RECOMMENDATIONS TO CONGRESS

Chapter 1: Consumer Bankruptcy - System Administration

1.1.1 *National Filing System*

A national filing system should be established and maintained that would identify bankruptcy filings using social security numbers or other unique identifying numbers.

1.1.2 *Heightened Requirements for Accurate Information*

The Bankruptcy Code should direct trustees to perform random audits of debtors' schedules to verify the accuracy of the information listed. Cases would be selected for audit according to guidelines developed by the Executive Office for United States Trustees.

1.1.3 *False Claims*

Courts should be authorized to order creditors who file and fail to correct materially false claims in bankruptcy to pay costs and the debtors' attorneys' fees involved in correcting the claim. If a creditor knowingly filed a false claim, the court could impose appropriate additional sanctions.

1.1.4 *Rule 9011*

The Commission endorses the amended Rule 9011 of the Federal Rules of Bankruptcy Procedure, to become effective on December 1, 1997, which will make an attorney's presentation to the court of any petition, pleading, written motion, or other paper a certification that the attorney made a reasonable inquiry into the accuracy of that information, and thus will help ensure that attorneys take responsibility for the information that they and their clients provide.

1.1.5 *Financial Education*

All debtors in both Chapter 7 and in Chapter 13 should have the opportunity to participate in a financial education program.

Chapter 1: Consumer Bankruptcy - Property Exemptions

1.2.1 *Elimination of Opt Out*

A consumer debtor who has filed a petition for relief under the Bankruptcy Code should be allowed to exempt property as provided in section 522 of the Code. Subsection (b)(1) and (2) of section 522 should be repealed.

1.2.2 *Homestead Property*

The debtor should be able to exempt the debtor's aggregate interest as a fee owner, a joint tenant, or a tenant by the entirety, in real property or personal property that the debtor or a dependent of the debtor uses as a residence in the amount determined by the laws of the state in which the debtor resides, but not less than $20,000 and not more than $100,000. Subsection (m) of section 522 should be revised to reflect that all exemptions except for the homestead exemption shall apply separately to each debtor in a joint case.

1.2.3 *Nonhomestead Lump Sum Exemption*

With respect to property of the estate not otherwise exempt by other provisions, a debtor should be permitted to retain up to $20,000 in value in any form. A debtor who claims no homestead exemption

should be permitted to exempt an additional $15,000 of property in any form.

1.2.4 All professionally-prescribed medical devices and health aids necessary for the health and maintenance of the debtor or a dependent of the debtor should be exempt.

1.2.5 ***Rights to Receive Benefits and Payments***

All funds held directly or indirectly in a trust that is exempt from federal income tax pursuant to sections 408 or 501(a) of the Internal Revenue Code should be exempt.

1.2.6 ***Rights to Payments***

Rights to receive future payments (*e.g.*, social security benefits, life insurance) should be exempt, and the debtor's right to receive an award under a crime victim's reparations law or payment for a personal bodily injury claim of the debtor or the debtor's dependent should be exempt.

Chapter 1: Consumer Bankruptcy - Reaffirmation Agreements and the Treatment of Secured Debt

1.3.1 11 U.S.C. § 524(c) should be amended to provide that a reaffirmation agreement is permitted, with court approval, only if the amount of the debt that the debtor seeks to reaffirm does not exceed the allowed secured claim, the lien is not avoidable under the provisions of title 11, no attorney fees, costs, or expenses have been added to the principal amount of the debt to be reaffirmed, the motion for approval of the agreement is accompanied by underlying contractual documents and all related security agreements or liens, together with evidence of their perfection, the debtor has provided all information requested in the motion for approval of the agreement, and the agreement conforms with all other requirements of subsection (c).

Section 524(d) should be amended to delineate the circumstances under which a hearing is not required as a prerequisite to a court approving an agreement of the kind specified in section 524(c): a hearing will not be required when the debtor was represented by counsel in negotiations on the agreement and the debtor's attorney has signed the affidavit as provided in section 524 (c), and a party in

interest has not requested a judicial valuation of the collateral that is the subject of the agreement. If one or more of the foregoing requirements is not met, or in the court's discretion, the court shall conduct a hearing to determine whether an agreement that meets all of the requirements of subsection (c) should be approved. Court approval of an agreement signifies that the court has determined that the agreement is in the best interest of the debtor and the debtor's dependents and does not impose undue hardship on the debtor and the debtor's dependents in light of the debtor's income and expenses.

The Commission recommends that the Advisory Committee on Bankruptcy Rules of the Judicial Conference prescribe a form motion for approval of reaffirmation agreements that contains information enabling the court and the parties to determine the propriety of the agreement. Approval of the motion would not entail a separate order of the court.

1.3.2 An additional subsection should be added to section 524 to provide that the court shall grant judgment in favor of an individual who has received a discharge under section 727, 1141, 1228, or 1328 of this title for costs and attorneys fees, plus treble damages, from a creditor who threatens, files suit, or otherwise seeks to collect any debt that was discharged in bankruptcy and was not the subject of an agreement in accordance with subsections (c) and (d) of section 524.

1.3.3 ***No Ride-Through***

Section 521(2) should be amended to clarify that a debtor with consumer debts that are secured, as determined by the provisions of title 11, by property of the estate must redeem the property or obtain court approval of an agreement under section 524(c) of title 11 in order to retain the property postdischarge, except for a security interest in real or personal property that is the debtor's principal residence.

1.3.4 ***Security Interests in Household Goods***

Household Goods Worth Less Than $500

Section 522(f) should provide that a creditor claiming a purchase money security interest in exempt property held for personal or household use of the debtor or a dependent of the debtor in household furnishings, wearing apparel, appliances, books, animals, crops, musical instruments, jewelry, implements, professional books, tools of the trade or professionally prescribed health aids for the debtor or a

member of the debtor's household must petition the bankruptcy court for continued recognition of the security interest. The court shall hold a hearing to value each item covered by the creditor's petition. If the value of the item is less than $500, the petition shall not be granted; if the value is $500 or greater, the security interest would be recognized and treated as a secured loan in Chapter 7 or Chapter 13.

1.3.5 *Characterization of Rent-to-Own Transactions*

Consumer rent-to-own transactions should be characterized in bankruptcy as installment sales contracts.

Chapter 1: Consumer Bankruptcy - Discharge, Exceptions to Discharge and Objections to Discharge

1.4.1 *Credit Card Debt*

Except for credit card debts that are excepted from discharge under section 523(a)(2)(B) (for materially false written statements respecting the debtor's financial condition) and section 523(a)(14), (debts incurred to pay nondischargeable taxes to the United States), debts incurred on a credit card issued to the debtor that did not exceed the debtor's credit limit should be dischargeable unless they were incurred within 30 days before the order for relief under title 11.

1.4.2 *Debts Incurred to Pay Nondischargeable Federal Tax Obligations*

Section 523(a)(14) should remain unchanged to except from discharge debts incurred for federal taxes that would be nondischargeable under section 523(a)(1).

