''each class''.

Subsec. (a)(7)(B). Pub. L. 98–353, § 512(a)(7)(B), substituted ''holder's'' for ''creditor's''.

Subsec. (a)(8). Pub. L. 98–353, § 512(a)(8), inserted ''of claims or interests'' after ''each class''.

Subsec. (a)(10). Pub. L. 98–353, § 512(a)(9), substituted ''If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider'' for ''At least one class of claims has accepted the plan, determined without including any acceptance of the plan by any insider holding a claim of such class''.

Subsec. (b)(2)(A)(i)(I), (ii). Pub. L. 98–353, § 512(b)(1), substituted ''liens'' for ''lien'' wherever appearing.

Subsec. (b)(2)(B)(ii). Pub. L. 98–353, § 512(b)(2), inserted ''under the plan'' after ''retain''.

Subsec. (b)(2)(C)(i). Pub. L. 98–353, § 512(b)(3), substituted ''interest'' for ''claim'', and ''or the value'' for ''and the value''.

Subsec. (d). Pub. L. 98–353, § 512(c), inserted ''the application of'' and provisions requiring that in any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–334 effective June 16, 1988, but not applicable to cases commenced under this title before that date, see section 4 of Pub. L. 100–334, set out as an Effective Date note under section 1114 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 225 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 347, 524, 901, 1110, 1112, 1114, 1123, 1127, 1146, 1161, 1168, 1173 of this title.

SUBCHAPTER III—POSTCONFIRMATION MATTERS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in section 103 of this title.

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2638; Pub. L. 98–353, title III, § 513, July 10, 1984, 98 Stat. 387.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1141(d) of the House amendment is derived from a comparable provision contained in the Senate amendment. However, section 1141(d)(2) of the House amendment is derived from the House bill as preferable to the Senate amendment. It is necessary for a corporation or partnership undergoing reorganization to be able to present its creditors with a fixed list of liabilities upon which the creditors or third parties can make intelligent decisions. Retaining an exception for discharge with respect to nondischargeable taxes would leave an undesirable uncertainty surrounding reorganizations that is unacceptable. Section 1141(d)(3) is derived from the Senate amendment. Section 1141(d)(4) is likewise derived from the Senate amendment.

SENATE REPORT NO. 95–989

Subsection (a) of this section makes the provisions of a confirmed plan binding on the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of the creditor, equity security holder, or partner is impaired under the plan and whether or not he has accepted the plan. There are two exceptions, enumerated in paragraph (2) and (3) of subsection (d).

Unless the plan or the order confirming the plan provides otherwise, the confirmation of a plan vests all of the property of the estate in the debtor and releases it from all claims and interests of creditors, equity security holders and general partners.

Subsection (d) contains the discharge for a reorganized debtor. Paragraph (1) specifies that the confirmation of a plan discharges the debtor from any debt that arose before the date of the order for relief unless the plan or the order confirming the plan provides otherwise. The discharge is effective against those claims whether or not proof of the claim is filed (or deemed filed), and whether or not the claim is allowed. The discharge also terminates all rights and interests of equity security holders and general partners provided for by the plan. The paragraph permits the plan or the order confirming the plan to provide otherwise, and excepts certain debts from the discharge as provided in paragraphs (2) and (3).

Paragraph (2) of subsection (d) makes clear what taxes remain nondischargeable in the case of a corporate debtor emerging from a reorganization under chapter 11. Nondischargeable taxes in such a reorganization are the priority taxes (under section 507) and tax payments which come due during and after the proceeding under a deferred or part-payment agreement which the debtor had entered into with the tax authority before the bankruptcy proceedings began. On the other hand, a corporation which is taken over by its creditors through a plan of reorganization will not continue to be liable for nonpriority taxes arising from the corporation's prepetition fraud, failure to file a return, or failure to file a timely return, since the creditors who take over the reorganized company should not bear the burden of acts for which the creditors were not at fault.

Paragraph (3) specifies that the debtor is not discharged by the confirmation of a plan if the plan is a liquidating plan and if the debtor would be denied discharge in a liquidation case under section 727. Specifically, if all or substantially all of the distribution under the plan is of all or substantially all of the property of the estate or the proceeds of it, if the business, if any, of the debtor does not continue, and if the debtor would be denied a discharge under section 727 (such as if the debtor were not an individual or if he had committed an act that would lead to a denial of discharge), the chapter 11 discharge is not granted.

Paragraph (4) authorizes the court to approve a waiver of discharge by the debtor.

HOUSE REPORT NO. 95–595

Paragraph (2) [of subsec. (d)] makes applicable to an individual debtor the general exceptions to discharge that are enumerated in section 523(a) of the bankruptcy code.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353, § 513(a), substituted ''any creditor, equity security holder, or general partner in'' for ''any creditor or equity security holder of, or general partner in,''.

Subsec. (c). Pub. L. 98–353, § 513(b), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: ''After confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, of equity security holders, and of general partners in the debtor, except as otherwise provided in the plan or in the order confirming the plan.''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 348, 523, 524, 727, 1112 of this title; title 12 section 1715z–1a.

§ 1142. Implementation of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2639; Pub. L. 98–353, title III, § 514(a), (c), (d), July 10, 1984, 98 Stat. 387.)

AMENDMENTS

1984—Pub. L. 98–353, § 514(a), substituted ''Implementation'' for ''Execution'' in section catchline.

Subsec. (a). Pub. L. 98–353, § 514(c), struck out the comma after ''shall carry out the plan''.

Subsec. (b). Pub. L. 98–353, § 514(d), inserted ''a'' after ''by''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 524, 901 of this title.

§ 1143. Distribution

If a plan requires presentment or surrender of a security or the performance of any other act as a condition to participation in distribution under the plan, such action shall be taken not later than five years after the date of the entry of the order of confirmation. Any entity that

has not within such time presented or surrendered such entity's security or taken any such other action that the plan requires may not participate in distribution under the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2639.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 1143 fixes a 5-year limitation on presentment or surrender of securities or the performance of any other act that is a condition to participation in distribution under the plan. The 5 years runs from the date of the entry of the order of confirmation. Any entity that does not take the appropriate action with the 5-year period is barred from participation in the distribution under the plan.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 901 of this title.

§ 1144. Revocation of an order of confirmation

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall—

(1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

(2) revoke the discharge of the debtor.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2639; Pub. L. 98–353, title III, § 515, July 10, 1984, 98 Stat. 387.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

If an order of confirmation was procured by fraud, then the court may revoke the order on request of a party in interest if the request is made before 180 days after the date of the entry of the order of confirmation. The order revoking the order of confirmation must revoke the discharge of the debtor, and contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation.

AMENDMENTS

1984—Pub. L. 98–353 inserted ''if and only'' after ''revoke such order''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 524, 901, 1112, 1129 of this title.

§ 1145. Exemption from securities laws

(a) Except with respect to an entity that is an underwriter as defined in subsection (b) of this section, section 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security do not apply to—

(1) the offer or sale under a plan of a security of the debtor, of an affiliate participating in a joint plan with the debtor, or of a successor to the debtor under the plan—

(A) in exchange for a claim against, an interest in, or a claim for an administrative expense in the case concerning, the debtor or such affiliate; or

(B) principally in such exchange and partly for cash or property;

(2) the offer of a security through any warrant, option, right to subscribe, or conversion privilege that was sold in the manner specified in paragraph (1) of this subsection, or the sale of a security upon the exercise of such a warrant, option, right, or privilege;

(3) the offer or sale, other than under a plan, of a security of an issuer other than the debtor or an affiliate, if—

(A) such security was owned by the debtor on the date of the filing of the petition;

(B) the issuer of such security is—

(i) required to file reports under section 13 or 15(d) of the Securities Exchange Act of 1934; and

(ii) in compliance with the disclosure and reporting provision of such applicable section; and

(C) such offer or sale is of securities that do not exceed—

(i) during the two-year period immediately following the date of the filing of the petition, four percent of the securities of such class outstanding on such date; and

(ii) during any 180-day period following such two-year period, one percent of the securities outstanding at the beginning of such 180-day period; or

(4) a transaction by a stockbroker in a security that is executed after a transaction of a kind specified in paragraph (1) or (2) of this subsection in such security and before the expiration of 40 days after the first date on which such security was bona fide offered to the public by the issuer or by or through an underwriter, if such stockbroker provides, at the time of or before such transaction by such stockbroker, a disclosure statement approved under section 1125 of this title, and, if the court orders, information supplementing such disclosure statement.

(b)(1) Except as provided in paragraph (2) of this subsection and except with respect to ordinary trading transactions of an entity that is not an issuer, an entity is an underwriter under section 2(11) of the Securities Act of 1933,[1] if such entity—

(A) purchases a claim against, interest in, or claim for an administrative expense in the case concerning, the debtor, if such purchase is with a view to distribution of any security received or to be received in exchange for such a claim or interest;

(B) offers to sell securities offered or sold under the plan for the holders of such securities;

(C) offers to buy securities offered or sold under the plan from the holders of such securities, if such offer to buy is—

[1] See References in Text note below.

(i) with a view to distribution of such securities; and

(ii) under an agreement made in connection with the plan, with the consummation of the plan, or with the offer or sale of securities under the plan; or

(D) is an issuer, as used in such section 2(11), with respect to such securities.

(2) An entity is not an underwriter under section 2(11) of the Securities Act of 1933[1] or under paragraph (1) of this subsection with respect to an agreement that provides only for—

(A)(i) the matching or combining of fractional interests in securities offered or sold under the plan into whole interests; or

(ii) the purchase or sale of such fractional interests from or to entities receiving such fractional interests under the plan; or

(B) the purchase or sale for such entities of such fractional or whole interests as are necessary to adjust for any remaining fractional interests after such matching.

(3) An entity other than an entity of the kind specified in paragraph (1) of this subsection is not an underwriter under section 2(11) of the Securities Act of 1933[1] with respect to any securities offered or sold to such entity in the manner specified in subsection (a)(1) of this section.

(c) An offer or sale of securities of the kind and in the manner specified under subsection (a)(1) of this section is deemed to be a public offering.

(d) The Trust Indenture Act of 1939 does not apply to a note issued under the plan that matures not later than one year after the effective date of the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2639; Pub. L. 98–353, title III, § 516, July 10, 1984, 98 Stat. 387; Pub. L. 103–394, title V, § 501(d)(33), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1145 of the House amendment deletes a provision contained in section 1145(a)(1) of the House bill in favor of a more adequate provision contained in section 364(f) of the House amendment. In addition, section 1145(d) has been added to indicate that the Trust Indenture Act [15 U.S.C. 77aaa et seq.] does not apply to a commercial note issued under a plan, if the note matures not later than 1 year after the effective date of the plan. Some commercial notes receive such an exemption under 304(a)(4) of the Trust Indenture Act of 1939 (15 U.S.C. § 77ddd(a)(4)) and others may receive protection by incorporation by reference into the Trust Indenture Act of securities exempt under section 3a(3), (7), (9), or (10) of the Securities Act of 1933 [15 U.S.C. 77c(a)(3), (7), (9), (10)].

In light of the amendments made to the Securities Act of 1933 [15 U.S.C. 77a et seq.] in title III of the House amendment to H.R. 8200, a specific exemption from the Trust Indenture Act [15 U.S.C. 77aaa et seq.] is required in order to create certainty regarding plans of reorganization. Section 1145(d) is not intended to imply that commercial notes issued under a plan that matures more than 1 year after the effective date of the plan are automatically covered by the Trust Indenture Act of 1939 since such notes may fall within another exemption thereto.

One other point with respect to Section 1145 deserves comment. Section 1145(a)(3) grants a debtor in possession or trustee in chapter 11 an extremely narrow portfolio security exemption from section 5 of the Securities Act of 1933 [15 U.S.C. 77e] or any comparable State law. The provision was considered by Congress and adopted after much study. The exemption is reasonable and is more restrictive than comparable provisions under the Securities Act [15 U.S.C. 77a et seq.] relating to the estates of decedents. Subsequent to passage of H.R. 8200 by the House of Representatives, the Securities and Exchange Commission promulgated Rule 148 to treat with this problem under existing law. Members of Congress received opinions from attorneys indicating dissatisfaction with the Commission's rule although the rule has been amended, the ultimate limitation of 1 percent promulgated by the Commission is wholly unacceptable.

The Commission rule would permit a trustee or debtor in possession to distribute securities at the rate of 1 percent every 6 months. Section 1145(a)(3) permits the trustee to distribute 4 percent of the securities during the 2-year period immediately following the date of the filing of the petition. In addition, the security must be of a reporting company under section 13 of the Securities and Exchange Act of 1934 [15 U.S.C. 78m], and must be in compliance with all applicable requirements for the continuing of trading in the security on the date that the trustee offers or sells the security.

With these safeguards the trustee or debtor in possession should be able to distribute 4 percent of the securities of a class at any time during the 2-year period immediately following the date of the filing of the petition in the interests of expediting bankruptcy administration. The same rationale that applies in expeditiously terminating decedents' estates applies no less to an estate under title 11.

SENATE REPORT NO. 95–989

This section, derived from similar provisions found in sections 264, 393, and 518 of the Bankruptcy Act [sections 664, 793, and 918 of former title 11], provides a limited exemption from the securities laws for securities issued under a plan of reorganization and for certain other securities. Subsection (a) exempts from the requirements of section 5 of the Securities Act of 1933 [15 U.S.C. 77e] and from any State or local law requiring registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security, the offer or sale of certain securities.

Paragraph (1) of subsection (a) exempts the offer or sale under section 364 of any security that is not an equity security or convertible into an equity security. This paragraph is designed to facilitate the issuance of certificates of indebtedness, and should be read in light of the amendment made in section 306 of title III to section 3(a)(7) of the 1933 act [15 U.S.C. 77c(a)(7)].

Paragraph (2) of subsection (a) exempts the offer or sale of any security of the debtor, a successor to the debtor, or an affiliate in a joint plan, distributed under a plan if such security is exchanged in principal part for securities of the debtor or for allowed claims or administrative expenses. This exemption is carried over from present law, except as to administrative claims, but is limited to prevent distribution of securities to other than claim holders or equity security holders of the debtor or the estate.

Paragraph (3) of subsection (a) exempts the offer or sale of any security that arises from the exercise of a subscription right or from the exercise of a conversion privilege when such subscription right or conversion privilege was issued under a plan. This exemption is necessary in order to enhance the marketability of subscription rights or conversion privileges, including warrants, offered or sold under a plan. This is present law.

Paragraph (4) of subsection (a) exempts sales of portfolio securities, excluding securities of the debtor or its affiliate, owned by the debtor on the date of the filing of the petition. The purpose of this exemption is to allow the debtor or trustee to sell or distribute, without allowing manipulation schemes, restricted portfolio securities held or acquired by the debtor. Subparagraph (B) of section 1145(a)(4) limits the exemption

to securities of a company that is required to file reports under section 13 of the Securities Act [15 U.S.C. 78m] and that is in compliance with all requirements for the continuance of trading those securities. This limitation effectively prevents selling into the market ''cats and dogs'' of a nonreporting company. Subparagraph (C) places a limitation on the amount of restricted securities that may be distributed. During the case, the trustee may sell up to 4 percent of each class of restricted securities at any time during the first 2 years and 1 percent during any 180-day period thereafter. This relaxation of the resale rules for debtors in holding restricted securities is similar to but less extensive than the relaxation in SEC Rule 114(c)(3)(v) for the estates of deceased holders of securities.