1.4.3 *Criminal Restitution Orders*

Section 523(a)(13) should be expanded to apply to all criminal restitution orders.

1.4.4 *Family Support Obligations*

Sections 523(a)(5), (a)(15), and (a)(18) should be combined. The revised 523(a)(5) should provide that all debts actually in the nature of support, whether they have been denominated in a prior court order as alimony, maintenance, support, property settlements, or otherwise,

are nondischargeable. In addition, debts owed under state law to a state or municipality in the nature of support would be nondischargeable in all chapters.

1.4.5 ***Dischargeability of Student Loans***

Section 523(a)(8) should be repealed.

1.4.6 ***Issue Preclusive Effect of True Defaults***

For complaints to establish nondischargeability on grounds set forth in section 523(c), the Bankruptcy Code should clarify that issues that were not actually litigated and necessary to a prior judgment shall not be given preclusive effect.

1.4.7 ***Vicarious Liability***

Section 523(c) should be amended such that intentional action by a wrongdoer who is not the debtor cannot be imputed to the debtor.

1.4.8 ***Effect of Lack of Notice on Time to Bring Objection to Discharge***

Creditors that did not receive notice of a bankruptcy should get an extension of time to file an objection to or seek revocation of a discharge.

1.4.9 ***Settlement and Dismissal of Objections to Discharge***

Section 727 should be amended to provide that (a) any complaint objecting to discharge may be dismissed on motion of the plaintiff only after giving notice to the United States trustee, the case trustee and all creditors entitled to notice, advising them of an opportunity to substitute as plaintiff in the action; (b) any motion to dismiss a complaint objecting to discharge must be accompanied by an affidavit of the moving party disclosing all consideration given or promised to be given by the debtor in connection with dismissal of the complaint; and (c) if the debtor has given or promised to give consideration in connection with dismissal of the complaint, the complaint may not be dismissed unless the consideration benefits the estate generally.

Chapter 1: Consumer Bankruptcy - Chapter 13 Repayment Plans

1.5.1 *Home Mortgages*

A Chapter 13 plan could not modify obligations on first mortgages and refinanced first mortgages, except to the extent currently permitted by the Bankruptcy Code. Section 1322(b)(2) should be amended to provide that the rights of a holder of a claim secured only by a junior security interest in real property that is the debtor's principal residence may not be modified to reduce the secured claim to less than the appraised value of the property at the time the security interest was made.

1.5.2 *Valuation*

A creditor's secured claim in personal property should be determined by the property's wholesale price.

A creditor's secured claim in real property should be determined by the property's fair market value, minus hypothetical costs of sale.

1.5.3 Payments on secured debts that are subject to modification should be spread over the life of the plan, according to fixed criteria for interest rates.

1.5.4 *Unsecured Debt*

Payments on unsecured debt should be determined by guidelines based on a graduated percentage of the debtor's income, subject to upward adjustment to meet the section 1325(a)(4) requirement that creditors receive at least the present value of whatever they would have received in a Chapter 7. The trustee or an unsecured creditor should be authorized to file an objection to any plan that deviates from the guidelines, and a court would determine whether the deviation was appropriate in light of all the circumstances.

1.5.5 *Consequences of Incomplete Payment Plans*

The Bankruptcy Code should provide that a case under Chapter 13 that otherwise meets the standards for dismissal shall be converted to Chapter 7 after notice and a hearing unless a party in interest objects on the basis that the debtor had been granted a discharge in a Chapter 7 case commenced within six years of the date on which the conversion

would take place, in which case the Chapter 13 case will be dismissed. In addition, the debtor may object to conversion without grounds, in which case the Chapter 13 case will be dismissed. The standards for modification, dismissal, and discharge in Chapter 13 would not otherwise change.

Section 362 should be amended to provide that the filing of a petition by an individual does not operate as a stay if the individual has filed two or more petitions for relief under title 11 within six years of filing the instant petition for relief and if the individual has been a debtor in a bankruptcy case within 180 days prior to the instant petition for relief. On the request of the debtor, after notice and a hearing, the court may impose a stay for cause shown, subject to such conditions and modifications as the court may impose.

1.5.6 *In Rem Orders*

Section 362 should be amended to provide that the filing of a petition by an individual does not operate as a stay with respect to property of the estate transferred by that individual to another individual who was a debtor under title 11 within 180 days of the filing of the instant petition, unless the court grants a stay with respect to such property after notice and a hearing on request of the debtor.

After notice and a hearing, a bankruptcy court should be empowered to issue *in rem* orders barring the application of a future automatic stay to identified property of the estate for a period of up to six years when a party could show that the debtor had transferred such real property or leasehold interests or fractional shares of property or leasehold interests to avoid creditor foreclosure or eviction. A subsequent owner of the property or tenant of the leasehold who files for bankruptcy (or the same owner or holder in a subsequent filing) should be permitted to petition the bankruptcy court for the imposition of a stay to protect property of the estate, which the court would be required to grant to protect innocent parties who were not a part of a scheme to transfer the property to hinder foreclosure or eviction.

1.5.7 *Retention of the "Superdischarge"*

Congress should retain 11 U.S.C. § 1328(a), which permits a debtor who completes all payments under the plan to discharge all debts provided for by the plan or disallowed under section 502 of title 11 except for those listed in section 1328(a)(1) - (3).

1.5.8 Debtors who choose Chapter 13 repayment plans should have their bankruptcy filings reported differently from those who do not. Debtors who complete voluntary debtor education programs should have that fact noted on their credit reports.

1.5.9 Trustees should be encouraged to establish credit rehabilitation programs to help provide better, cheaper access to credit for those who participate in repayment plans.

Chapter 2: Treatment of Mass Future Claims in Bankruptcy

2.1.1 *Definition of Mass Future Claim*

A definition of "mass future claim" should be added as a subset of the definition of "claim" in 11 U.S.C. § 101(5). "Mass future claim" should be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one or more acts or omissions of the debtor if:

1) **the act(s) or omission(s) occurred before or at the time of the order for relief;**
2) **the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;**
3) **at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;**
4) **the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and**
5) **the amount of such liability is reasonably capable of estimation.**

The definition of "claim" in section 101(5) should be amended to add a definition of "holder of a mass future claim," which would be an entity that holds a mass future claim.

2.1.2 *Protecting the Interests of Holders of Mass Future Claims*

The Bankruptcy Code should provide that a party in interest may petition the court for the appointment of a mass future claims representative. When a plan includes a class or classes of mass future claims, the Bankruptcy Code should authorize a court to order the appointment of a representative for each class of holders of mass future claims. A mass future claims representative shall serve until further order of the bankruptcy court.

The Bankruptcy Code should provide that a mass future claims representative shall have the exclusive power to file a claim or claims on behalf of the class of mass future claims (and to determine whether or not to file a claim), to cast votes on behalf of the holders of mass future claims and to exercise all of the powers of a committee appointed pursuant to section 1102. However, a holder of a mass future claim may elect to represent his, her, or its own interests and may opt out of being represented by the mass future claims representative.

The Bankruptcy Code should provide that prior to confirmation of a plan of reorganization, the fees and expenses of a mass future claims representative and his or her agents shall be administrative expenses under section 503. Following the confirmation of a plan of reorganization, and for so long as holders of mass future claims may exist, any continuing fees and expenses of a mass future claims representative and his or her agents shall be an expense of the fund established for the compensation of mass future claims.

The Bankruptcy Code should provide that a mass future claims representative shall serve until further orders of the bankruptcy court declare otherwise, shall serve as a fiduciary for the holders of future claims in such representative's class, and shall be subject to suit only in the district where the representative was appointed.

2.1.3 *Determination of Mass Future Claims*

Section 502 should provide that the court may estimate mass future claims and also may determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting. In addition, 28 U.S.C. § 157(b)(2)(B) should specify that core proceedings include the estimation or determination of the amount of mass future claims.

2.1.4 ***Channeling Injunctions***

Section 524 should authorize courts to issue channeling injunctions.

2.1.5 ***Plan Confirmation and Discharge; Successor Liability***

Sections 363 and 1123 should provide that the trustee may dispose of property free and clear of mass future claims when the trustee or plan proponent has satisfied the requirements for treating mass future claims. Upon approving the sale, the court could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser.

Chapter 2: Transnational Insolvency

2.2.1 Adoption of the UNCITRAL Model Law for Cross-Border Insolvencies

2.2.2 Retention of provisions for additional relief

2.2.3 Amendment of title 28 to add jurisdiction over the Model Law provisions

2.2.4 Conforming amendments to the definitions of foreign proceeding and foreign representative in 11 U.S.C. § 101(23)-(24)

2.2.5 Exclusion from the application of the Model Law of consumers resident in the United States if their debts are within the limits for Chapter 13

2.2.6 Recognition *vel non* of foreign tax claims to be left to evolving caselaw and treaty negotiations

2.2.7 28 U.S.C. § 1410 should be amended to provide that the various bases for venue may be used in the alternative as a matter of choice, *i.e.*, the word "only" should be deleted from the section; additionally there should be a catch-all venue choice related to the interest of justice and convenience of the parties

Chapter 2: Partnerships

2.3.1 *Defining the term "General Partner"*

A "general partner" should be defined under 11 U.S.C. § 101 as any entity that as a result of an existing or former status as an actual or purported general partner in an existing, former, predecessor, or affiliated partnership, is liable under applicable nonbankruptcy law for one or more debts of the partnership.

2.3.2 *Consent of Former Partners*

The Bankruptcy Code and Rules should be amended to clarify that, notwithstanding Recommendation 1 (defining "general partner"), a former general partner of a partnership is not, absent a specific court order to the contrary, required to consent to a voluntary petition by a partnership, to be served with a petition or summons in an involuntary case against a partnership, or to perform the duties of disclosure or procedural duties imposed on a general partner of a debtor partnership.

2.3.3 *Bankruptcy Court Jurisdiction*

The court in which a partnership case is pending should have jurisdiction under 28 U.S.C. § 1334(b) to determine who is or may be liable as a general partner for the debts of the partnership and may determine the rights among the general partners with respect to the debts of the partnership. Such matters should constitute core proceedings under 28 U.S.C. § 157(b).

2.3.4 *Liability of General Partner for Deficiency in Partnership Case*

If there is a deficiency of property of the partnership estate to pay in full all allowed claims in a case under title 11, the estate should have a claim against each general partner to the extent that, under applicable nonbankruptcy law, such general partner is personally liable for such deficiency. The amount of the deficiency claim should not be reduced on account of any right of contribution or indemnity among general partners. The claim should be estimated if its determination would unduly delay the administration of the case. Any action or proceeding to enforce liability under this section should be commenced no later than four years after the entry of the order for relief in the case concerning the partnership.

2.3.5 *Power of the Court to Assure Payment of the Deficiency*

Renumbered section 723(b) of the Bankruptcy Code should be amended to provide that the court in a partnership case may, after notice and a hearing, order any general partner that is not a debtor in a case under this title (1) to provide the estate, in such amount as the court shall determine to be appropriate under the circumstances, with indemnity for, or assurance of payment of, any deficiency recoverable from such general partner, or (2) not to incur obligations or transfer property except under specified circumstances.

2.3.6 *Trustee's Recovery against the Estate of a Debtor General Partner*

Renumbered section 723(c) of the Bankruptcy Code should be amended to provide that notwithstanding section 728(c), the trustee of a partnership has a claim against the estate of each general partner in such partnership that is a debtor in a case under title 11 for (1) the full amount of all claims allowed in the case concerning the partnership for which such general partner would otherwise be personally liable as a general partner under applicable nonbankruptcy law; and (2) administrative claims which have been assessed against such general partner. Notwithstanding section 502 of this title, there shall not be allowed in such partner's case a claim against the partner on which both the general partner and the partnership are liable, except to the extent that such claim is allowable and secured only by property of such general partner and not by property of such partnership.

2.3.7 *Repeal of the "Jingle Rule" in All General Partner Bankruptcy Cases*

Chapter 5 of the Bankruptcy Code should be amended in order to provide that the claim of a trustee of a partnership debtor, or the claim of a creditor of a nondebtor partnership, is entitled to share in the distribution in a general partner's bankruptcy case in the same manner and to the same extent as any other claim of the same class of a creditor of such general partner.

2.3.8 *Allocation of Expenses of Administration of a Partnership Case*

Chapter 5 of the Bankruptcy Code should be amended to provide that the expenses of administration of a partnership case under section 503 of the Bankruptcy Code may be assessed against general partners or paid from the property constituting recoveries from general partners under this section and from other property of the estate in such

proportions as the court shall determine are fair and reasonable after notice and hearing.

2.3.9 ***Distribution of Recoveries from General Partners***

Renumbered section 723 of the Bankruptcy Code should be amended to provide that notwithstanding section 726 of the Bankruptcy Code (except as provided in Recommendation 2.3.8 above), the trustee should apply any recovery obtained from a general partner or the estate of a general partner only to the payment of deficiencies on claims for which such general partner is personally liable as a general partner under applicable nonbankruptcy law. Any property constituting recoveries from general partners or the estates of general partners under this Recommendation not applied to the proper deficiencies as herein provided or to administration expenses (as provided in Recommendation 2.3.8 above), should be equitably distributed by the trustee to such general partner or to such general partners' estates as may be ordered by the court after notice and hearing.