Paragraph (5) contains an exemption for brokers and dealers (stockbrokers, as defined in title 11) akin to the exemption provided by section 4(3)(A) of the Securities Act of 1933 [15 U.S.C. 77d(3)(A)]. Instead of being required to supply a prospectus, however, the stockbroker is required to supply the approved disclosure statement, and if the court orders, information supplementing the disclosure statement. Under present law, the stockholder is not required to supply anything.

Subsection (b) is new. The subsection should be read in light of the amendment in section 306 of title III to the 1933 act [15 U.S.C. 77c(a)(7), (9), (10)]. It specifies the standards under which a creditor, equity security holder, or other entity acquiring securities under the plan may resell them. The Securities Act places limitations on sales by underwriters. This subsection defines who is an underwriter, and thus restricted, and who is free to resell. Paragraph (1) enumerates real underwriters that participate in a classical underwriting. A person is an underwriter if he purchases a claim against, interest in, or claim for an administrative expense in the case concerning, the debtor, with a view to distribution or interest. This provision covers the purchase of a certificate of indebtedness issued under proposed 11 U.S.C. 364 and purchased from the debtor, if the purchase of the certificate was with a view to distribution.

A person is also an underwriter if he offers to sell securities offered or sold under the plan for the holders of such securities, or offers to buy securities offered or sold under the plan from the holders of such securities, if the offer to buy is with a view to distribution of the securities and under an agreement made in connection with the plan, with the consummation of the plan or with the offer or sale of securities under the plan. Finally, a person is an underwriter if he is an issuer, as used in section 2(11) of the Securities Act of 1933 [15 U.S.C. 77b(11)].

Paragraph (2) of subsection (b) exempts from the definition of underwriter any entity to the extent that any agreement that would bring the entity under the definition in paragraph (1) provides only for the matching combination of fractional interests in the covered securities or the purchase or sale of fractional interests. This paragraph and paragraph (1) are modeled after former rule 133 of the Securities and Exchange Commission.

Paragraph (3) specifies that if an entity is not an underwriter under the provisions of paragraph (1), as limited by paragraph (2), then the entity is not an underwriter for the purposes of the Securities Act of 1933 [15 U.S.C. 77a et seq.] with respect to the covered securities, that is, those offered or sold in an exempt transaction specified in subsection (a)(2). This makes clear that the current definition of underwriter in section 2(11) of the Securities Act of 1933 [15 U.S.C. 77b(11)] does not apply to such a creditor. The definition in that section technically applies to any person that purchases securities with ''a view to distribution.'' If literally applied, it would prevent any creditor in a bankruptcy case from selling securities received without filing a registration statement or finding another exemption.

Subsection (b) is a first run transaction exemption and does not exempt a creditor that, for example, some years later becomes an underwriter by reacquiring securities originally issued under a plan.

Subsection (c) makes an offer or sale of securities under the plan in an exempt transaction (as specified in subsection (a)(2)) a public offering, in order to prevent characterization of the distribution as a ''private placement'' which would result in restrictions, under rule 144 of the SEC, on the resale of the securities.

REFERENCES IN TEXT

Section 5 of the Securities Act of 1933, referred to in subsec. (a), is classified to section 77e of Title 15, Commerce and Trade.

Sections 13 and 15(d) of the Securities Exchange Act of 1934, referred to in subsec. (a)(3)(B)(i), are classified to sections 78m and 78*o*(d), respectively, of Title 15, Commerce and Trade.

Section 2(11) of the Securities Act of 1933, referred to in subsec. (b), was redesignated section 2(a)(11) of the Act by Pub. L. 104–290, title I, §106(a)(1), Oct. 11, 1996, 110 Stat. 3424, and is classified to section 77b(a)(11) of Title 15, Commerce and Trade.

The Trust Indenture Act of 1939, referred to in subsec. (d), is title III of act May 27, 1933, ch. 38, as added Aug. 3, 1939, ch. 411, 53 Stat. 1149, as amended, which is classified generally to subchapter III (§77aaa et seq.) of chapter 2A of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 77aaa of Title 15 and Tables.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394, §501(d)(33)(A), in introductory provisions struck out ''(15 U.S.C. 77e)'' after ''Act of 1933'' and substituted ''do not apply'' for ''does not apply'' and in par. (3)(B)(i) struck out ''(15 U.S.C. 78m or 78*o*(d))'' after ''Act of 1934''.

Subsec. (b)(1). Pub. L. 103–394, §501(d)(33)(B), struck out ''(15 U.S.C. 77b(11))'' after ''Act of 1933''.

Subsec. (d). Pub. L. 103–394, §501(d)(33)(C), struck out ''(15 U.S.C. 77aaa et seq.)'' after ''Act of 1939''.

1984—Subsec. (a)(3)(B)(i). Pub. L. 98–353, §516(a)(1), inserted ''or 15(d)'' after ''13'', and ''or 78*o*(d)'' after ''78m''.

Subsec. (a)(3)(B)(ii). Pub. L. 98–353, §516(a)(2), amended cl. (ii) generally. Prior to amendment, cl. (ii) read as follows: ''in compliance with all applicable requirements for the continuance of trading in such security on the date of such offer or sale; and''.

Subsec. (a)(4). Pub. L. 98–353, §516(a)(3), substituted ''stockbroker'' for ''stockholder'' in two places.

Subsec. (b)(1). Pub. L. 98–353, §516(b)(1), inserted ''and except with respect to ordinary trading transactions of an entity that is not an issuer''.

Subsec. (b)(1)(C). Pub. L. 98–353, §516(b)(2), substituted ''from'' for ''for''.

Subsec. (b)(2)(A)(i). Pub. L. 98–353, §516(b)(3), substituted ''or combining'' for ''combination''.

Subsec. (b)(2)(A)(ii). Pub. L. 98–353, §516(b)(4), substituted ''from or to'' for ''among''.

Subsec. (d). Pub. L. 98–353, §516(c), struck out ''commercial'' before ''note''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 364, 901 of this title.

§ 1146. Special tax provisions

(a) For the purposes of any State or local law imposing a tax on or measured by income, the

taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 706 of this title.

(b) The trustee shall make a State or local tax return of income for the estate of an individual debtor in a case under this chapter for each taxable period after the order for relief under this chapter during which the case is pending.

(c) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

(d) The court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of—

(1) the date on which such governmental unit responds to the request under this subsection; or

(2) 270 days after such request.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641; Pub. L. 98–353, title III, § 517, July 10, 1984, 98 Stat. 388.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1146 of the House amendment represents a compromise between the House bill and Senate amendment.

Special tax provisions: reorganization: The House bill provided rules on the effect of bankruptcy on the taxable year of the debtor and on tax return filing requirements for State and local taxes only. The House bill also exempted from State or local stamp taxes the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan. The House bill also authorized the bankruptcy court to declare the tax effects of a reorganization plan after the proponent of the plan had requested a ruling from State or local tax authority and either had received an unfavorable ruling or the tax authority had not issued a ruling within 270 days.

The Senate amendment deleted the rules concerning the taxable years of the debtor and tax return filing requirements since the Federal rules were to be considered in the next Congress. It broadened the rule exempting transfers of securities to include Federal stamp or similar taxes, if any. In addition, the Senate amendment deleted the provision which permitted the bankruptcy court to determine the tax effects of a plan.

The House amendment retains the State and local rules in the House bill with one modification. Under the House amendment, the power of the bankruptcy court to declare the tax effects of the plan is limited to issues of law and not to questions of fact such as the allowance of specific deductions. Thus, the bankruptcy court could declare whether the reorganization qualified for taxfree status under State or local tax rules, but it could not declare the dollar amount of any tax attributes that survive the reorganization.

SENATE REPORT NO. 95–989

Section 1146 provides special tax rules applicable to Title 11 reorganizations. Subsection (a) provides that the taxable period of an individual debtor terminates on the date of the order for relief, unless the case has been converted into a reorganization from a liquidation proceeding.

Subsection (b) requires the trustee of the estate of an individual debtor in a reorganization to file a tax return for each taxable period while the case is pending after the order for relief. For corporations in chapter 11, the trustee is required to file the tax returns due while the case is pending (sec. 346(c)(2)).

Subsection (c) exempts from Federal, State, or local stamp taxes the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan. This subsection is derived from section 267 of the present Bankruptcy Act [section 667 of former title 11].

Subsection (d) permits the court to authorize the proponent of a reorganization plan to request from the Internal Revenue Service (or State or local tax authority) an advance ruling on the tax effects of the proposed plan. If a ruling is not obtained within 270 days after the request was made, or if a ruling is obtained but the proponent of the plan disagrees with the ruling, the bankruptcy court may resolve the dispute and determine the tax effects of the proposed plan.

Subsection (e) provides that prepetition taxes which are nondischargeable in a reorganization, and all taxes arising during the administration period of the case, may be assessed and collected from the debtor or the debtor's successor in a reorganization (see sec. 505(c) of the bill).

HOUSE REPORT NO. 95–595

Section 1146 of title 11 specifies five subsections which embody special tax provisions that apply in a case under chapter 11 of title 11. Subsection (a) indicates that the tax year of an individual debtor terminates on the date of the order for relief under chapter 11. Termination of the taxable year of the debtor commences the tax period of the estate. If the case was converted from chapter 7 of title 11 then the estate is created as a separate taxable entity dating from the order for relief under chapter 7. If multiple conversion of the case occurs, then the estate is treated as a separate taxable entity on the date of the order for relief under the first chapter under which the estate is a separate taxable entity.

Subsection (d) permits the court to authorize the proponent of a plan to request a taxing authority to declare the tax effects of such plan. In the event of an actual controversy, the court may declare the tax effects of the plan of reorganization at any time after the earlier of action by such taxing authority or 270 days after the request. Such a declaration, unless appealed, becomes a final judgment and binds any tax authority that was requested by the proponent to determine the tax effects of the plan.

AMENDMENTS

1984—Subsec. (c). Pub. L. 98–353, § 517(a), struck out ''State or local'' before ''law imposing a stamp tax''.

Subsec. (d)(1). Pub. L. 98–353, § 517(b), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 346, 348 of this title; title 28 section 2201.

SUBCHAPTER IV—RAILROAD REORGANIZATION

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 103, 1113 of this title; title 45 sections 915, 1017.

§ 1161. Inapplicability of other sections

Sections 341, 343, 1102(a)(1), 1104, 1105, 1107, 1129(a)(7), and 1129(c) of this title do not apply in a case concerning a railroad.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section makes inapplicable sections of the bill which are either inappropriate in railroad reorganizations, or relate to matters which are otherwise dealt with in subchapter IV.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 103 of this title.

§ 1162. Definition

In this subchapter, ''Board'' means the ''Surface Transportation Board''.

(Added Pub. L. 104–88, title III, § 302(1), Dec. 29, 1995, 109 Stat. 943.)

PRIOR PROVISIONS

A prior section 1162, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641, defined ''Commission'', prior to repeal by Pub. L. 104–88, title III, § 302(1), Dec. 29, 1995, 109 Stat. 943.

EFFECTIVE DATE

Section effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as a note under section 701 of Title 49, Transportation.

§ 1163. Appointment of trustee

As soon as practicable after the order for relief the Secretary of Transportation shall submit a list of five disinterested persons that are qualified and willing to serve as trustees in the case. The United States trustee shall appoint one of such persons to serve as trustee in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641; Pub. L. 99–554, title II, § 226, Oct. 27, 1986, 100 Stat. 3102.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1163 of the House amendment represents a compromise between the House bill and Senate amendment with respect to the appointment of a trustee in a railroad reorganization. As soon as practicable after the order for relief, the Secretary of Transportation is required to submit a list of five disinterested persons who are qualified to serve as trustee and the court will than appoint one trustee from the list to serve as trustee in the case.

The House amendment deletes section 1163 of the Senate amendment in order to cover intrastate railroads in a case under subchapter IV of chapter 11. The bill does not confer jurisdiction on the Interstate Commerce Commission with respect to intrastate railroads.

SENATE REPORT NO. 95–989

[Section 1166 (enacted as section 1163)] Requires the court to appoint a trustee in every case. Since the trustee may employ whatever help he needs, multiple trusteeships are unnecessary and add to the cost of administration. The present requirement of section 77(c)(1) [section 205(c)(1) of former title 11] that the trustee be approved by the Interstate Commerce Commission is unnecessary, since the trustee will be selected either from the panel established under section 606(f) of title 28, or someone certified by the Director of the Administrative Office of the United States Courts as qualified to become a member of that panel.

HOUSE REPORT NO. 95–595

[Section 1162] This section [enacted as section 1163] requires the appointment of an independent trustee in a railroad reorganization case. The court may appoint one or more disinterested persons to serve as trustee in the case.

AMENDMENTS

1986—Pub. L. 99–554 amended section generally, substituting ''relief the Secretary'' for ''relief, the Secretary'' and ''The United States trustee shall appoint'' for ''The court shall appoint''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 322, 546, 1104 of this title.

§ 1164. Right to be heard

The Board, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor may raise and may appear and be heard on any issue in a case under this chapter, but may not appeal from any judgment, order, or decree entered in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641; Pub. L. 104–88, title III, § 302(2), Dec. 29, 1995, 109 Stat. 943.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1164 of the Senate amendment is deleted as a matter to be left to the Rules of Bankruptcy Procedure. It is anticipated that the rules will require a petition in a railroad reorganization to be filed with the Interstate Commerce Commission and the Secretary of Transportation in a case concerning an interstate railroad.

Section 1164 of the House amendment is derived from section 1163 of the House bill. The section makes clear that the Interstate Commerce Commission, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor may raise and appear and be heard on any issue in a case under subchapter IV of chapter 11, but may not appeal from any judgment, order, or decree in the case. As under section 1109 of title 11, such intervening parties are not parties in interest.

HOUSE REPORT NO. 95–595

[Section 1163] This section [enacted as section 1164] gives the same right to raise, and appear and be heard on, any issue in a railroad reorganization case to the Interstate Commerce Commission, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor as is given to the SEC and indenture trustees under section 1109 in ordinary reorganization cases. The right of appeal is denied the ICC, the Department of Transportation, and State and local regulatory agencies, the same as it is denied the SEC.

AMENDMENTS

1995—Pub. L. 104–88 substituted ''Board'' for ''Commission''.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

§ 1165. Protection of the public interest

In applying sections 1166, 1167, 1169, 1170, 1171, 1172, 1173, and 1174 of this title, the court and the trustee shall consider the public interest in addition to the interests of the debtor, creditors, and equity security holders.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1165 of the House amendment represents a modification of sections 1165 and 1167 of the Senate amendment requiring the court and the trustee to consider the broad, general public interest in addition to the interests of the debtor, creditors, and equity security holders in applying specific sections of the subchapter.

SENATE REPORT NO. 95–989

Section 1165 requires the court, in consideration of the relief to be granted upon the filing of an involuntary petition, to take into account the ''public interest'' in the preservation of the debtor's rail service. This is an important factor in railroad reorganization, which distinguishes them from other business reorganizations. Hence, this section modifies the provisions in sections 303 and 305 that govern generally when the business of a debtor may continue to operate, when relief under the Act sought should be granted, and when the petition should be dismissed.

Section 1167 [enacted as section 1165] imposes on the trustee the obligations, in addition to his other duties and responsibilities, to take into account the ''public interest'' in the preservation of the debtor's rail service.

§ 1166. Effect of subtitle IV of title 49 and of Federal, State, or local regulations

Except with respect to abandonment under section 1170 of this title, or merger, modification of the financial structure of the debtor, or issuance or sale of securities under a plan, the trustee and the debtor are subject to the provisions of subtitle IV of title 49 that are applicable to railroads, and the trustee is subject to orders of any Federal, State, or local regulatory body to the same extent as the debtor would be if a petition commencing the case under this chapter had not been filed, but—

(1) any such order that would require the expenditure, or the incurring of an obligation for the expenditure, of money from the estate is not effective unless approved by the court; and

(2) the provisions of this chapter are subject to section 601(b) of the Regional Rail Reorganization Act of 1973.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2642; Pub. L. 97–449, §5(a)(2), Jan. 12, 1983, 96 Stat. 2442; Pub. L. 98–353, title III, §518, July 10, 1984, 98 Stat. 388; Pub. L. 103–394, title V, §501(d)(34), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1166 of the House amendment is derived from sections 1164 and 1165 of the House bill. An alternative proposal contained in section 1168(1) of the Senate bill is rejected as violative of the principle of equal treatment of all creditors under title 11.

SENATE REPORT NO. 95–989

Section 1168 [enacted as section 1166] makes the trustee subject to the Interstate Commerce Act [49 U.S.C. 10101 et seq.] and to lawful orders of the Interstate Commerce Commission, the U.S. Department of Transportation, and State and regulatory bodies. The approval of the court is required, however, if the order requires the expenditure of money or the incurring of an expenditure other than the payment of certain interline accounts. The limitation of ''lawful orders'' of State commissions to those involving ''safety, location of tracks, and terminal facilities,'' which is contained in present section 77(c)(2) [section 205(c)(2) of former title 11], is eliminated.

Subsection (1) further provides that the debtor must pay in cash all amounts owed other carriers for current balances owed for interline freight, passenger and per diem, including incentive per diem, for periods both prior and subsequent to the filing of the petition, without the necessity of court approval.

Subsection (2) makes the provisions of the chapter subject to section 601(b) of the Regional Rail Reorganization Act [45 U.S.C. 791(b)], which excludes the Interstate Commerce Commission from any participation in the reorganization of certain northeast railroads that have transferred their rail properties to Consolidated Rail Corporation (Conrail).

HOUSE REPORT NO. 95–595

Section 1164 [enacted as section 1166] makes the debtor railroad subject to the provisions of the Interstate Commerce Act [49 U.S.C. 10101 et seq.] that are applicable to railroads, and the trustee subject to the orders of the Interstate Commerce Commission to the same extent as the debtor would have been if the case had not been commenced. There are several exceptions. The section does not apply with respect to abandonment of rail lines, which is provided for under section 1169, or with respect to merger under a plan, modification of the financial structure of the debtor by reason of the plan, or the issuance or sale of securities under a plan. Further, the orders of the ICC are not effective if the order would require the expenditure or the incurring of an obligation for the expenditure of money from the estate, unless approved by the court, and the provisions of this chapter are subject to section 601(b) of the Regional Rail Reorganization Act of 1973 [45 U.S.C. 791(b)].

[Section 1165 (enacted as section 1166)] The same rules apply with respect to Federal, State, or local regulations. The trustee is subject to the orders of a Federal, State, or local regulatory body to the same extent as the debtor would be if the case had not been commenced. However, any order that would require the expenditure, or the incurring of an obligation for the expenditure, of money is not effective under [until] approved by the court.

REFERENCES IN TEXT

Section 601(b) of the Regional Rail Reorganization Act of 1973, referred to in par. (2), is classified to section 791(b) of Title 45, Railroads.

AMENDMENTS

1994—Par. (2). Pub. L. 103–394 struck out ''(45 U.S.C. 791(b))'' after ''Act of 1973''.

1984—Pub. L. 98–353 directed substitution of ''subtitle IV of title 49'' for ''the Interstate Commerce Act (49 U.S.C. 1 et seq.)'', which substitution had previously been made by Pub. L. 97–449.

1983—Pub. L. 97–449 substituted ''subtitle IV of title 49'' for ''Interstate Commerce Act'' in section catchline, and ''subtitle IV of title 49'' for ''the Interstate Commerce Act (49 U.S.C. 1 et seq.)'' in text.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced

under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1165 of this title; title 28 section 959.

§ 1167. Collective bargaining agreements

Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2642; Pub. L. 103–394, title V, § 501(d)(35), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 1176 [enacted as section 1167] is derived from present section 77(n) [section 205(n) of former title 11]. It provides that notwithstanding the general section governing the rejection of executory contracts (section 365), neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act [45 U.S.C. 151 et seq.], except in accordance with section 6 of that Act [45 U.S.C. 156]. As reported by the subcommittee this section provided that wages and salaries of rail employees could not be affected by the trustee, but that work rules could be rejected by the trustee. The reorganization court was given the authority to review the trustee's decisions and to settle any disputes arising from the rejection. This provision was withdrawn by the full committee, and hearings will be conducted next year by the Human Resources Committee in the area of rail labor contracts and the trustee's ability to reject them in a bankruptcy situation.

HOUSE REPORT NO. 95–595

Section 1167 is derived from present section 77(n) [section 205(n) of former title 11]. It provides that notwithstanding the general section governing the rejection of executory contracts (section 365), neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act [45 U.S.C. 151 et seq.], except in accordance with section 6 of that Act [45 U.S.C. 156]. The subject of railway labor is too delicate and has too long a history for this code to upset established relationships. The balance has been struck over the years. This provision continues that balance unchanged.

REFERENCES IN TEXT

The Railway Labor Act, referred to in text, is act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§ 151 et seq.) of Title 45, Railroads. Section 6 of the Act is classified to section 156 of Title 45. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

AMENDMENTS

1994—Pub. L. 103–394 struck out ''(45 U.S.C. 151 et seq.)'' after ''Railway Labor Act'' and ''(45 U.S.C. 156)'' after ''such Act''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1165 of this title.

§ 1168. Rolling stock equipment

(a)(1) The right of a secured party with a security interest in or of a lessor or conditional vendor of equipment described in paragraph (2) to take possession of such equipment in compliance with an equipment security agreement, lease, or conditional sale contract is not affected by section 362, 363, or 1129 or by any power of the court to enjoin the taking of possession, unless—

(A) before the date that is 60 days after the date of commencement of a case under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after the date of commencement of the case under such security agreement, lease, or conditional sale contract; and

(B) any default, other than a default of a kind described in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

(i) that occurs before the date of commencement of the case and is an event of default therewith is cured before the expiration of such 60-day period; and

(ii) that occurs or becomes an event of default after the date of commencement of the case is cured before the later of—

(I) the date that is 30 days after the date of the default or event of default; or

(II) the expiration of such 60-day period.

(2) Equipment is described in this paragraph if it is rolling stock equipment or accessories used on such equipment, including superstructures and racks, that is subject to a security interest granted by, leased to, or conditionally sold to the debtor.

(3) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1).

(c) With respect to equipment first placed in service on or prior to the date of enactment of this subsection, for purposes of this section—

(1) the term ''lease'' includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

(2) the term ''security interest'' means a purchase-money equipment security interest.

(d) With respect to equipment first placed in service after the date of enactment of this subsection, for purposes of this section, the term ''rolling stock equipment'' includes rolling stock equipment that is substantially rebuilt and accessories used on such equipment.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2642; Pub. L. 98–353, title III, § 519, July 10, 1984, 98 Stat. 388; Pub. L. 103–394, title II, § 201(b), Oct. 22, 1994, 108 Stat. 4120.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1168 of the House amendment incorporates a provision contained in section 1166 of the House bill instead of the provision contained in section 1175 of the Senate amendment for the reasons stated in connection with the discussion of section 1110 of the House amendment.

SENATE REPORT NO. 95–989

Section 1175 [enacted as section 1168] continues the protection accorded in present section 77(j) [section 205(j) of former title 11] to the rights of holders of purchase-money equipment security, and of lessors or conditional vendors of railroad rolling stock, but accords to the trustee a limited period within which to assume the debtor's obligation and to cure any defaults. The rights of such lenders are not affected by the automatic stay and related provisions of sections 362 and 363, or by any power of the court, unless (1) within 60 days after the commencement of the case (or such longer period as may be agreed to by the secured party, lessor or conditional vendor) the trustees, with the approval of the court, agrees to perform all of the debtor's obligations under the security agreement, lease or conditional sale contract, and (2) all defaults are cured within the 60-day period. Defaults described in section 365(b)(2)—defaults which are breaches of provisions relating to the insolvency or financial condition of the debtor, or the commencement of a case under this title, or the appointment of a trustee—are for obvious reasons, excepted.

HOUSE REPORT NO. 95–595

[Section 1166] This section [enacted as section 1168], derived with changes from the last sentence of present section 77(j) [section 205(j) of former title 11], protects the interests of rolling stock equipment financers, while providing the trustee with some opportunity to cure defaults, agree to make payments, and retain and use the equipment. The provision is parallel to section 1110, concerning aircraft equipment and vessels.

REFERENCES IN TEXT

The date of enactment of this subsection, referred to in subsecs. (c) and (d), is the date of enactment of Pub. L. 103–394, which added subsecs. (c) and (d) and was approved Oct. 22, 1994.

AMENDMENTS

1994—Pub. L. 103–394 amended section generally. Prior to amendment, section read as follows:

''(a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, rolling stock equipment or accessories used on such equipment, including superstructures and racks, that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, the debtor to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless—

''(1) before 60 days after the date of the commencement of a case under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract, as the case may be; and

''(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—

''(A) that occurred before such date and is an event of default therewith is cured before the expiration of such 60-day period; and

''(B) that occurs or becomes an event of default after such date is cured before the later of—

''(i) 30 days after the date of such default or event of default; and

''(ii) the expiration of such 60-day period.

''(b) The trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section, may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.''

1984—Subsec. (b). Pub. L. 98–353 inserted a comma after ''approval''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1169. Effect of rejection of lease of railroad line

(a) Except as provided in subsection (b) of this section, if a lease of a line of railroad under which the debtor is the lessee is rejected under section 365 of this title, and if the trustee, within such time as the court fixes, and with the court's approval, elects not to operate the leased line, the lessor under such lease, after such approval, shall operate the line.

(b) If operation of such line by such lessor is impracticable or contrary to the public interest, the court, on request of such lessor, and after notice and a hearing, shall order the trustee to continue operation of such line for the account of such lessor until abandonment is ordered under section 1170 of this title, or until such operation is otherwise lawfully terminated, whichever occurs first.

(c) During any such operation, such lessor is deemed a carrier subject to the provisions of subtitle IV of title 49 that are applicable to railroads.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2643; Pub. L. 97–449, § 5(a)(3), Jan. 12, 1983, 96 Stat. 2442; Pub. L. 98–353, title III, § 520, July 10, 1984, 98 Stat. 388.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1169 of the Senate amendment is deleted from the House amendment as unnecessary since 28 U.S.C. 1407 treating with the judicial panel on multi-district litigation will apply by its terms to cases under title 11.

SENATE REPORT NO. 95–989

Section 1177 [enacted as section 1169] continues, essentially without change, the provisions relating to the rejection by the trustee of a lease of a line of railroad now contained in section 77(c)(6) [section 205(c)(6) of former title 11]. Subsection (a) requires the lessor of a line of railroad to operate it if the lease is rejected by

the trustee and the trustee, with the approval of the court, elects not to operate the leased line. Subsection (b), however, further provides that if operation by the lessor is impractical or contrary to the public interest, the court shall require the trustee to operate the line for the account of the lessor until the operation is lawfully terminated. Subsection (c) provides that during such operation, the lessor is a carrier subject to the Interstate Commerce Act [49 U.S.C. 10101 et seq.].

HOUSE REPORT NO. 95–595

[Section 1168] This section [enacted as section 1169] governs the effect of the rejection by the trustee of an unexpired lease of railroad line under which the debtor is the lessee. If the trustee rejects such a lease, and if the trustee, within such time as the court allows, and with the approval of the court, elects not to operate the leased line, then the lessor under the lease must operate the line.

Subsection (b) excuses the lessor from the requirement to operate the line under certain circumstances. If operation of the line by the lessor is impracticable or contrary to the public interest, the court, on request of the lessor, must order the trustee to continue operation of the line for the account of the lessor until abandonment is ordered under section 1169, governing abandonments generally, or until the operation is otherwise lawfully terminated, such as by an order of the ICC.

Subsection (c) deems the lessor a carrier subject to the provisions of the Interstate Commerce Act [49 U.S.C. 10101 et seq.] during the operation of the line before abandonment.

AMENDMENTS

1984—Subsec. (c). Pub. L. 98–353 directed substitution of ''subtitle IV of title 49'' for ''the Interstate Commerce Act (49 U.S.C. 1 et seq.)'', which substitution had previously been made by Pub. L. 97–449.

1983—Subsec. (c). Pub. L. 97–449 substituted ''subtitle IV of title 49'' for ''the Interstate Commerce Act (49 U.S.C. §1 et seq.)''.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1165 of this title.

§ 1170. Abandonment of railroad line

(a) The court, after notice and a hearing, may authorize the abandonment of all or a portion of a railroad line if such abandonment is—

(1)(A) in the best interest of the estate; or

(B) essential to the formulation of a plan; and

(2) consistent with the public interest.

(b) If, except for the pendency of the case under this chapter, such abandonment would require approval by the Board under a law of the United States, the trustee shall initiate an appropriate application for such abandonment with the Board. The court may fix a time within which the Board shall report to the court on such application.

(c) After the court receives the report of the Board, or the expiration of the time fixed under subsection (b) of this section, whichever occurs first, the court may authorize such abandonment, after notice to the Board, the Secretary of Transportation, the trustee, any party in interest that has requested notice, any affected shipper or community, and any other entity prescribed by the court, and a hearing.

(d)(1) Enforcement of an order authorizing such abandonment shall be stayed until the time for taking an appeal has expired, or, if an appeal is timely taken, until such order has become final.

(2) If an order authorizing such abandonment is appealed, the court, on request of a party in interest, may authorize suspension of service on a line or a portion of a line pending the determination of such appeal, after notice to the Board, the Secretary of Transportation, the trustee, any party in interest that has requested notice, any affected shipper or community, and any other entity prescribed by the court, and a hearing. An appellant may not obtain a stay of the enforcement of an order authorizing such suspension by the giving of a supersedeas bond or otherwise, during the pendency of such appeal.