2.3.10 ***Distribution of Property of the Partnership Estate***

Renumbered section 723 of the Bankruptcy Code should be amended to provide that notwithstanding section 726 of the Code, and except as set forth in Recommendation 2.3.8 above (treatment of expenses of administration), the trustee should distribute property of the partnership estate which is not recovered from general partners or the estates of debtor general partners to allowed claims against the partnership in accordance with otherwise applicable provisions of this title without considering distributions of property from general partners or general partners' estates.

2.3.11 ***Trustee's Power to File Involuntary Cases***

Section 303(b)(3) of the Bankruptcy Code should be amended to permit the trustee of a partnership in a case commenced under title 11 to file an involuntary petition against a general partner without regard to the number of creditors, nature of the claims or dollar amount of the claims otherwise required under section 303(b)(1) and (2).

2.3.12 ***Appointment of Committee of General Partners***

Chapter 11 of the Bankruptcy Code should be amended to provide that, on request of a party in interest, the court may authorize the

United States trustee to appoint a committee of general partners that is fairly representative of the interests of all general partners.

2.3.13 ***General Partner Liability on Nonrecourse Partnership Debt under 11 U.S.C. § 1111(b)***

Section 1111(b) of the Bankruptcy Code should be amended to clarify that, except as otherwise provided in a confirmed plan of a partnership debtor or the order confirming the plan, a general partner is not liable on a nonrecourse claim against the partnership except to the extent that the general partner is personally liable on such claim under applicable nonbankruptcy law.

2.3.14 ***'Temporary' Injunction of Proceedings or Acts against Nondebtor General Partners***

The Bankruptcy Code should be amended to permit the court for cause, upon motion of a party in interest and after notice and hearing, to temporarily enjoin actions of creditors or general partners of a debtor partnership against nondebtor general partners or their property on account of partnership obligations. No injunction should be granted under this Recommendation unless the nondebtor general partner (1) consents to the jurisdiction of the bankruptcy court; (2) makes or undertakes to make the disclosures required by Recommendation 2.3.18 below; and (3) the order granting the injunction precludes the protected general partner from incurring obligations or transfers of property except under specified circumstances.

2.3.15 ***Relief from the Temporary Injunction***

The Bankruptcy Code should be amended to provide that the court, upon request of a party in interest and after notice and hearing, may, for cause, grant relief from the temporary injunction provided pursuant to Recommendation 2.3.14. The relief available would include the termination, annulment, modification or conditioning a continuation of the injunction.

2.3.16 ***'Postconfirmation' Injunction of Proceedings or Acts against Nondebtor General Partners Who Contribute to Plans***

The Bankruptcy Code should be amended to permit the court, in connection with the confirmation of a plan of reorganization in a partnership case, to enjoin partnership creditors and general partners

from actions or proceedings against a general partner or its property to collect on partnership-related claims where the general partner has contributed or made an enforceable commitment to contribute an amount to the payment of debts in accordance with the plan or the order confirming the plan. The court, after notice and hearing, must determine that the plan complies with otherwise applicable requirements for confirmation in light of the personal assets of the nondebtor contributing partners and that the injunction will not discriminate unfairly or inequitably with respect to creditors of the partnership or the claims of the general partners for contribution or indemnity.

2.3.17 ***Revocation of Injunction***

The Bankruptcy Code should be amended to provide that the injunction issued with respect to any nondebtor general partner under Recommendation 2.3.16 above should be terminated or revoked on the request of a party in interest if, after notice and hearing, the court determines (1) that the protected nondebtor general partner has failed to perform a material commitment under the plan; (2) that the order confirming the plan in which the injunction was issued is revoked under sections 1144 or 1230 of the Code; or (3) that the nondebtor general partner has procured the injunction by fraud. The Bankruptcy Code should be further amended to provide that a request for revocation for fraud under provision (3) should be made at any time within two years after the date of the entry of the confirmation order.

2.3.18 ***Duty of Disclosure by Nondebtor General Partners***

The Bankruptcy Code should be amended to provide that, unless otherwise ordered by the court for cause, each nondebtor general partner shall, within 30 days after the entry of the order for relief in a partnership case or within such time as the court shall fix, produce information concerning such partner's financial condition and affairs similar to that provided by a debtor, together with such additional information and periodic reports as may be required by the court from time to time.

2.3.19 ***Access to Disclosed Information***

The Bankruptcy Code should be amended to provide that the trustee, debtor in possession or other entity designated by the court in a partnership bankruptcy case should maintain and promptly provide

to parties in interest in the case, on reasonable request, certain important information regarding the nondebtor general partners of the debtor partnership.

2.3.20 ***Treatment of LLC Member or LLC Manager Under the Bankruptcy Code***

Debtor LLC members in member-managed LLCs should be treated like general partners under the Bankruptcy Code. Similarly, debtor managers of manager-managed LLC's should be treated like general partners under the Bankruptcy Code. This treatment should be limited to three aspects of the LLC member or LLC manager relationship: (1) continuity of LLC after LLC member's or manager's bankruptcy filing; (2) transferability of LLC ownership interest; and (3) management rights in the LLC.

2.3.21 ***Exclusion of a Partnership or LLC Relationship from Treatment under 11 U.S.C. § 365***

The Bankruptcy Code should be amended to exclude partnership and LLC governing documents and relationships from treatment under 11 U.S.C. § 365. A new section concerning partnership and LLC governing documents and relationships should be added to the Bankruptcy Code.

2.3.22 ***Ipso Facto Provisions in Partnership or LLC Governing Documents Rendered Unenforceable***

***Ipso facto* provisions relating to partnerships, LLCs, and the rights or interests of partners or LLC members or managers should not be enforceable under the Bankruptcy Code. *Ipso facto* provisions include any provision in a partnership agreement, LLC operating agreement, or applicable nonbankruptcy law that operates to terminate or modify the rights of a partner or LLC member based on insolvency, financial condition, commencement of a voluntary or involuntary case under title 11, or appointment of a trustee or custodian. Non-*ipso facto* provisions that limit a partner's or LLC member's rights, relationship, interest, or permit expulsion on the basis of something other than insolvency, financial condition, commencement of a voluntary or involuntary case under title 11, or the appointment of a receiver would remain enforceable.**

2.3.23 *Property of the Estate, Transferability, and Valuation of a Partnership or LLC Interest*

"Property of the estate" for a partner or LLC member should include all rights attendant with the partnership or LLC interest, including management rights, voting rights, and economic rights (including goodwill, the right to share in profits and losses, and any other right to payment). Except as provided below, the Recommendation does not alter the effect of section 541(a)(6), to the extent it is applicable. In the case of an individual partner or LLC member who (1) continues employment (in whatever capacity) with the partnership or LLC after the order for relief, *and* (2) whose estate receives or is more likely than not going to receive the "buyout price" as defined below, all partnership or LLC interest amounts arising, accruing, or payable after the order for relief are deemed to be on account of personal services rendered by the partner or LLC member and do not become property of the estate. There should be a presumption, in a case of an individual debtor, that the estate is more likely than not going to receive the "buyout price," upon which presumption the parties should be entitled to rely and function until the court orders to the contrary, after notice and hearing, on motion of the trustee or any party in interest.