(e)(1) In authorizing any abandonment of a railroad line under this section, the court shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347[1] of title 49.

(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2643; Pub. L. 96–448, title II, §227(a), Oct. 14, 1980, 94 Stat. 1931; Pub. L. 98–353, title III, §521, July 10, 1984, 98 Stat. 388; Pub. L. 104–88, title III, §302(2), Dec. 29, 1995, 109 Stat. 943.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) of section 1178 [enacted as section 1170] permits the court to authorize the abandonment of a railroad line if the abandonment is consistent with the public interest and either in the best interest of the estate or essential to the formulation of a plan. This avoids the normal abandonment requirements of generally applicable railroad regulatory law.

Subsection (b) permits some participation by the Interstate Commerce Commission in the abandonment process. The Commission's role, however, is only advisory. The Commission will represent the public interest, while the trustee and various creditors and equity security holders will represent the interests of those who have invested money in the enterprise. The court will balance the various interests and make an appropriate decision. The subsection specifies that if, except for the pendency of the railroad reorganization case, the proposed abandonment would require Commission approval, then the trustee, with the approval of the court, must initiate an application for the abandonment with the Commission. The court may then fix a time within which the Commission must report to the court on the application.

Subsection (c) permits the court to act after it has received the report of the Commission or the time fixed under subsection (b) has expired, whichever occurs first. The court may then authorize the abandonment after notice and a hearing. The notice must go to the Commission, the Secretary of Transportation, the trustee, and party in interest that has requested notice, any affected shipper or community, and any other entity that the court specifies.

Subsection (d) stays the enforcement of an abandonment until the time for taking an appeal has expired, or if an appeal has been taken, until the order has become final. However, the court may, and after notice and a hearing, on request of a party in interest authorize termination of service on the line or a portion of the line pending the determination of the appeal. The notice required is the same as that required under sub-

[1] See References in Text note below.

section (c). If the court authorizes termination of service pending determination of the appeal, an appellant may not obtain a stay of the enforcement of the order authorizing termination, either by the giving of a supersedeas bond or otherwise, during the pendency of the appeal.

REFERENCES IN TEXT

Section 11347 of title 49, referred to in subsec. (e)(1), was omitted in the general amendment of subtitle IV of Title 49, Transportation, by Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 804. For provisions similar to those contained in section 11347, see section 11326(a) of Title 49.

AMENDMENTS

1995—Subsecs. (b), (c), (d)(2). Pub. L. 104–88 substituted ''Board'' for ''Commission'' wherever appearing.

1984—Subsec. (a). Pub. L. 98–353, §521(a), inserted ''of all or a portion'' after ''the abandonment''.

Subsec. (c). Pub. L. 98–353, §521(b), inserted a comma after ''abandonment''.

Subsec. (d)(2). Pub. L. 98–353, §521(c), substituted ''such abandonment'' for ''the abandonment of a railroad line'', and ''suspension'' for ''termination'' in two places.

1980—Subsec. (e). Pub. L. 96–448 added subsec. (e).

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Section 710 of Pub. L. 96–448 provided that:

''(a) Except as provided in subsections (b), (c), and (d) of this section, the provisions of this Act and the amendments made by this Act [see Tables for classification] shall take effect on October 1, 1980.

''(b) Section 206 of this Act [enacting former section 10712 of Title 49, Transportation] shall take effect on January 1, 1981.

''(c) Section 218(b) of this Act [amending former section 10705 of Title 49] shall take effect on October 1, 1983.

''(d) Section 701 of this Act [enacting section 1018 of Title 45, Railroads, and amending sections 231f, 825, 906, 913, 914, 1002, 1005, 1007, and 1008 of Title 45] shall take effect on the date of enactment of this Act [Oct. 14, 1980].''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1165, 1166, 1169, 1172 of this title; title 45 sections 904, 915.

§ 1171. Priority claims

(a) There shall be paid as an administrative expense any claim of an individual or of the personal representative of a deceased individual against the debtor or the estate, for personal injury to or death of such individual arising out of the operation of the debtor or the estate, whether such claim arose before or after the commencement of the case.

(b) Any unsecured claim against the debtor that would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the date of the order for relief under this title shall be entitled to the same priority in the case under this chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2643; Pub. L. 98–353, title III, §522, July 10, 1984, 98 Stat. 388.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1171 of the House amendment is derived from section 1170 of the House bill in lieu of section 1173(a)(9) of the Senate amendment.

HOUSE REPORT NO. 95–595

[Section 1170] This section [enacted as section 1171] is derived from current law. Subsection (a) grants an administrative expense priority to the claim of any individual (or of the personal representative of a deceased individual) against the debtor or the estate for personal injury to or death of the individual arising out of the operation of the debtor railroad or the estate, whether the claim arose before or after commencement of the case. The priority under current law, found in section 77(n) [section 205(n) of former title 11], applies only to employees of the debtor. This subsection expands the protection provided.

Subsection (b) follows present section 77(b) of the Bankruptcy Act [section 205(b) of former title 11] by giving priority to any unsecured claims that would be entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the date of the order for relief under the bankruptcy laws. As under current law, the courts will determine the precise contours of the priority recognized by this subsection in each case.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353 substituted ''the same'' for ''such''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1165 of this title.

§ 1172. Contents of plan

(a) In addition to the provisions required or permitted under section 1123 of this title, a plan—

(1) shall specify the extent to and the means by which the debtor's rail service is proposed to be continued, and the extent to which any of the debtor's rail service is proposed to be terminated; and

(2) may include a provision for—

(A) the transfer of any or all of the operating railroad lines of the debtor to another operating railroad; or

(B) abandonment of any railroad line in accordance with section 1170 of this title.

(b) If, except for the pendency of the case under this chapter, transfer of, or operation of or over, any of the debtor's rail lines by an entity other than the debtor or a successor to the debtor under the plan would require approval by the Board under a law of the United States, then a plan may not propose such a transfer or such operation unless the proponent of the plan initiates an appropriate application for such a transfer or such operation with the Board and, within such time as the court may fix, not exceeding

180 days, the Board, with or without a hearing, as the Board may determine, and with or without modification or condition, approves such application, or does not act on such application. Any action or order of the Board approving, modifying, conditioning, or disapproving such application is subject to review by the court only under sections 706(2)(A), 706(2)(B), 706(2)(C), and 706(2)(D) of title 5.

(c)(1) In approving an application under subsection (b) of this section, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11347 [1] of title 49.

(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2644; Pub. L. 96–448, title II, § 227(b), Oct. 14, 1980, 94 Stat. 1931; Pub. L. 104–88, title III, § 302(2), Dec. 29, 1995, 109 Stat. 943.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1172 of the House amendment is derived from section 1171 of the House bill in preference to section 1170 of the Senate amendment with the exception that section 1170(4) of the Senate amendment is incorporated into section 1172(a)(1) of the House amendment.

Section 1172(b) of the House amendment is derived from section 1171(c) of the Senate amendment. The section gives the Interstate Commerce Commission the exclusive power to approve or disapprove the transfer of, or operation of or over, any of the debtor's rail lines over which the Commission has jurisdiction, subject to review under the Administrative Procedures Act [5 U.S.C. 551 et seq. and 701 et seq.]. The section does not apply to a transfer of railroad lines to a successor of the debtor under a plan of reorganization by merger or otherwise.

The House amendment deletes section 1171(a) of the Senate amendment as a matter to be determined by the Rules of Bankruptcy Procedure. It is anticipated that the rules will specify the period of time, such as 18 months, within which a trustee must file with the court a proposed plan of reorganization for the debtor or a report why a plan cannot be formulated. Incorporation by reference of section 1121 in section 1161 of title 11 means that a party in interest will also have a right to file a plan of reorganization. This differs from the position taken in the Senate amendment which would have permitted the Interstate Commerce Commission to file a plan of reorganization.

SENATE REPORT NO. 95–989

Section 1170 adds to the general provisions required or permitted in reorganization plans by section 1123. Subsection (1) requires that a reorganization plan under the railroad subchapter specify the means by which the value of the claims of creditors and the interests of equity holders which are materially and adversely affected by the plan are to be realized. Subsection (2) permits a plan to include provisions for the issuance of warrants. Subsection (3) requires that the plan provide for fixed charges by probable earnings for their payment. Subsection (4) requires that the plan specify the means by which, and the extent to which, the debtor's rail service is to be continued, and shall identify any rail service to be terminated. Subsection (5) permits other appropriate provisions not inconsistent with the chapter. With the exception of subsection (4), the requirements are comparable to those of present section 77(b) [section 205(b) of former title 11]; subsection (4) emphasizes the public interest in the preservation of rail transportation.

Section 1171 imposes on the court, rather than the Interstate Commerce Commission, as in present section 77 [section 205 of former title 11], the responsibility for the plan of reorganization. The Commission is empowered to make final decisions subject only to review by the court under the standards of the Administrative Procedure Act [5 U.S.C. 551 et seq. and 701 et seq.] as to any part of the plan which deals with transportation matters, such as the grant of operating rights of or over, or transfer of, the debtor's rail lines to other carriers.

Subsection (a) requires the trustee to file a plan of reorganization within 18 months after the petition is filed, and permits the court, for good cause shown, to extend such time limit. Subsection (b) permits a plan to be proposed by any interested person, and permits the trustee to revise his plan at any time before it is approved by the court.

Subsections (c), (d) and (e) require the court, when a plan is submitted by the trustee or, if the court deems it worthy of consideration, a plan submitted is proposed by any other person proposes the transfer of, or operation of or over, any of the debtor's lines by other carriers, to refer to such provisions of the plan to the Interstate Commerce Commission. The Commission, within 240 days, and after a hearing if the Commission so determines, is to report to the court the effects of such provisions of the plan in the light of national transportation policy and sections 5(3)(f)(A), (B), and (D), (F)–(I) of the Interstate Commerce Act [49 U.S.C. 11350(b)(1), (2), (4), (6)–(9)]. The report of the Commission is conclusive in all further hearings on the plan by the court, subject only to review pursuant to 5 U.S.C. 706(2)(A)–(D).

HOUSE REPORT NO. 95–595

[Section 1171 (enacted as section 1172)] A plan in a railroad reorganization case may include provisions in addition to those required and permitted under an ordinary reorganization plan. It may provide for the transfer of any or all of the operating railroad lines of the debtor to another operating railroad.

Paragraph (1) contemplates a liquidating plan for the debtor's rail lines, much as occurred in the Penn Central case by transfer of operating lines to ConRail. Such a liquidating plan is not per se contrary to the public interest, and the court will have to determine on a case-by-case basis, with the guidance of the Interstate Commerce Commission and of other parties in interest, whether the particular plan proposed is in the public interest, as required under proposed 11 U.S.C. 1172(3).

The plan may also provide for abandonment in accordance with section 1169, governing abandonment generally. Neither of these provisions in a plan, transfer or abandonment of lines, requires ICC approval. Confirmation of the plan by the court authorizes the debtor to comply with the plan in accordance with section 1142(a) notwithstanding any bankruptcy law to the contrary.

REFERENCES IN TEXT

Section 11347 of title 49, referred to in subsec. (c)(1), was omitted in the general amendment of subtitle IV of Title 49, Transportation, by Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 804. For provisions similar to those contained in section 11347, see section 11326(a) of Title 49.

AMENDMENTS

1995—Subsecs. (b), (c)(1). Pub. L. 104–88 substituted ''Board'' for ''Commission'' wherever appearing.

1980—Subsec. (c). Pub. L. 96–448 added subsec. (c).

[1] See References in Text note below.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–448 effective Oct. 1, 1980, see section 710(a) of Pub. L. 96–448, set out as a note under section 1170 of this title.

NONAPPLICATION OF SUBSEC. (c)

For provision that subsec. (c) of this section does not apply to Amtrak and its employees, see section 142(d) of Pub. L. 105–134, set out in an Employee Protection Reforms note under section 24706 of Title 49, Transportation.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1165 of this title.

§ 1173. Confirmation of plan

(a) The court shall confirm a plan if—

(1) the applicable requirements of section 1129 of this title have been met;

(2) each creditor or equity security holder will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the value of property that each such creditor or equity security holder would so receive or retain if all of the operating railroad lines of the debtor were sold, and the proceeds of such sale, and the other property of the estate, were distributed under chapter 7 of this title on such date;

(3) in light of the debtor's past earnings and the probable prospective earnings of the reorganized debtor, there will be adequate coverage by such prospective earnings of any fixed charges, such as interest on debt, amortization of funded debt, and rent for leased railroads, provided for by the plan; and

(4) the plan is consistent with the public interest.

(b) If the requirements of subsection (a) of this section are met with respect to more than one plan, the court shall confirm the plan that is most likely to maintain adequate rail service in the public interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2644; Pub. L. 98–353, title III, § 523, July 10, 1984, 98 Stat. 388.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1173 of the House amendment concerns confirmation of a plan of railroad reorganization and is derived from section 1172 of the House bill as modified. In particular, section 1173(a)(3) of the House amendment is derived from section 1170(3) of the Senate amendment. Section 1173(b) is derived from section 1173(a)(8) of the Senate amendment.

SENATE REPORT NO. 95–989

Section 1173 adapts the provisions dealing with reorganization plans generally contained in section 1130 to the particular requirements of railroad reorganization plans, as set out in present section 77(e) [section 205(e) of former title 11]. Subsection (a) specifies the findings which the court must make before approving a plan: (1) The plan complies with the applicable provisions of the chapter; (2) the proponent of the plan complies with the applicable provisions of the chapter; (3) the plan has been proposed in good faith; (4) any payments for services or for costs or expenses in connection with the case or the plan are disclosed to the court and are reasonable, or, if to be paid later, are subject to the approval of the court as reasonable; (5) the proponent of the plan has disclosed the identity and affiliations of the individuals who will serve as directors, officers, or voting trustees, such appointments or continuations in office are consistent with the interests of creditors, equity security holders, and the proponent the public, and has disclosed the identity and compensation of any insider who will be employed or retained under the plan; (6) that rate changes proposed in the plan have been approved by the appropriate regulatory commission, or that the plan is contingent on such approval; (7) that confirmation of the plan is not likely to be followed by further reorganization or liquidation, unless it is contemplated by the plan; (8) that the plan, if there is more than one, is the one most likely to maintain adequate rail service and (9) that the plan provides the priority traditionally accorded by section 77(b) [section 205(b) of former title 11] to claims by rail creditors for necessary services rendered during the 6 months preceding the filing of the petition in bankruptcy.

Subsection (b) continues the present power of the court in section 77(e) [section 205(e) of former title 11] to confirm a plan over the objections of creditors or equity security holders who are materially and adversely affected. The subsection also confirms the authority of the court to approve a transfer of all or part of a debtor's property or its merger over the objections of equity security holders if it finds (1) that the ''public interest'' in continued rail transportation outweighs any adverse effect on creditors and equity security holders, and (2) that the plan is fair and equitable, affords due recognition to the rights of each class, and does not discriminate unfairly against any class.

Subsection (c) permits modification of a plan confirmed by a final order only for fraud.

HOUSE REPORT NO. 95–595

[Section 1172] This section [enacted as section 1173] requires the court to confirm a plan if the applicable requirements of section 1129 (relating to confirmation of reorganization plans generally) are met, if the best interest test is met, and if the plan is compatible with the public interest.

The test in this paragraph is similar to the test prescribed for ordinary corporate reorganizations. However, since a railroad cannot liquidate its assets and sell them for scrap to satisfy its creditors, the test focuses on the value of the railroad as a going concern. That is, the test is based on what the assets, sold as operating rail lines, would bring.

The public interest requirement, found in current law, will now be decided by the court, with the ICC representing the public interest before the court, rather than in the first instance by the ICC. Liquidation of the debtor is not, per se, contrary to the public interest.

AMENDMENTS

1984—Subsec. (a)(4). Pub. L. 98–353 substituted ''consistent'' for ''compatible''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 347, 1165, 1174 of this title; title 26 section 354.

§ 1174. Liquidation

On request of a party in interest and after notice and a hearing, the court may, or, if a plan has not been confirmed under section 1173 of this title before five years after the date of the order

for relief, the court shall, order the trustee to cease the debtor's operation and to collect and reduce to money all of the property of the estate in the same manner as if the case were a case under chapter 7 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2644.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1174 of the House amendment represents a compromise between the House bill and Senate amendment on the issue of liquidation of a railroad. The provision permits a party in interest at any time to request liquidation. In addition, if a plan has not been confirmed under section 1173 of the House amendment before 5 years after the date of order for relief, the court must order the trustee to cease the debtor's operation and to collect and reduce to money all of the property of the estate in the same manner as if the case were a case under chapter 7 of title 11. The approach differs from the conversion to chapter 7 under section 1174 of the Senate bill in order to make special provisions contained in subchapter IV of chapter 11 applicable to liquidation. However, maintaining liquidation in the context of chapter 11 is not intended to delay liquidation of the railroad to a different extent than if the case were converted to chapter 7.

Although the House amendment does not adopt provisions contained in sections 1170(1), (2), (3), or (5), of the Senate amendment such provisions are contained explicitly or implicitly in section 1123 of the House amendment.

SENATE REPORT NO. 95–989

Section 1174 permits the court to convert the case to a liquidation under chapter 7 if the court finds that the debtor cannot be reorganized, or if various time limits specified in the subchapter are not met. Section 77 [section 205 of former title 11] does not authorize a liquidation of a railroad under the Bankruptcy Act [former title 11]. If the railroad is not reorganizable, the only action open to the court is to dismiss the petition, which would in all likelihood be followed by a State court receivership, with all of its attendant disadvantages. If reorganization is impossible, the debtor should be liquidated under the Bankruptcy Act.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1165 of this title.

CHAPTER 12—ADJUSTMENT OF DEBTS OF A FAMILY FARMER WITH REGULAR ANNUAL INCOME

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

SUBCHAPTER II—THE PLAN

TERMINATION OF CHAPTER

For termination of reenactment of this chapter by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 101, 103, 109, 321, 326, 327, 329, 330, 346, 347, 362, 363, 365, 502, 706, 1106, 1112, 1306, 1307 of this title; title 7 sections 2005, 2008h; title 20 section 1087; title 28 sections 157, 586, 1930.

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

§ 1201. Stay of action against codebtor

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 of this title.

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3105, 3124; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note below.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub.

L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note below.

EFFECTIVE DATE

Chapter effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

REPEAL, REENACTMENT, AND TERMINATION OF CHAPTER

Pub. L. 105–277, div. C, title I, §149, Oct. 21, 1998, 112 Stat. 2681–610, provided that:

''(a) Chapter 12 of title 11 of the United States Code, as in effect on September 30, 1998, is hereby reenacted for the period beginning on October 1, 1998, and ending on April 1, 1999.

''(b) All cases commenced or pending under chapter 12 of title 11, United States Code, as reenacted under subsection (a), and all matters and proceedings in or relating to such cases, shall be conducted and determined under such chapter as if such chapter were continued in effect after April 1, 1999. The substantive rights of parties in connection with such cases, matters, and proceedings shall continue to be governed under the laws applicable to such cases, matters, and proceedings as if such chapter were continued in effect after April 1, 1999.

''(c) This section shall take effect on October 1, 1998.''

Chapter repealed Oct. 1, 1998, except that cases commenced or pending under this chapter, and all matters and proceedings in or relating to such cases, are to be conducted and determined as if this chapter had not been repealed, and substantive rights of parties in connection with such cases, matters, and proceedings are to continue to be governed under the laws applicable to such cases, matters, and proceedings as if this chapter had not been repealed, see section 302(f) of Pub. L. 99–554, as amended, set out in an Effective Date of 1986 Amendment note under section 581 of Title 28, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 108, 348 of this title.

§ 1202. Trustee

(a) If the United States trustee has appointed an individual under section 586(b) of title 28 to serve as standing trustee in cases under this chapter and if such individual qualifies as a trustee under section 322 of this title, then such individual shall serve as trustee in any case filed under this chapter. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as trustee in the case if necessary.

(b) The trustee shall—

(1) perform the duties specified in sections 704(2), 704(3), 704(5), 704(6), 704(7), and 704(9) of this title;

(2) perform the duties specified in section 1106(a)(3) and 1106(a)(4) of this title if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;

(3) appear and be heard at any hearing that concerns—

(A) the value of property subject to a lien;

(B) confirmation of a plan;

(C) modification of the plan after confirmation; or

(D) the sale of property of the estate;

(4) ensure that the debtor commences making timely payments required by a confirmed plan; and

(5) if the debtor ceases to be a debtor in possession, perform the duties specified in sections 704(8), 1106(a)(1), 1106(a)(2), 1106(a)(6), 1106(a)(7), and 1203.

(Added and amended Pub. L. 99–554, title II, §§227, 255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3103, 3106, 3124; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

AMENDMENTS

1986—Subsecs. (c), (d). Pub. L. 99–554, §227, struck out subsecs. (c) and (d) which read as follows:

''(c) If the number of cases under this chapter commenced in a particular judicial district so warrants, the court may appoint one or more individuals to serve as standing trustee for such district in cases under this chapter.

''(d)(1) A court that has appointed an individual under subsection (a) of this section to serve as standing trustee in cases under this chapter shall set for such individual—

''(A) a maximum annual compensation not to exceed the lowest annual rate of basic pay in effect for grade GS–16 of the General Schedule prescribed under section 5332 of title 5; and

''(B) a percentage fee not to exceed the sum of—

''(i) not to exceed ten percent of the payments made under the plan of such debtor, with respect to payments in an aggregate amount not to exceed $450,000; and

''(ii) three percent of payments made under the plan of such debtor, with respect to payments made after the aggregate amount of payments made under the plan exceeds $450,000;

based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.

''(2) Such individual shall collect such percentage fee from all payments under plans in the cases under this chapter for which such individual serves as standing trustee. Such individual shall pay annually to the Treasury—

''(A) any amount by which the actual compensation received by such individual exceeds five percent of all such payments made under plans in cases under this chapter for which such individual serves as standing trustee; and

''(B) any amount by which the percentage fee fixed under paragraph (1)(B) of this subsection for all such cases exceeds—

''(i) such individual's actual compensation for such cases, as adjusted under subparagraph (A) of this paragraph; plus

''(ii) the actual, necessary expenses incurred by such individual as standing trustee in such cases.''

See section 586(b) and (e) of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE

Section effective 30 days after Oct. 27, 1986, and before the amendment by section 227 of Pub. L. 99–554, see section 302(c)(2) of Pub. L. 99–554, set out as an Effective Date of 1986 Amendment note under section 581 of Title 28, Judiciary and Judicial Procedure.

Effective date and applicability of amendment by section 227 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554.

REFERENCES IN SUBSECTION (a) TEMPORARILY DEEMED TO BE REFERENCES TO OTHER PROVISIONS

Until the amendments made by subtitle A (§§ 201 to 231) of title II of Pub. L. 99–554 become effective in a district and apply to a case, in subsec. (a) of this section—

(1) the first two references to the United States trustee are deemed to be references to the court, and

(2) any reference to section 586(b) of Title 28, Judiciary and Judicial Procedure, is deemed to be a reference to subsec. (c) of this section,

see section 302(c)(3)(B), (d), (e) of Pub. L. 99–554, set out as an Effective Date note under section 581 of Title 28.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 322, 326, 327, 546, 557, 1226 of this title.

§ 1203. Rights and powers of debtor

Subject to such limitations as the court may prescribe, a debtor in possession shall have all the rights, other than the right to compensation under section 330, and powers, and shall perform all the functions and duties, except the duties specified in paragraphs (3) and (4) of section 1106(a), of a trustee serving in a case under chapter 11, including operating the debtor's farm.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3107, 3124; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 363, 364, 1202 of this title.

§ 1204. Removal of debtor as debtor in possession

(a) On request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the commencement of the case.

(b) On request of a party in interest, and after notice and a hearing, the court may reinstate the debtor in possession.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3107, 3124; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 363, 364, 1207 of this title.

§ 1205. Adequate protection

(a) Section 361 does not apply in a case under this chapter.

(b) In a case under this chapter, when adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of property securing a claim or of an entity's ownership interest in property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of property securing a claim or of an entity's ownership interest in property;

(3) paying to such entity for the use of farmland the reasonable rent customary in the community where the property is located, based upon the rental value, net income, and earning capacity of the property; or

(4) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will adequately protect the value of property securing a claim or of such entity's ownership interest in property.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3107, 3124; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal,

Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 1206. Sales free of interests

After notice and a hearing, in addition to the authorization contained in section 363(f), the trustee in a case under this chapter may sell property under section 363(b) and (c) free and clear of any interest in such property of an entity other than the estate if the property is farmland or farm equipment, except that the proceeds of such sale shall be subject to such interest.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3108, 3124; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 1207. Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7 of this title, whichever occurs first.

(b) Except as provided in section 1204, a confirmed plan, or an order confirming a plan, the debtor shall remain in possession of all property of the estate.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3108, 3124; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1230 of this title.

§ 1208. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706 or 1112 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including—

(1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1221 of this title;

(4) failure to commence making timely payments required by a confirmed plan;

(5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; or

(9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation.

(d) On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter or convert a case under this chapter to a case under chapter 7 of this title upon a showing that the debtor has committed fraud in connection with the case.

(e) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3108, 3124; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 365, 706, 726, 728, 1307 of this title.

SUBCHAPTER II—THE PLAN

§ 1221. Filing of plan

The debtor shall file a plan not later than 90 days after the order for relief under this chapter, except that the court may extend such period if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3109, 3124; Pub. L. 103–65, §2, Aug. 6, 1993, 107 Stat. 311; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

AMENDMENTS

1993—Pub. L. 103–65 substituted ''the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable'' for ''an extension is substantially justified''.

EFFECTIVE DATE OF 1993 AMENDMENT

Section 3 of Pub. L. 103–65 provided that:

''(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act [amending this section and provisions set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure] and the amendments made by this Act shall take effect on the date of the enactment of this Act [Aug. 6, 1993].

''(b) APPLICATION OF AMENDMENT MADE BY SECTION 2.—The amendment made by section 2 [amending this section] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act.''

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 1208 of this title.

§ 1222. Contents of plan

(a) The plan shall—

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims and interests, provide the same treatment for each claim or interest within a particular class unless the holder of a particular claim or interest agrees to less favorable treatment.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) modify the rights of holders of secured claims, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(7) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(8) provide for the sale of all or any part of the property of the estate or the distribution of all or any part of the property of the estate among those having an interest in such property;

(9) provide for payment of allowed secured claims consistent with section 1225(a)(5) of this title, over a period exceeding the period permitted under section 1222(c);

(10) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(11) include any other appropriate provision not inconsistent with this title.

(c) Except as provided in subsections (b)(5) and (b)(9), the plan may not provide for payments over a period that is longer than three years unless the court for cause approves a longer period, but the court may not approve a period that is longer than five years.

(d) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1225(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3109, 3124; Pub. L. 103–394, title III, §305(b), Oct. 22, 1994, 108 Stat. 4134; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

AMENDMENTS

1994—Subsec. (d). Pub. L. 103–394 added subsec. (d).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and applicable only to agreements entered into after Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1223, 1225, 1228, 1229 of this title.

§ 1223. Modification of plan before confirmation

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1222 of this title.

(b) After the debtor files a modification under this section, the plan as modified becomes the plan.

(c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3110, 3124; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1229 of this title.

§ 1224. Confirmation hearing

After expedited notice, the court shall hold a hearing on confirmation of the plan. A party in interest, the trustee, or the United States trustee may object to the confirmation of the plan. Except for cause, the hearing shall be concluded not later than 45 days after the filing of the plan.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3110, 3124; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 28 section 586.

§ 1225. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed by the trustee or the debtor under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period, or such longer period as the court may approve under section 1222(c), beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, ''disposable income'' means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; or

(B) for the payment of expenditures necessary for the continuation, preservation, and operation of the debtor's business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3110, 3124; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 347, 1208, 1222, 1229, 1230, 1231 of this title.

§ 1226. Payments

(a) Payments and funds received by the trustee shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan. If a plan is not confirmed, the trustee shall return any such payments to the debtor, after deducting—

(1) any unpaid claim allowed under section 503(b) of this title; and

(2) if a standing trustee is serving in the case, the percentage fee fixed for such standing trustee.

(b) Before or at the time of each payment to creditors under the plan, there shall be paid—

(1) any unpaid claim of the kind specified in section 507(a)(1) of this title; and

(2) if a standing trustee appointed under section 1202(c)[1] of this title is serving in the case, the percentage fee fixed for such standing trustee under section 1202(d)[1] of this title.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3111, 3124; Pub. L. 103–394, title V, § 501(d)(36), Oct. 22, 1994, 108 Stat. 4147; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

REFERENCES IN TEXT

Section 1202(c) and (d) of this title, referred to in subsec. (b)(2), was repealed by section 227 of Pub. L. 99–554, and provisions relating to appointment of and fixing percentage fees for standing trustees are contained in section 586(b) and (e) of Title 28, Judiciary and Judicial Procedure, as amended by section 113(b), (c) of Pub. L. 99–554.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

AMENDMENTS

1994—Subsec. (b)(2). Pub. L. 103–394 substituted ''1202(c)'' for ''1202(d)'' and ''1202(d)'' for ''1202(e)''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 347 of this title.

§ 1227. Effect of confirmation

(a) Except as provided in section 1228(a) of this title, the provisions of a confirmed plan bind the

[1] See References in Text note below.

debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder, or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general partner in the debtor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in section 1228(a) of this title and except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3112, 3124; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 1228. Discharge

(a) As soon as practicable after completion by the debtor of all payments under the plan, other than payments to holders of allowed claims provided for under section 1222(b)(5) or 1222(b)(10) of this title, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan allowed under section 503 of this title or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1222(b)(5) or 1222(b)(10) of this title; or

(2) of the kind specified in section 523(a) of this title.