The court should have the power to authorize a sale under section 363 of the partnership or LLC interest and order the admission of the buyer to the partnership or LLC with all rights and duties the debtor had, except that if the governing documents preclude transfer under a non-*ipso facto* provision, the anti-transfer clauses will be given effect, but only if the partnership or LLC pays the "buyout price" to the estate. The court should retain the power to (1) fashion reasonable payment terms which balance the needs of the estate for receipt of cash as rapidly as possible with the needs of the entity for liquidity and working capital to conduct its operations in a prudent manner; and (2) ensure receipt of the buyout price by the estate.

The "buyout price" means the highest price (including a calculation or appraisal method), if any, provided in the governing documents in the case of a buyout of an interest not on account of the bankruptcy of, insolvency of, financial condition of, commencement of a voluntary or involuntary case under title 11 for, or appointment of a trustee or custodian for, a partner or LLC member or manager. If no such price is provided, the court should determine a fair buyout value.

2.3.24 *Treatment of Partnership and LLC Management Rights*

During any period when an estate administered in a bankruptcy case includes a partnership or LLC interest, the management and voting rights of the partner or LLC member are to be exercised as follows:

- **A debtor in possession under Chapter 11 or a debtor under either Chapter 12 or Chapter 13 should exercise all management and voting rights, subject to the applicable non-*ipso facto* provisions of the partnership or LLC governing documents and applicable nonbankruptcy law, and the other applicable provisions of the Bankruptcy Code;**

- **Where (a) there is more than one general partner or LLC managing entity and at least one of such partners or entities is not a debtor in a case under the Bankruptcy Code, and (b) a Chapter 7 or Chapter 11 trustee has been appointed, then the trustee should not exercise any management rights except to the extent necessary to constitute a quorum or to meet a minimum majority required by the governing documents or applicable nonbankruptcy law;**

- **In all other cases where a Chapter 7 or Chapter 11 trustee has been appointed, the trustee shall exercise all management and voting rights.**

Regardless of the foregoing, in all cases where (1) an individual debtor continues to function as a partner or member after the order for relief, and (2) the estate receives or is more likely than not going to receive, the "buyout price," then the individual should have the sole power to exercise management and voting rights attributable to periods after the order for relief.

2.3.25 *11 U.S.C. § 523 and Imputed Conduct or Liability*

11 U.S.C. § 523 should be amended to provide that nothing in this section shall preclude the discharge of a general partner from a debt (otherwise nondischargeable in a copartner's or agent's bankruptcy case) arising solely as a result of imputing to the general partner the conduct or liability of a copartner or agent.

2.3.26 *Subordination of Claims Arising from the Purchase or Sale of a Partnership Interest*

11 U.S.C. § 510(b) should be amended to subordinate the claims "arising from the rescission of a purchase or sale" of their partnership interests or "for damages arising from the purchase or sale" of their partnership interests to all claims and interests that are senior or equal to the claim or interest represented by such security or other interest in the bankruptcy case of a general partner.

Chapter 2: General Issues in Chapter 11

2.4.1 *Clarifying the Meaning of "Rejection"*

The concept of "rejection" in section 365 should be replaced with "election to breach."

Section 365 should provide that a trustee's ability to elect to breach a contract of the debtor is not an avoiding power.

Section 502(g) should be amended to provide that a claim arising from the election to breach shall be allowed or disallowed the same as if such claim had arisen before the date of the filing of the petition.

2.4.2 *Clarifying the Option of "Assumption"*

"Assumption" should be replaced with "election to perform" in section 365.

2.4.3 *Interim Protection and Obligations of Nondebtor Parties*

A court should be authorized to grant an order governing temporary performance and/or providing protection of the interests of the nondebtor party until the court approves a decision to perform or breach a contract.

Section 503(b) should include as an administrative expense losses reasonably and unavoidably sustained by a nondebtor party to a contract, a standard based on nonbankruptcy contract principles, pending court approval of an election to perform or breach a contract

if such nondebtor party was acting in accordance with a court order governing temporary performance.

2.4.4 *Contracts Subject to Section 365; Eliminating the "Executory" Requirement*

Title 11 should be amended to delete all references to "executory" in section 365 and related provisions, and "executoriness" should be eliminated as a prerequisite to the trustee's election to assume or breach a contract.

2.4.5 *Prebankruptcy Waivers of Bankruptcy Code Provisions*

Section 558 of the Bankruptcy Code should provide that except as otherwise provided in title 11, a clause in a contract or lease or a provision in a court order or plan of reorganization executed or issued prior to the commencement of a bankruptcy case does not waive, terminate, restrict, condition, or otherwise modify any rights or defenses provided by title 11. Any issue actually litigated or any issue resolved by consensual agreement between the debtor and a governmental unit in its police or regulatory capacity, whether embodied in a judgment, administrative order or settlement agreement, would be given preclusive effect.

2.4.6 *Prepackaged Plans of Reorganization; Section 341 Meeting of Creditors*

Section 341 should provide that upon the motion of any party in interest in a Chapter 11 case that entails a prepackaged plan of reorganization, the court may waive the requirement that the U.S. trustee convene a meeting of creditors.

2.4.7 *Authorization for Local Mediation Programs*

Congress should authorize judicial districts to enact local rules establishing mediation programs in which the court may order non-binding, confidential mediation upon its own motion or upon the motion of any party in interest. The court should be able to order mediation in an adversary proceeding, contested matter, or otherwise in a bankruptcy case, except that the court may not order mediation of a dispute arising in connection with the retention or payment of professionals or in connection with a motion for contempt, sanctions, or other judicial disciplinary matters. The court should have explicit statutory authority to approve the payment of persons performing mediation functions pursuant to the local rules of that district's

mediation program who satisfy the training requirements or standards set by the local rules of that district. The statute should provide further that the details of such mediation programs that are not provided herein may be determined by local rule.

2.4.8 *Court Review of Appointments to Creditors' Committees*

Subsection (a)(2) of 11 U.S.C. § 1102, "Creditors' and equity security holders' committees," should be amended to read as follows:

> **(2) On request of a party in interest and after notice and a hearing, the court may order a change in membership of a committee appointed under subsection (a) of this section if necessary to ensure adequate representation of creditors or of equity security holders. 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.**

2.4.9 *Employee Participation in Bankruptcy Cases*

Changes to the Official Forms, the U.S. Trustee program guidelines and the Federal Rules of Bankruptcy Procedure, are recommended to the Administrative Office of the U.S. Courts, the Executive Office of the U.S. Trustee, and the Advisory Committee on Bankruptcy Rules of the Judicial Conference, as appropriate, in order to improve identification of employment-related obligations and facilitate the participation by employee representatives in bankruptcy cases. The Official Forms for the bankruptcy petition, list of largest creditors, and/or schedules of liabilities should solicit more specific information regarding employee obligations. The U.S. Trustee program guidelines for the formation of creditors' committees should be amended to provide better guidance regarding employee and benefit fund claims. The appointment of employee creditors' committees should be encouraged in appropriate circumstances as a mechanism to resolve claims and other matters affecting the employees in a Chapter 11 case.