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1229 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1222(b)(5) or 1222(b)(10) of this title; or

(2) of a kind specified in section 523(a) of this title.

(d) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if—

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

(e) After the debtor is granted a discharge, the court shall terminate the services of any trustee serving in the case.

(Added and amended Pub. L. 99–554, title II, §255, title III, §302(f), Oct. 27, 1986, 100 Stat. 3112, 3124; Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, §302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, §1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, §149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 523, 524, 727, 1227 of this title.

§ 1229. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, on request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

(b)(1) Sections 1222(a), 1222(b), and 1223(c) of this title and the requirements of section 1225(a)

of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3113, 3124; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1208, 1228, 1230 of this title; title 28 section 586.

§ 1230. Revocation of an order of confirmation

(a) On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1225 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

(b) If the court revokes an order of confirmation under subsection (a) of this section, the court shall dispose of the case under section 1207 of this title, unless, within the time fixed by the court, the debtor proposes and the court confirms a modification of the plan under section 1229 of this title.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3113, 3124; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1208 of this title.

§ 1231. Special tax provisions

(a) For the purpose of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 706 of this title.

(b) The trustee shall make a State or local tax return of income for the estate of an individual debtor in a case under this chapter for each taxable period after the order for relief under this chapter during which the case is pending.

(c) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1225 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

(d) The court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of—

(1) the date on which such governmental unit responds to the request under this subsection; or

(2) 270 days after such request.

(Added and amended Pub. L. 99–554, title II, § 255, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3113, 3124; Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610.)

TERMINATION OF SECTION

For termination of reenactment of this section by section 149(a) of Pub. L. 105–277, see Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

CODIFICATION

Section repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Section, as in effect on Sept. 30, 1998, reenacted by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610, for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999. See Repeal, Reenactment, and Termination of Chapter note set out under section 1201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

CHAPTER 13—ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 101, 103, 109, 321, 326, 329, 330, 346, 347, 348, 362, 363, 365, 502, 706, 1106, 1112 of this title; title 7 section 2008h; title 15 section 1673; title 20 section 1087; title 28 sections 157, 586, 1930.

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

§ 1301. Stay of action against codebtor

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2645; Pub. L. 98–353, title III, §§313, 524, July 10, 1984, 98 Stat. 355, 388.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1301 of the House amendment is identical with the provision contained in section 1301 of the House bill and adopted by the Senate amendment. Section 1301(c)(1) indicates that a basis for lifting the stay is that the debtor did not receive consideration for the claim by the creditor, or in other words, the debtor is really the ''codebtor.'' As with other sections in title 11, the standard of receiving consideration is a general rule, but where two co-debtors have agreed to share liabilities in a different manner than profits it is the individual who does not ultimately bear the liability that is protected by the stay under section 1301.

SENATE REPORT NO. 95–989

Subsection (a) automatically stays the holder of a claim based on a consumer debt of the chapter 13 debtor from acting or proceeding in any way, except as authorized pursuant to subsections (b) and (c), against an individual or the property of an individual liable with the chapter 13 debtor, unless such codebtor became liable in the ordinary course of his business, or unless the case is closed, dismissed, or converted to another chapter.

Under the terms of the agreement with the codebtor who is not in bankruptcy, the creditor has a right to collect all payments to the extent they are not made by the debtor at the time they are due. To the extent to which a chapter 13 plan does not propose to pay a creditor his claims, the creditor may obtain relief from the court from the automatic stay and collect such claims from the codebtor. Conversely, a codebtor obtains the benefit of any payments made to the creditor under the plan. If a debtor defaults on scheduled payments under the plan, then the codebtor would be liable for the remaining deficiency; otherwise, payments not made under the plan may never be made by the codebtor. The obligation of the codebtor to make the creditor whole at the time payments are due remains.

The automatic stay under this section pertains only to the collection of a consumer debt, defined by section 101(7) of this title to mean a debt incurred by an individual primarily for a personal, family, or household purpose. Therefore, not all debts owed by a chapter 13 debtor will be subject to the stay of the codebtor, particularly those business debts incurred by an individual with regular income, as defined by section 101(24) of this title, engaged in business, that is permitted by virtue of section 109(b) and section 1304 to obtain chapter 13 relief.

Subsection (b) excepts the giving of notice of dishonor of a negotiable instrument from the reach of the codebtor stay.

Under subsection (c), if the codebtor has property out of which the creditor's claim can be satisfied, the court can grant relief from the stay absent the transfer of a security interest in that property by the codebtor to the creditor. Correspondingly, if there is reasonable cause to believe that property is about to be disposed of by the codebtor which could be used to satisfy his obligation to the creditor, the court should lift the stay to allow the creditor to perfect his rights against such property. Likewise, if property is subject to rapid depreciation or decrease in value the stay should be lifted to allow the creditor to protect his rights to reach such property. Otherwise, the creditor's interest would be irreparably harmed by such stay. Property which could be used to satisfy the claim could be disposed of or encumbered and placed beyond the reach of the creditor. The creditor should be allowed to protect his rights to reach property which could satisfy his claim and prevent its erosion in value, disposal, or encumbrance.

HOUSE REPORT NO. 95–595

This section is new. It is designed to protect a debtor operating under a chapter 13 individual repayment plan case by insulating him from indirect pressures from his creditors exerted through friends or relatives that may have cosigned an obligation of the debtor. The protection is limited, however, to ensure that the creditor involved does not lose the benefit of the bargain he made for a cosigner. He is entitled to full compensation, in-

cluding any interest, fees, and costs provided for by the agreement under which the debtor obtained his loan. The creditor is simply required to share with other creditors to the extent that the debtor will repay him under the chapter 13 plan. The creditor is delayed, but his substantive rights are not affected.

Subsection (a) is the operative subsection. It stays action by a creditor after an order for relief under chapter 13. The creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that has secured the debt, unless the individual became liable or secured the debt in the ordinary course of his business, or the case is closed, dismissed, or converted to chapter 7 or 11.

Subsection (b) permits the creditor, notwithstanding the stay, to present a negotiable instrument and to give notice of dishonor of the instrument, in order to preserve his substantive rights against the codebtor as required by applicable nonbankruptcy law.

Subsection (c) requires the court to grant relief from the stay in certain circumstances. The court must grant relief to the extent that the debtor does not propose to pay, under the plan, the amount owed to the creditor. The court must also grant relief to the extent that the debtor was really the codebtor in the transaction, that is, to the extent that the nondebtor party actually received the consideration for the claim held by the creditor. Finally, the court must grant relief to the extent that the creditor's interest would be irreparably harmed by the stay, for example, where the codebtor filed bankruptcy himself, or threatened to leave the locale, or lost his job.

AMENDMENTS

1984—Subsec. (c)(3). Pub. L. 98–353, § 524, inserted ''continuation of'' after ''by''.

Subsec. (d). Pub. L. 98–353, § 313, added subsec. (d).

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 108, 348 of this title.

§ 1302. Trustee

(a) If the United States trustee appoints an individual under section 586(b) of title 28 to serve as standing trustee in cases under this chapter and if such individual qualifies under section 322 of this title, then such individual shall serve as trustee in the case. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as a trustee in the case.

(b) The trustee shall—

(1) perform the duties specified in sections 704(2), 704(3), 704(4), 704(5), 704(6), 704(7), and 704(9) of this title;

(2) appear and be heard at any hearing that concerns—

(A) the value of property subject to a lien;

(B) confirmation of a plan; or

(C) modification of the plan after confirmation;

(3) dispose of, under regulations issued by the Director of the Administrative Office of the United States Courts, moneys received or to be received in a case under chapter XIII of the Bankruptcy Act;

(4) advise, other than on legal matters, and assist the debtor in performance under the plan; and

(5) ensure that the debtor commences making timely payments under section 1326 of this title.

(c) If the debtor is engaged in business, then in addition to the duties specified in subsection (b) of this section, the trustee shall perform the duties specified in sections 1106(a)(3) and 1106(a)(4) of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2645; Pub. L. 98–353, title III, §§ 314, 525, July 10, 1984, 98 Stat. 356, 388; Pub. L. 99–554, title II, §§ 228, 283(w), Oct. 27, 1986, 100 Stat. 3103, 3118; Pub. L. 103–394, title V, § 501(d)(37), Oct. 22, 1994, 108 Stat. 4147.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1302 of the House amendment adopts a provision contained in the Senate amendment instead of the position taken in the House bill. Sections 1302(d) and (e) are modeled on the standing trustee system contained in the House bill with the court assuming supervisory functions in districts not under the pilot program.

SENATE REPORT NO. 95–989

The principal administrator in a chapter 13 case is the chapter 13 trustee. Experience under chapter XIII of the Bankruptcy Act [chapter 13 of former title 11] has shown that the more efficient and effective wage earner programs have been conducted by standing chapter XIII trustees who exercise a broad range of responsibilities in both the design and the effectuation of debtor plans.

Subsection (a) provides administrative flexibility by permitting the bankruptcy judge to appoint an individual from the panel of trustees established pursuant to 28 U.S.C. § 604(f) and qualified under section 322 of title 11, either to serve as a standing trustee in all chapter 13 cases filed in the district or a portion thereof, or to serve in a single case.

Subsection (b)(1) makes it clear that the chapter 13 trustee is no mere disbursing agent of the monies paid to him by the debtor under the plan [section 1322(a)(1)], by imposing upon him certain relevant duties of a liquidation trustee prescribed by section 704 of this title.

Subsection (b)(2) requires the chapter 13 trustee to appear before and be heard by the bankruptcy court whenever the value of property secured by a lien or the confirmation or modification of a plan after confirmation as provided by sections 1323–1325 is considered by the court.

Subsection (b)(3) requires the chapter 13 trustee to advise and counsel the debtor while under chapter 13, except on matters more appropriately left to the attorney for the debtor. The chapter 13 trustee must also assist the debtor in performance under the plan by attempting to tailor the requirements of the plan to the changing needs and circumstances of the debtor during the extension period.

Subsection (c) imposes on the trustee in a chapter 13 case filed by a debtor engaged in business the investigative and reporting duties normally required of a chapter 11 debtor or trustee as prescribed by section 1106(a)(3) and (4).

HOUSE REPORT NO. 95–595

Subsection (d) gives the trustee an additional duty if the debtor is engaged in business, as defined in section 1304. The trustee must perform the duties specified in sections 1106(a)(3) and 1106(a)(4), relating to investigation of the debtor.

REFERENCES IN TEXT

Chapter XIII of the Bankruptcy Act, referred to in subsec. (b)(3), is chapter XIII of act July 1, 1898, ch. 541,

as added June 22, 1938, ch. 575, §1, 52 Stat. 930, which was classified to chapter 13 (§1001 et seq.) of former Title 11.

AMENDMENTS

1994—Subsec. (b)(3). Pub. L. 103–394 struck out ''and'' at end.

1986—Subsec. (a). Pub. L. 99–554, §228(1), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: ''If the court has appointed an individual under subsection (d) of this section to serve as standing trustee in cases under this chapter and if such individual qualifies under section 322 of this title, then such individual shall serve as trustee in the case. Otherwise, the court shall appoint a person to serve as trustee in the case.''

Subsec. (d). Pub. L. 99–554, §228(2), struck out subsec. (d) which read as follows: ''If the number of cases under this chapter commenced in a particular judicial district so warrant, the court may appoint one or more individuals to serve as standing trustee for such district in cases under this chapter.''

Subsec. (e). Pub. L. 99–554, §283(w), which directed the amendment of par. (1) by substituting ''set for such individual'' for ''fix'' could not be executed in view of the repeal of subsec. (e) by section 228(2) of Pub. L. 99–554. See 1984 Amendment note below.

Pub. L. 99–554, §228(2), struck out subsec. (e) which read as follows:

''(1) A court that has appointed an individual under subsection (d) of this section to serve as standing trustee in cases under this chapter shall set for such individual—

''(A) a maximum annual compensation, not to exceed the lowest annual rate of basic pay in effect for grade GS–16 of the General Schedule prescribed under section 5332 of title 5; and

''(B) a percentage fee, not to exceed ten percent, based on such maximum annual compensation and the actual, necessary expenses incurred by such individual as standing trustee.

''(2) Such individual shall collect such percentage fee from all payments under plans in the cases under this chapter for which such individual serves as standing trustee. Such individual shall pay annually to the Treasury—

''(A) any amount by which the actual compensation received by such individual exceeds five percent of all such payments made under plans in cases under this chapter for which such individual serves as standing trustee; and

''(B) any amount by which the percentage fee fixed under paragraph (1)(B) of this subsection for all such cases exceeds—

''(i) such individual's actual compensation for such cases, as adjusted under subparagraph (A) of this paragraph; plus

''(ii) the actual, necessary expenses incurred by such individual as standing trustee in such cases.''

1984—Subsec. (b)(1). Pub. L. 98–353, §314(1), substituted ''704(7), and 704(9) of this title'' for ''and 704(8) of this title''.

Subsec. (b)(2). Pub. L. 98–353, §314(2), struck out ''and'' at the end.

Subsec. (b)(3) to (5). Pub. L. 98–353, §525(a), added par. (3) and redesignated former pars. (3) and (4) as (4) and (5), respectively.

Pub. L. 98–353, §314(3), (4), substituted ''; and'' for the period at end of par. (3) and added par. (4).

Subsec. (e)(1). Pub. L. 98–353, §525(b)(1), which directed the amendment of par. (4) by substituting ''set for such individual'' for ''fix'' was executed to par. (1) as the probable intent of Congress.

Subsec. (e)(1)(A). Pub. L. 98–353, §525(b)(2), struck out ''for such individual'' after ''a maximum annual compensation''.

Subsec. (e)(2)(A). Pub. L. 98–353, §525(b)(3), substituted ''received by'' for ''of'', and ''of all such payments made'' for ''upon all payments''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 228 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 322, 326, 546, 557 of this title.

§ 1303. Rights and powers of debtor

Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(*l*), of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2646.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1303 of the House amendment specifies rights and powers that the debtor has exclusive of the trustees. The section does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although section 1323 is not specified in section 1303, certainly it is intended that the debtor has the power to sue and be sued.

SENATE REPORT NO. 95–989

A chapter 13 debtor is vested with the identical rights and powers, and is subject to the same limitations in regard to their exercise, as those given a liquidation trustee by virtue of section 363(b), (d), (e), (f), and (h) of title 11, relating to the sale, use or lease of property.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 1304. Debtor engaged in business

(a) A debtor that is self-employed and incurs trade credit in the production of income from such employment is engaged in business.

(b) Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and, subject to any limitations on a trustee under sections 363(c) and 364 of this title and to such limitations or conditions as the court prescribes, shall have, exclusive of the trustee, the rights and powers of the trustee under such sections.

(c) A debtor engaged in business shall perform the duties of the trustee specified in section 704(8) of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2646; Pub. L. 98–353, title III, §§311(b)(2), 526, July 10, 1984, 98 Stat. 355, 389.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1304(b) of the House amendment adopts the approach taken in the comparable section of the Senate amendment as preferable to the position taken in the House bill.

SENATE REPORT NO. 95–989

Increased access to the simpler, speedier, and less expensive debtor relief provisions of chapter 13 is accomplished by permitting debtors engaged in business to proceed under chapter 13, provided their income is sufficiently stable and regular to permit compliance with a chapter 13 plan [section 101(24)] and that the debtor (or the debtor and spouse) do not owe liquidated, noncontingent unsecured debts of $50,000, or liquidated, noncontingent secured debts of $200,000 (§ 109(d)).

Section 1304(a) states that a self-employed individual who incurs trade credit in the production of income is a debtor engaged in business.

Subsection (b) empowers a chapter 13 debtor engaged in business to operate his business, subject to the rights, powers and limitations that pertain to a trustee under sections 363(c) and 364 of title 11, and subject to such further limitations and conditions as the court may prescribe.

Subsection (c) requires a chapter 13 debtor engaged in business to file with the court certain financial statements relating to the operation of the business.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353, § 526, struck out the comma after ''of the debtor''.

Subsec. (c). Pub. L. 98–353, § 311(b)(2), substituted ''section 704(8)'' for ''section 704(7)''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 363, 364 of this title.

§ 1305. Filing and allowance of postpetition claims

(a) A proof of claim may be filed by any entity that holds a claim against the debtor—

(1) for taxes that become payable to a governmental unit while the case is pending; or

(2) that is a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

(b) Except as provided in subsection (c) of this section, a claim filed under subsection (a) of this section shall be allowed or disallowed under section 502 of this title, but shall be determined as of the date such claim arises, and shall be allowed under section 502(a), 502(b), or 502(c) of this title, or disallowed under section 502(d) or 502(e) of this title, the same as if such claim had arisen before the date of the filing of the petition.

(c) A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable and was not obtained.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2647.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1305(a)(2) of the House amendment modifies similar provisions contained in the House and Senate bills by restricting application of the paragraph to a consumer debt. Debts of the debtor that are not consumer debts should not be subjected to section 1305(c) or section 1328(d) of the House amendment.

Section 1305(b) of the House amendment represents a technical modification of similar provisions contained in the House bill and Senate amendment.

The House amendment deletes section 1305(d) of the Senate amendment as unnecessary. Section 502(b)(1) is sufficient to disallow any claim to the extent the claim represents the usurious interest or any other charge forbidden by applicable law. It is anticipated that the Rules of Bankruptcy Procedure may require a creditor filing a proof of claim in a case under chapter 13 to include an affirmative statement as contemplated by section 1305(d) of the Senate amendment.

SENATE REPORT NO. 95–989

Section 1305, exclusively applicable in chapter 13 cases, supplements the provisions of sections 501–511 of title 11, dealing with the filing and allowance of claims. Sections 501–511 apply in chapter 13 cases by virtue of section 103(a) of this title. Section 1305(a) provides for the filing of a proof of claim for taxes and other obligations incurred after the filing of the chapter 13 case. Subsection (b) prescribes that section 502 of title 11 governs the allowance of section 1305(a) claims, except that its standards shall be applied as of the date of allowance of the claim, rather than the date of filing of the petition. Subsection (c) requires the disallowance of a postpetition claim for property or services necessary for the debtor's performance under the plan, if the holder of the claim knew or should have known that prior approval by the trustee of the debtor's incurring of the obligation was practicable and was not obtained.

HOUSE REPORT NO. 95–595

Subsection (a) permits the filing of a proof of a claim against the debtor that is for taxes that become payable to a governmental unit while the case is pending, or that arises after the date of the filing of the petition for property or services that are necessary for the debtor's performance under the plan, such as auto repairs in order that the debtor will be able to get to work, or medical bills. The effect of the latter provision, in paragraph (2), is to treat postpetition credit extended to a chapter 13 debtor the same as a prepetition claim for purposes of allowance, distribution, and so on.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 348, 1322, 1328 of this title.

§ 1306. Property of the estate

(a) Property of the estate includes, in addition to the property specified in section 541 of this title—

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2647; Pub. L. 99–554, title II, § 257(u), Oct. 27, 1986, 100 Stat. 3116.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1306(a)(2) adopts a provision contained in the Senate amendment in preference to a similar provision contained in the House bill.

SENATE REPORT NO. 95–989

Section 541 is expressly made applicable to chapter 13 cases by section 103(a). Section 1306 broadens the definition of property of the estate for chapter 13 purposes to include all property acquired and all earnings from services performed by the debtor after the commencement of the case.

Subsection (b) nullifies the effect of section 521(3), otherwise applicable, by providing that a chapter 13 debtor need not surrender possession of property of the estate, unless required by the plan or order of confirmation.

AMENDMENTS

1986—Subsec. (a). Pub. L. 99–554 inserted reference to chapter 12 in pars. (1) and (2).

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

§ 1307. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees and charges required under chapter 123 of title 28;

(3) failure to file a plan timely under section 1321 of this title;

(4) failure to commence making timely payments under section 1326 of this title;

(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;

(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.

(d) Except as provided in subsection (e) of this section, at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 or 12 of this title.

(e) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2647; Pub. L. 98–353, title III, §§ 315, 527, July 10, 1984, 98 Stat. 356, 389; Pub. L. 99–554, title II, §§ 229, 257(v), Oct. 27, 1986, 100 Stat. 3103, 3116.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1307(a) is derived from the Senate amendment in preference to a comparable provision contained in the House bill.

SENATE REPORT NO. 95–989

Subsections (a) and (b) confirm, without qualification, the rights of a chapter 13 debtor to convert the case to a liquidating bankruptcy case under chapter 7 of title 11, at any time, or to have the chapter 13 case dismissed. Waiver of any such right is unenforceable. Subsection (c) specifies various conditions for the exercise of the power of the court to convert a chapter 13 case to one under chapter 7 or to dismiss the case. Subsection (d) deals with the conversion of a chapter 13 case to one under chapter 11. Subsection (e) prohibits conversion of the chapter 13 case filed by a farmer to chapter 7 or 11 except at the request of the debtor. No case is to be converted from chapter 13 to any other chapter, unless the debtor is an eligible debtor under the new chapter.

HOUSE REPORT NO. 95–595

Subsection (f) reinforces section 109 by prohibiting conversion to a chapter under which the debtor is not eligible to proceed.

AMENDMENTS

1986—Subsec. (b). Pub. L. 99–554, § 257(v)(1), inserted reference to section 1208 of this title.

Subsec. (c). Pub. L. 99–554, § 229(1)(A), inserted ''or the United States trustee'' after ''party in interest'' in provisions preceding par. (1).

Subsec. (c)(9), (10). Pub. L. 99–554, § 229(1)(B)–(D), added pars. (9) and (10).

Subsec. (d). Pub. L. 99–554, § 257(v)(2), inserted reference to chapter 12.

Pub. L. 99–554, § 229(2), inserted ''or the United States trustee'' after ''party in interest''.

Subsec. (e). Pub. L. 99–554, § 257(v)(3), inserted reference to chapter 12.

1984—Subsec. (b). Pub. L. 98–353, § 527(a), inserted a comma after ''time''.

Subsec. (c)(4). Pub. L. 98–353, § 315(2), added par. (4). Former par. (4) redesignated (5).

Subsec. (c)(5). Pub. L. 98–353, §§ 315(1), 527(b)(1), redesignated former par. (4) as (5) and inserted ''a request made for'' before ''additional''. Former par. (5) redesignated (6).

Subsec. (c)(6). Pub. L. 98–353, § 315(1), redesignated former par. (5) as (6). Former par. (6) redesignated (7).

Subsec. (c)(7). Pub. L. 98–353, §§ 315(1), 527(b)(2), redesignated former par. (6) as (7) and substituted ''or'' for ''and''. Former par. (7) redesignated (8).

Subsec. (c)(8). Pub. L. 98–353, §§ 315(1), 527(b)(3), redesignated former par. (7) as (8) and inserted ''other than completion of payments under the plan'' after ''in the plan''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 229 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 257 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 348, 365, 706, 726, 1330 of this title.

SUBCHAPTER II—THE PLAN

§ 1321. Filing of plan

The debtor shall file a plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2648.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Chapter 13 contemplates the filing of a plan only by the debtor.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1307 of this title.

§ 1322. Contents of plan

(a) The plan shall—

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(10) include any other appropriate provision not inconsistent with this title.

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

(d) The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

(e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall

be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2648; Pub. L. 98–353, title III, §§316, 528, July 10, 1984, 98 Stat. 356, 389; Pub. L. 103–394, title III, §§301, 305(c), Oct. 22, 1994, 108 Stat. 4131, 4134.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1322(b)(2) of the House amendment represents a compromise agreement between similar provisions in the House bill and Senate amendment. Under the House amendment, the plan may modify the rights of holders of secured claims other than a claim secured by a security interest in real property that is the debtor's principal residence. It is intended that a claim secured by the debtor's principal residence may be treated with under section 1322(b)(5) of the House amendment.

Section 1322(c) adopts a 5-year period derived from the House bill in preference to a 4-year period contained in the Senate amendment. A conforming change is made in section 1329(c) adopting the provision in the House bill in preference to a comparable provision in the Senate amendment.

Tax payments in wage earner plans: The House bill provided that a wage earner plan had to provide that all priority claims would be paid in full. The Senate amendment contained a special rule in section 1325(c) requiring that Federal tax claims must be paid in cash, but that such tax claims can be paid in deferred cash installments under the general rules applicable to the payment of debts in a wage earner plan, unless the Internal Revenue Service negotiates with the debtor for some different medium or time for payment of the tax liability.

The House bill adopts the substance of the Senate amendment rule under section 1322(a)(2) of the House amendment. A wage earner plan must provide for full payment in deferred cash payments, of all priority claims, unless the holder of a particular claim agrees with a different treatment of such claim.

SENATE REPORT NO. 95–989

Chapter 13 is designed to serve as a flexible vehicle for the repayment of part or all of the allowed claims of the debtor. Section 1322 emphasizes that purpose by fixing a minimum of mandatory plan provisions.

Subsection (a) requires that the plan submit whatever portion of the future income of the debtor is necessary to implement the plan to the control of the trustee, mandates payment in full of all section 507 priority claims, and requires identical treatment for all claims of a particular class.

Subsection (b) permits a chapter 13 plan to (1) divide unsecured claims not entitled to priority under section 507 into classes in the manner authorized for chapter 11 claims; (2) modify the rights of holders of secured and unsecured claims, except claims wholly secured by real estate mortgages; (3) cure or waive any default; (4) propose payments on unsecured claims concurrently with payments on any secured claim or any other class of unsecured claims; (5) provide for curing any default on any secured or unsecured claim on which the final payment is due after the proposed final payment under the plan; (6) provide for payment of any allowed postpetition claim; (7) assume or reject any previously unrejected executory contract or unexpired lease of the debtor; (8) propose the payment of all or any part of any claim from property of the estate or of the debtor; (9) provide for the vesting of property of the estate; and (10) include any other provision not inconsistent with other provisions of title 11.

Subsection (c) limits the payment period under the plan to 3 years, except that a 4–year payment period may be permitted by the court.

AMENDMENTS

1994—Subsecs. (c), (d). Pub. L. 103–394, §301, added subsec. (c) and redesignated former subsec. (c) as (d).

Subsec. (e). Pub. L. 103–394, §305(c), added subsec. (e).

1984—Subsec. (a)(2). Pub. L. 98–353, §528(a), inserted a comma after ''payments''.

Subsec. (b)(1). Pub. L. 98–353, §316, inserted ''; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims''.

Subsec. (b)(2). Pub. L. 98–353, §528(b)(1), inserted '', or leave unaffected the rights of the holders of any class of claims''.

Subsec. (b)(4). Pub. L. 98–353, §528(b)(2), inserted ''other'' after ''claim or any''.

Subsec. (b)(7). Pub. L. 98–353, §528(b)(3), inserted ''subject to section 365 of this title,'' before ''provide'', substituted '', rejection, or assignment'' for ''or rejection'', and substituted ''under such section'' for ''under section 365 of this title''.

Subsec. (b)(8). Pub. L. 98–353, §528(b)(4), struck out ''any'' before ''part of a claim''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by section 301 of Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, and amendment by section 305(c) of Pub. L. 103–394 effective Oct. 22, 1994, and applicable only to agreements entered into after Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1323, 1328, 1329 of this title.

§ 1323. Modification of plan before confirmation

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1322 of this title.

(b) After the debtor files a modification under this section, the plan as modified becomes the plan.

(c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2649.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

The debtor is permitted to modify the plan before confirmation without court approval so long as the modified plan, which becomes the plan on filing, complies with the requirements of section 1322.

The original acceptance or rejection of a plan by the holder of a secured claim remains binding unless the modified plan changes the rights of the holder and the holder withdraws or alters its earlier acceptance or rejection.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1329 of this title.

§ 1324. Confirmation hearing

After notice, the court shall hold a hearing on confirmation of the plan. A party in interest may object to confirmation of the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2649; Pub. L. 98–353, title III, § 529, July 10, 1984, 98 Stat. 389; Pub. L. 99–554, title II, § 283(x), Oct. 27, 1986, 100 Stat. 3118.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Any party in interest may object to the confirmation of a plan, as distinguished from merely rejecting a plan. An objection to confirmation is predicated on failure of the plan or the procedures employed prior to confirmation to conform with the requirements of chapter 13. The bankruptcy judge is required to provide notice and an opportunity for hearing any such objection to confirmation.

AMENDMENTS

1986—Pub. L. 99–554 struck out ''the'' after ''object to''.

1984—Pub. L. 98–353 struck out ''the'' before ''confirmation of the plan''.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 28 section 586.

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if—

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan—

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, ''disposable income'' means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions (that meet the definition of ''charitable contribution'' under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2649; Pub. L. 98–353, title III, §§ 317, 530, July 10, 1984, 98 Stat. 356, 389; Pub. L. 99–554, title II, § 283(y), Oct. 27, 1986, 100 Stat. 3118; Pub. L. 105–183, § 4(a), June 19, 1998, 112 Stat. 518.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1325(a)(5)(B) of the House amendment modifies the House bill and Senate amendment to significantly protect secured creditors in chapter 13. Unless the secured creditor accepts the plan, the plan must provide that the secured creditor retain the lien securing the creditor's allowed secured claim in addition to receiving value, as of the effective date of the plan of property to be distributed under the plan on account of the claim not less than the allowed amount of the claim. To this extent, a secured creditor in a case under chapter 13 is treated identically with a recourse creditor under section 1111(b)(1) of the House amendment except that the secured creditor in a case under chapter 13 may receive any property of a value as of the effective date of the plan equal to the allowed amount of the creditor's secured claim rather than being restricted to receiving deferred cash payments. Of course, the secured creditors' lien only secures the value of the collateral and to the extent property is distributed of a present value equal to the allowed amount of the creditor's secured claim the creditor's lien will have been satisfied in full. Thus the lien created under section 1325(a)(5)(B)(i) is effective only to secure deferred payments to the extent of the amount of the allowed secured claim. To the extent the deferred payments ex-

ceed the value of the allowed amount of the secured claim and the debtor subsequently defaults, the lien will not secure unaccrued interest represented in such deferred payments.