2.4.10 *Enhancing the Efficacy of Examiners and Limiting the Grounds for Appointment of Examiners in Chapter 11 Cases*

Congress should amend section 327 to provide for the retention of professionals by examiners for cause under the same standards that govern the retention of other professionals.

The Advisory Committee on Bankruptcy Rules of the Judicial Conference should consider a recommendation that Federal Rule of Bankruptcy Procedure 2004(a) be amended to provide that "On motion of any party in interest or of an examiner appointed under section 1104 of title 11, the court may order the examination of any entity."

Congress should eliminate section 1104(c)(2), which requires the court to order appointment of an examiner upon the request of a party in interest if the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes or owing to an insider, exceed $5,000,000.

2.4.11 *Valuation*

A creditor's secured claim in personal property should be determined by the property's wholesale price.

A creditor's secured claim in real property should be determined by the property's fair market value, minus hypothetical costs of sale.

2.4.12 *Clarifying The Conditions for Sales Free & Clear Under 11 U.S.C. § 363(f)*

Congress should make clear that bankruptcy courts can authorize sales of property of the estate free of creditors' interests regardless of the relationship between the face amount of any liens and the value of the property sold.

2.4.13 *Release of Claims Against Nondebtor Parties*

Congress should amend sections 1123 and 524(e) to clarify that it is within the discretion of the court to allow a plan proponent to solicit releases of nondebtor liabilities. Creditors that agree in a separate document to release nondebtor parties will be bound by such releases, whereas creditors that decline to release their claims against nondebtor parties will not be bound to release their claims.

2.4.14 *Exclusion of Payroll Deductions from Property of the Estate*

Congress should amend 11 U.S.C. § 541(b) to clarify that funds deducted from paid wages within 180 days prior to the date of the commencement of a case under title 11, held by a debtor/employer, and owed by employees to third parties, other than a federal, state or local taxing authority, do not fall within the definition of "property of the estate."

2.4.15 *Absolute Priority and Exclusivity*

11 U.S.C. § 1129(b)(2)(B)(ii) should be amended to provide that the court may find a plan to be fair and equitable that provides for members of a junior class of claims or interests to purchase new interests in the reorganized debtor.

11 U.S.C. § 1121 should be amended to provide that on the request of a party in interest, the court will terminate exclusivity if a debtor moves to confirm a non-consensual plan that provides for the participation of a holder of a junior claim or interest under 1129(b)(2)(B) but does not satisfy the condition set forth in section 1129(b)(2)(B)(i).

2.4.16 *Classification of Claims*

Section 1122 should be amended to provide that a plan proponent may classify legally similar claims separately if, upon objection, the proponent can demonstrate that the classification is supported by a "rational business justification."

2.4.17 *Prepetition Solicitation for a Prepackaged Plan of Reorganization*

The standards and requirements provided in the Bankruptcy Code for postpetition solicitation should be applicable to solicitation for a plan of reorganization within 120 days prior to filing a Chapter 11 petition by an entity that is subject to and in compliance with the public periodic reporting requirements of the Securities Exchange Act of 1934. Notice of such prepetition solicitation should be served on the Securities and Exchange Commission. If an entity solicits for a plan of reorganization but does not file for bankruptcy, the bankruptcy requirements and standards should be applicable if the entity does not complete an exchange offer or any other transaction on the basis of such solicitation.

2.4.18 *Postpetition Solicitation for a Prepackaged Plan of Reorganization*

Section 1125(b) should be amended to provide that the acceptance or rejection of a plan may be solicited after the commencement of a case under title 11 but before the court approves a written disclosure statement from those classes that were solicited for the plan prior to the filing of the bankruptcy petition.

2.4.19 *Elimination of Prohibition on Nonvoting Equity Securities*

Congress should amend section 1123(a)(6) to eliminate the requirement that the charter of the reorganized corporate debtor prohibit the issuance of nonvoting equity securities. Section 1123(a)(6) should otherwise remain unchanged.

2.4.20 *Postconfirmation Plan Modification*

11 U.S.C. § 1127(b) should be amended to permit modification after confirmation of a plan until the later of 1) substantial consummation or 2) two years after the date on which the order of confirmation is entered. All other restrictions on postconfirmation plan modification in section 1127(b) should remain unaltered.

Chapter 2: Small Business Proposals

2.5.1 *Defining the term "Small Business"*

A "small business debtor" is any debtor in a case under Chapter 11 (including any group of affiliated debtors) which has aggregate noncontingent, liquidated secured and unsecured debts as of the petition date or order for relief of five million dollars ($5,000,000) or less and any single asset real estate debtor as defined in 11 U.S.C.§ 101(51B), regardless of the amount of such debtor's liabilities.

2.5.2 *Flexible Rules for Disclosure Statement and Plan*

Give the bankruptcy courts authority, after notice and hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases where the benefits to creditors of fulfillment of full compliance with Bankruptcy Code § 1125 are outweighed by cost and lack of meaningful benefit to creditors which would exist if the full requirements of § 1125 were imposed;

The Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") shall be called upon to adopt, within a reasonable time after enactment, uniform safe-harbor standard forms of disclosure statements and plans of reorganization for small business debtors, after such experimentation on a local level as they deem appropriate. These forms would not preclude parties from using documents drafted by themselves or other forms, but would be propounded as one choice that plan proponents could make, which, if used and completed accurately in all material respects, would be presumptively deemed upon filing to comply with all applicable requirements of Bankruptcy Code §§ 1123 and 1125. The forms shall be designed to fulfill the most practical balance between (i) on the one hand, the reasonable needs of the courts, the U.S. Trustee, creditors and other parties in interest for reasonably complete information to arrive at an informed decision and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors; and

Repeal those provisions of 11 U.S.C. § 105(d) which are inconsistent with the proposals made herein, *e.g.*, those setting deadlines for filing plans.

Amend the Bankruptcy Code to expressly provide for combining approval of the disclosure statement with the hearing on confirmation of the plan.

2.5.3 *Reporting Requirements*

To create uniform national reporting requirements to permit U.S. Trustees, as well as creditors and the courts, better to monitor the activities of Chapter 11 debtors, the Rules Committee shall be called upon to adopt, with a reasonable time after enactment, amended rules requiring small business debtors to comply with the obligations imposed thereunder. The new rules will require debtors to file periodic financial and other reports, such as monthly operating reports, designed to embody, upon the basis of accounting and other reporting conventions to be determined by the Rules Committee, the best practical balance between (i) on the one hand, the reasonable needs of the court, the U.S. Trustee, and creditors for reasonably complete information and (ii) on the other hand, appropriate affordability, lack of undue burden, economy and simplicity for debtors. Specifically, the Rules Committee, shall be called upon to prescribe uniform reporting as to:

a. the debtor's profitability, *i.e.*, approximately how much money the debtor has been earning or losing during current and relevant recent fiscal periods;

b. what the reasonably approximate ranges of projected cash receipts and cash disbursements (including those required by law or contract and those that are discretionary but excluding prepetition debt not lawfully payable after the entry of order for relief) for the debtor appear likely to be over a reasonable period in the future;

c. how approximate actual cash receipts and disbursements compare with results from prior reports;

d. whether the debtor is or is not (i) in compliance in all material respects with postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules and (ii) filing tax returns and paying taxes and other administrative claims as required by applicable nonbankruptcy law as will be required by the amended statute and rules and, if not, what the failures are, how and when the debtor intends to remedy such failures and what the estimated costs thereof are; and

e. such other matters applicable to small business debtors as may be called for in the best interests of debtors and creditors and the public interest in fair and efficient procedures under Chapter 11.

2.5.4 *Duties of the Debtor in Possession*

The debtor is required to:

a. append to the voluntary petition or, in an involuntary case, to file within three days after the order for relief, either (A)(i) its most recent balance sheet, statement of operations and cash-flow statement and (ii) its most recent federal income tax return or (B) a statement made under penalty of perjury that no such financial statements have been prepared or that no federal income tax return has been filed or (C) both;

b. attend meetings, at which the debtor is represented by its senior management personnel and counsel, scheduled by the court, the U.S. Trustee, or the Bankruptcy Administrator including, but not limited to initial debtor interviews, court-

ordered scheduling conferences, and meetings of creditors convened under 11 U.S.C. § 341;

c. file all schedules and statements of financial affairs for small business debtors within the limits set by the Bankruptcy Rules, unless the court, upon notice to the U.S. Trustee and a hearing, grants an extension, which extension or extensions shall not, in any event, exceed thirty (30) days after the order for relief absent extraordinary and compelling circumstances;

d. comply with postpetition obligations, including but not limited to the duties to: file tax returns, maintain appropriate and reasonable current insurance as is customary and appropriate to the industry, and timely pay all administrative expense tax claims, except those being contested by appropriate proceedings being diligently prosecuted;

e. create within ten (10) business days of the entry of order for relief (or as soon thereafter as possible in case all banks contacted during the first ten (10) business days decline the business) separate deposit accounts with a bank or banks in which the debtor shall be required to timely deposit, until a plan is confirmed or the case is dismissed or converted or a trustee is appointed, after receipt, all taxes collected or withheld by it for governmental units. In compelling circumstances, the court may dispense with these requirements after notice and a hearing;

f. allow the U.S. Trustee or its designated representative to inspect the debtor's business premises, books and records at reasonable times on reasonable prior written notice to the debtor.

2.5.5 *Deadlines for Plan Filing and Confirmation*

In small business cases only, require that the disclosure statement, if any, and plan must be filed within 90 days after the entry of order for relief, unless extended as permitted below. During this 90-day period, only the debtor may file a plan unless on request of a party in interest made during this period and after notice and a hearing, the court, for cause, orders otherwise. In small business cases only, require the plan to be confirmed within 150 days after the entry of order for relief, unless extended as permitted below.

2.5.6 *Burden of Proof for Extensions of Deadlines*

Permit extensions of the deadlines for filing and approving disclosure statements, if any, and filing and confirming plans of reorganization only if the debtor, having duly noticed and appeared at the necessary extension hearing conducted and ruled upon prior to the expiration of the deadline, if any, and having carried the burdens of coming forward and persuasion, demonstrates by a preponderance of the evidence that it is more likely than not to confirm a plan of reorganization within a reasonable time. No such deadline may be extended unless a new deadline is imposed at the time the extension is granted. The Bankruptcy and Judicial Codes will require the U.S. Trustee, as the case may be, to be a recipient of notice of extension hearings and to participate actively therein, in order to assure, to the maximum extent feasible, that the interests of the public are protected when determinations are made as to whether small business debtors receive extensions and have proven by a preponderance of the evidence that it is more likely than not that they will confirm a plan within a reasonable time.

2.5.7 *Scheduling Conferences*

Require the bankruptcy court to promptly conduct at least one on-the-record scheduling hearing, on notice to the U.S. Trustee and the debtor's 20 largest unsecured creditors to be sure that the deadlines discussed above are met except that no such hearing is required if an agreed order is filed by the debtor and U.S. Trustee and approved by the court after notice and hearing. The court shall also conduct such other scheduling hearings and status conferences as it deems fit and proper. Whenever possible, these hearings shall be scheduled in conjunction with other mandatory events so as to minimize to the most reasonable practicable extent, the time of debtor personnel spent in court and at official meetings.

2.5.8 *Serial Filer Provisions*

Provide in the Bankruptcy Code that, with respect to any debtor (or any entity which has succeeded to substantially all the debtor's assets or business) which files a second case while another case is pending in which such debtor is the (or one of the) debtor(s) or in the event that it again becomes a debtor in a Chapter 11 case within two years after an order of dismissal of a Chapter 11 case in which it was the debtor has become a final order or a Chapter 11 plan has been confirmed, shall not be entitled to the section 362(a) stay unless, after it has

become a debtor, it bears the burdens of coming forward and of persuasion, by a preponderance of the evidence, that (1) the new case has resulted from circumstances beyond the control of the debtor not foreseeable at the time the first case was filed and (2) it is more likely than not that it will confirm a feasible plan, but not a liquidating plan, within a reasonable time. In cases involving such debtors when the owners have transferred the business to a new legal entity, owned and arranged by them, the section 362(a) stay would apply on filing but would be lifted on a verified, *ex parte* motion of the U.S. Trustee, with the right to have it reimposed upon a showing of (1) and (2) above. The Federal Rule of Civil Procedure governing injunctions applies to the court's award of a stay to the debtor.

2.5.9 ***Expanded Grounds for Dismissal or Conversion and Appointment of Trustee***

a. Modify section 1112 to read as follows:

(b)(1) **Except as provided in subsection (c) of this section or in section 1104(a)(3) of this title, on request of a party in interest or the U.S. Trustee, and after notice and a hearing, the court shall convert a case under this chapter to a case under Chapter 7 of this title or shall dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, where movant establishes cause, except that such relief shall not be granted if the debtor or another party in interest objects and establishes both:**

(A) **that it is more likely than not that a plan will be confirmed within a time as fixed by this title or by order of the court; and**

(B) **if the cause is an act or omission of the debtor:**

(i) **that there exists a reasonable justification for the act or omission; and**

(ii) **that the act or omission will be cured within a reasonable time fixed by the court not to exceed 30 days after the court decides the motion unless the movant expressly consents to a continuance for a specific period of time or there are compelling circumstances beyond the control of the debtor which justify an extension.**

(2) **For purposes of this subsection, cause includes:**

(A) substantial or continuing loss to or diminution of the estate;
(B) gross mismanagement of the estate;
(C) failure to maintain appropriate insurance;
(D) unauthorized use of cash collateral harmful to one or more creditors;
(E) failure to comply with an order of the court;
(F) failure timely to satisfy any filing or reporting requirement established by this title or by applicable rule;
(G) failure to attend the section 341(a) meeting of creditors or an examination ordered under Bankruptcy Rule 2004;
(H) failure timely to provide information or attend meetings reasonably requested by the U.S. Trustee or;
(I) failure timely to pay taxes due after the order for relief or to file tax returns due after the order for relief;
(J) failure to file or confirm a plan within the time fixed by this title or by order of the court; and
(K) failure to pay any fees or charges required under Chapter 123 of title 28.