SENATE REPORT NO. 95–989

The bankruptcy court must confirm a plan if (1) the plan satisfies the provisions of chapter 13 and other applicable provisions of title 11; (2) it is proposed in good faith; (3) it is in the best interests of creditors, and defined by subsection (a)(4) of Section 1325; (4) it has been accepted by the holder of each allowed secured claim provided for the plan or where the holder of any such secured claim is to receive value under the plan not less than the amount of the allowed secured claim, or where the debtor surrenders to the holder the collateral securing any such allowed secured claim; (5) the plan is feasible; and (6) the requisite fees and charges have been paid.

Subsection (b) authorizes the court to order an entity, as defined by Section 101(15), to pay any income of the debtor to the trustee. Any governmental unit is an entity subject to such an order.

AMENDMENTS

1998—Subsec. (b)(2)(A). Pub. L. 105–183 inserted before semicolon ‘‘, including charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made’’.

1986—Subsec. (b)(2)(A). Pub. L. 99–554 substituted ‘‘; and’’ for ‘‘; or’’.

1984—Subsec. (a). Pub. L. 98–353, § 317(1), substituted ‘‘Except as provided in subsection (b), the’’ for ‘‘The’’.

Subsec. (a)(1). Pub. L. 98–353, § 530, inserted ‘‘the’’ before ‘‘other’’.

Subsecs. (b), (c). Pub. L. 98–353, § 317(2), (3), added subsec. (b) and redesignated former subsec. (b) as (c).

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105–183 applicable to any case brought under an applicable provision of this title that is pending or commenced on or after June 19, 1998, see section 5 of Pub. L. 105–183, set out as a note under section 544 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1307, 1322, 1329, 1330 of this title.

§ 1326. Payments

(a)(1) Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.

(2) A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as practicable. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

(b) Before or at the time of each payment to creditors under the plan, there shall be paid—

(1) any unpaid claim of the kind specified in section 507(a)(1) of this title; and

(2) if a standing trustee appointed under section 586(b) of title 28 is serving in the case, the percentage fee fixed for such standing trustee under section 586(e)(1)(B) of title 28.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2650; Pub. L. 98–353, title III, §§ 318(a), 531, July 10, 1984, 98 Stat. 357, 389; Pub. L. 99–554, title II, §§ 230, 283(z), Oct. 27, 1986, 100 Stat. 3103, 3118; Pub. L. 103–394, title III, § 307, Oct. 22, 1994, 108 Stat. 4135.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1326(a)(2) of the House amendment adopts a comparable provision contained in the House bill providing for standing trustees.

SENATE REPORT NO. 95–989

Section 1326 supplements the priorities provisions of section 507. Subsection (a) requires accrued costs of administration and filing fees, as well as fees due the chapter 13 trustee, to be disbursed before payments to creditors under the plan. Subsection (b) makes it clear that the chapter 13 trustee is normally to make distribution to creditors of the payments made under the plan by the debtor.

HOUSE REPORT NO. 95–595

Subsection (a) requires that before or at the time of each payment any outstanding administrative expenses [and] any percentage fee due for a private standing chapter 13 trustee be paid in full.

AMENDMENTS

1994—Subsec. (a)(2). Pub. L. 103–394 inserted ‘‘as soon as practicable’’ before period at end of second sentence.

1986—Subsec. (a)(2). Pub. L. 99–554, § 283(z), substituted ‘‘payment’’ for ‘‘payments’’ in last sentence.

Subsec. (b). Pub. L. 99–554, § 230, amended subsec. (b) generally, substituting ‘‘586(b) of title 28’’ for ‘‘1302(d) of this title’’ and ‘‘586(e)(1)(B) of title 28’’ for ‘‘1302(e) of this title’’ in par. (2).

1984—Subsec. (a). Pub. L. 98–353, § 318(a)(2), added subsec. (a). Former subsec. (a) redesignated (b).

Subsec. (b). Pub. L. 98–353, § 318(a)(1), redesignated subsec. (a) as (b). Former subsec. (b) redesignated (c).

Subsec. (b)(2). Pub. L. 98–353, § 531, inserted ‘‘of this title’’ after ‘‘1302(d)’’.

Subsec. (c). Pub. L. 98–353, § 318(a)(1), redesignated former subsec. (b) as (c).

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 230 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 347, 1302, 1307 of this title.

§ 1327. Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2650.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) binds the debtor and each creditor to the provisions of a confirmed plan, whether or not the claim of the creditor is provided for by the plan and whether or not the creditor has accepted, rejected, or objected to the plan. Unless the plan itself or the order confirming the plan otherwise provides, confirmation is deemed to vest all property of the estate in the debtor, free and clear of any claim or interest of any creditor provided for by the plan.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 106 of this title.

§ 1328. Discharge

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title;

(2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title; or

(3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.

(b) At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if—

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

(c) A discharge granted under subsection (b) of this section discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 of this title, except any debt—

(1) provided for under section 1322(b)(5) of this title; or

(2) of a kind specified in section 523(a) of this title.

(d) Notwithstanding any other provision of this section, a discharge granted under this section does not discharge the debtor from any debt based on an allowed claim filed under section 1305(a)(2) of this title if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

(e) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if—

(1) such discharge was obtained by the debtor through fraud; and

(2) the requesting party did not know of such fraud until after such discharge was granted.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2650; Pub. L. 98–353, title III, § 532, July 10, 1984, 98 Stat. 389; Pub. L. 101–508, title III, § 3007(b)(1), Nov. 5, 1990, 104 Stat. 1388–28; Pub. L. 101–581, §§ 2(b), 3, Nov. 15, 1990, 104 Stat. 2865; Pub. L. 101–647, title XXXI, §§ 3102(b), 3103, Nov. 29, 1990, 104 Stat. 4916; Pub. L. 103–394, title III, § 302, title V, § 501(d)(38), Oct. 22, 1994, 108 Stat. 4132, 4147.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1328(a) adopts a provision contained in the Senate amendment permitting the court to approve a waiver of discharge by the debtor. It is anticipated that such a waiver must be in writing executed after the order for relief in a case under chapter 13.

SENATE REPORT NO. 95–989

The court is to enter a discharge, unless waived, as soon as practicable after completion of payments under the plan. The debtor is to be discharged of all debts provided for by the plan or disallowed under section 502, except a debt provided for under the plan the last payment on which was not due until after the completion of the plan, or a debt incurred for willful and malicious conversion of or injury to the property or person of another.

Subsection (b) is the successor to Bankruptcy Act Section 661 [section 1061 of former title 11]. This subsection permits the bankruptcy judge to grant the debtor a discharge at any time after confirmation of a plan, if the court determines, after notice and hearing, that the failure to complete payments under the plan is due to circumstances for which the debtor should not justly be held accountable, the distributions made to each creditor under the plan equal in value the amount that would have been paid to the creditor had the estate been liquidated under chapter 7 of title 11 at the date of the hearing under this subsection, and that modification of the plan is impracticable. The discharge granted under subsection (b) relieves the debtor

from all unsecured debts provided for by the plan or disallowed under section 502, except nondischargeable debts described in section 523(a) of title 11 or debts of the type covered by section 1322(b)(5).

Subsection (d) excepts from any chapter 13 discharge a debt based on an allowed section 1305(a)(2) postpetition claim, if prior trustee approval of the incurring of the debt was practicable but was not obtained.

A chapter 13 discharge obtained through fraud and before the moving party gained knowledge of the fraud may be revoked by the court under subsection (e), after notice and hearing, at the request of any party in interest made within 1 year after the discharge was granted.

AMENDMENTS

1994—Subsec. (a)(2). Pub. L. 103–394, §501(d)(38)(A), substituted ''(5), (8), or (9)'' for ''(5) or (8)''.

Subsec. (a)(3). Pub. L. 103–394, §501(d)(38)(B), struck out last par. (3). See 1990 Amendment note below.

Pub. L. 103–394, §302, inserted '', or a criminal fine,'' after ''restitution''.

1990—Subsec. (a)(1). Pub. L. 101–581, §3(1), and Pub. L. 101–647, §3103(1), made identical amendments striking ''or'' at end.

Subsec. (a)(2). Pub. L. 101–581, §3(2), and Pub. L. 101–647, §3103(2), made identical amendments substituting ''; or'' for period at end.

Pub. L. 101–581, §2(b), and Pub. L. 101–647, §3102(b), which directed identical insertions of ''or 523(a)(9)'' after ''523(a)(5)'', could not be executed because of prior amendment by Pub. L. 101–508. See below.

Pub. L. 101–508 substituted ''paragraph (5) or (8) of section 523(a)'' for ''section 523(a)(5)''.

Subsec. (a)(3). Pub. L. 101–581, §3(3), and Pub. L. 101–647, §3103(3), made identical amendments adding par. (3).

1984—Subsec. (e)(1). Pub. L. 98–353, §532(1), inserted ''by the debtor'' after ''obtained''.

Subsec. (e)(2). Pub. L. 98–353, §532(2), substituted ''the requesting party did not know of such fraud until'' for ''knowledge of such fraud came to the requesting party''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1990 AMENDMENTS

Amendment by Pub. L. 101–647 effective Nov. 29, 1990, but not applicable with respect to cases commenced under this title before Nov. 29, 1990, see section 3104 of Pub. L. 101–647, set out as a note under section 523 of this title.

Amendment by Pub. L. 101–581 effective Nov. 15, 1990, but not applicable with respect to cases commenced under this title before Nov. 15, 1990, see section 4 of Pub. L. 101–581, set out as a note under section 523 of this title.

Section 3007(b)(2) of Pub. L. 101–508 provided that: ''The amendment made by paragraph (1) [amending this section] shall not apply to any case under the provisions of title 11, United States Code, commenced before the date of the enactment of this Act [Nov. 5, 1990].''

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 523, 524 of this title; title 12 section 1715z–1a; title 26 sections 6327, 7437.

§ 1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2651; Pub. L. 98–353, title III, §§319, 533, July 10, 1984, 98 Stat. 357, 389.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

At any time prior to the completion of payments under a confirmed plan, the plan may be modified, after notice and hearing, to change the amount of payments to creditors or a particular class of creditors and to extend or reduce the payment period. A modified plan may not contain any provision which could not be included in an original plan as prescribed by section 1322. A modified plan may not call for payments to be made beyond four years as measured from the date of the commencement of payments under the original plan.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353, §§319, 533(1), (2), inserted ''of the plan'' after ''confirmation'', substituted ''such plan'' for ''a plan'', and inserted provisions respecting requests by the debtor, the trustee, or the holder of an allowed unsecured claim for modification.

Subsec. (a)(3). Pub. L. 98–353, §533(3), substituted ''plan to'' for ''plan, to''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1307, 1328, 1330 of this title; title 28 section 586.

§ 1330. Revocation of an order of confirmation

(a) On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

(b) If the court revokes an order of confirmation under subsection (a) of this section, the

court shall dispose of the case under section 1307 of this title, unless, within the time fixed by the court, the debtor proposes and the court confirms a modification of the plan under section 1329 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2651.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1331 of the House bill and Senate amendment is deleted in the House amendment.

Special tax provision: Section 1331 of title 11 of the House bill and the comparable provisions in sections 1322 and 1327(d) of the Senate amendment, pertaining to assessment and collection of taxes in wage earner plans, are deleted, and the governing rule is placed in section 505(c) of the House amendment. The provisions of both bills allowing assessment and collection of taxes after confirmation of the wage-earner plan are modified to allow assessment and collection after the court fixes the fact and amount of a tax liability, including administrative period taxes, regardless of whether this occurs before or after confirmation of the plan. The provision of the House bill limiting the collection of taxes to those assessed before one year after the filing of the petition is eliminated, thereby leaving the period of limitations on assessment of these nondischargeable tax liabilities the usual period provided by the Internal Revenue Code [Title 26].

SENATE REPORT NO. 95–989

The court may revoke an order of confirmation procured by fraud, after notice and hearing, on application of a party in interest filed within 180 days after the entry of the order. Thereafter, unless a modified plan is confirmed, the court is to convert or dismiss the chapter 13 case as provided in section 1307.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1307 of this title.

[CHAPTER 15—REPEALED]

[§§ 1501 to 151326. Repealed. Pub. L. 99–554, title II, § 231, Oct. 27, 1986, 100 Stat. 3103]

Section 1501, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2652, related to applicability of chapter which provided a pilot program for a United States trustee system.

Section 15101, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2652, related to definitions.

Section 15102, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2652, related to a rule of construction.

Section 15103, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2652; Pub. L. 98–353, title III, §§ 311(b)(3), 318(b), July 10, 1984, 98 Stat. 355, 357, related to applicability of subchapters and sections.

Section 15303, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2653, related to involuntary cases.

Section 15321, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2653, related to eligibility to serve as trustee.

Section 15322, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2653, related to qualification of trustee.

Section 15324, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2653, related to removal of trustee or examiner.

Section 15326, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2653, related to limitation on compensation of trustee.

Section 15330, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2653, related to compensation of officers.

Section 15343, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2653, related to examination of debtor.

Section 15345, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2654; Pub. L. 97–258, § 3(c), Sept. 13, 1982, 96 Stat. 1064, related to money of estates.

Section 15701, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2654, related to interim trustee.

Section 15703, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2654, related to successor trustee.

Section 15704, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2655, related to duties of trustee.

Section 15727, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2655, related to discharge.

Section 151102, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2655, related to creditors' and equity security holders' committees.

Section 151104, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2655, related to appointment of trustee or examiner.

Section 151105, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2656, related to termination of trustee's appointment.

Section 151163, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2656, related to appointment of trustee.

Section 151302, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2656; Pub. L. 98–353, title III, §§ 311(b)(4), 534, July 10, 1984, 98 Stat. 355, 390, related to trustees.

Section 151326, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2657, related to payments.

EFFECTIVE DATE OF REPEAL

Effective date and applicability of repeal by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as an Effective Date note under section 581 of Title 28, Judiciary and Judicial Procedure.

Pub. L. 95–598, title IV, § 408(c), Nov. 6, 1978, 92 Stat. 2687, as amended by Pub. L. 98–166, title II, § 200, Nov. 28, 1983, 97 Stat. 1081; Pub. L. 98–353, title III, § 323, July 10, 1984, 98 Stat. 358; Pub. L. 99–429, Sept. 30, 1986, 100 Stat. 985; Pub. L. 99–500, § 101(b) [title II, § 200], Oct. 18, 1986, 100 Stat. 1783–39, 1783–45, and Pub. L. 99–591, § 101(b) [title II, § 200], Oct. 30, 1986, 100 Stat. 3341–39, 3341–45; Pub. L. 99–554, title III, § 307(a), Oct. 27, 1986, 100 Stat. 3125, provided for the repeal of this chapter at a prospective date, prior to repeal by Pub. L. 99–554, title III, § 307(b), Oct. 27, 1986, 100 Stat. 3125.