(3) The court shall commence the hearing on any motion under this subsection within 30 days after filing of the motion, and shall decide the motion within 15 days after commencement of the hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

b. Additional Grounds for Appointment of Trustee

Add the following new section to 11 U.S.C. § 1104:

(a)(3) where grounds exist to convert or dismiss the case under section 1112 of this title, but the court determines that the appointment of a Chapter 11 trustee is in the best interests of creditors and the estate.

2.5.10 ***Enhanced Powers of the United States Trustee and Bankruptcy Administrator***

Add a new subclause (e) to 11 U.S.C. § 341, and amend 28 U.S.C. § 586 (the general statute governing the powers and duties of the U.S. Trustee) and the Manual for Bankruptcy Administrators, (governing

the duties of Bankruptcy Administrators) to require U.S. Trustees in every small business debtor case (except where they, in their reasonable discretion determine that the conduct enumerated below is not advisable in the circumstances):

(1)(a) to conduct an initial debtor interview ("IDI") with the debtor as soon as practicable after the entry of order for relief but prior to the first meeting scheduled under Bankruptcy Code § 341(a). At the IDI, the U.S. Trustee shall, at a minimum, begin to investigate the debtor's viability, inquire about the debtor's business plan, explain the debtor's obligations to file monthly operating reports and other required reports, attempt to develop an agreed scheduling order, and inform the debtor of other Chapter 11 obligations;

(b) when determined by the U.S. Trustee to be appropriate and advisable, to visit the appropriate business premises of the debtor and ascertain the general state of the debtor's books and records and verify that the debtor has filed its tax returns. This visit should take place in connection with or reasonably promptly after the IDI (wherever possible, these events shall be combined with other events so as to minimize to the most reasonable practicable extent the amount of time of debtor personnel spent in court and at official meetings); and

(c) to review and monitor diligently on a continuous basis each debtor's activities, with a view to identifying as promptly as possible those debtors which do not pass the test of being more likely than not to be able to confirm a Chapter 11 plan within a reasonable time; and

(2) in cases where, upon the basis of continuing review, monitoring or otherwise, the U.S. Trustee finds material grounds for any relief under Bankruptcy Code § 1112, to move the court promptly for relief.

Chapter 2: Single Asset Proposals

2.6.1 ***Change the Present Statutory Definition of "Single Asset Real Estate" in two ways.***

First, the $4 million debt limit should be eliminated from the definition of "single asset real estate" debtor subject to section 362(d)(3).

Second, the definition of "single asset real estate" should be more carefully worded to exclude cases in which the real property is used by a debtor in an active business.

The definition, as proposed, incorporating both concepts, would read as follows:

undeveloped real property or other real property constituting a single property or project other than residential real property with fewer than 4 residential units on which is located a single development or project which property or project generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor, or by a commonly controlled group of entities substantially all of which are concurrently Chapter 11 debtors, other than the business of operating the real property and activities incidental thereto.

2.6.2 ***Amend Code Section 362(d)(3) in Three Particulars***

a. Make clear that payments required by section 362(d)(3) may be made from rents generated from the property.

b. Provide that the interest rate with respect to which payments are calculated shall be the nondefault contract rate.

c. Amend the statute to provide that the payments must be commenced or a plan filed on the later of 90 days after the petition date or 30 days after the court determines the debtor to be subject to section 362(d)(3).

2.6.3 ***Require Substantial Equity in order to Confirm a Lien-Stripping Plan Using the New Value Exception***

In cases where the secured creditor has not made the election under section 1111(b)(1)(a)(i), a plan must satisfy the following requirements to be confirmed under the new-value exception following rejection by a class that includes the unsecured portion of a claim secured by real property: (1) The new value contribution must pay down the secured portion of the claim on the effective date of the plan so that, giving effect to the confirmation of the plan, sufficient cash payments on the secured portion of the claim shall have been made so that the principal amount of debt secured by the property is no more than 80 percent of the court-determined fair market value of the property as of the confirmation date; (2) the payment terms for the secured portion of the claim must both (i) satisfy all applicable requirements of section 1129 of the Code, and (ii) satisfy then-prevailing market terms in the same locality regarding maturity date, amortization, interest rate, fixed-charge coverage and loan documentation; and (3) the new value contribution must be treated as an equity interest that is not convertible to or exchangeable for debt.

Chapter 3: Jurisdiction

3.1.1 ***Establishing the Bankruptcy Court under Article III of the Constitution***

The bankruptcy court should be established under Article III of the Constitution.

3.1.2 ***Transition to an Article III Bankruptcy Court***

As of the enactment of legislation to establish an Article III bankruptcy court, sitting bankruptcy judges should be permitted to finish their current fourteen year terms. As vacancies are created through attrition (including expiration of current statutory term, appointment as an Article III judge, resignation, retirement prior to end of term for any reason, or death), Article III bankruptcy judges should be appointed by the President upon the advice and consent of the Senate to fill those positions. Sitting bankruptcy judges should be permitted to apply for any Article III judgeship positions while remaining on the bench.

Nothing in the Recommendation will affect the length of the current term, salary, retirement benefits, or other attributes of sitting bankruptcy judges.

During the transition period, bankruptcy jurisdiction should be treated in the following manner: as Article III bankruptcy judges are appointed, the jurisdiction provisions under 28 U.S.C. §§ 1334 and 157 should be transferred on a district-by-district basis to the Article III bankruptcy judge sitting in that district. Consequently, bankruptcy jurisdiction would reside in the Article III bankruptcy judge, including the power to refer and withdraw cases and proceedings. While a district is without an Article III bankruptcy judge, the Judicial Council for that circuit should be authorized to: (1) determine the need for an Article III bankruptcy judge in that district, and (2) if necessary, designate an Article III bankruptcy judge from another district (within the circuit) to sit in that district. In the event the judicial council determines a need for an Article III bankruptcy judge and one has not yet been appointed to sit within that circuit, the Chief Justice, upon receiving a certificate of necessity from the chief judge of the circuit, should be authorized to designate an Article III bankruptcy judge from another circuit to fulfill the request.

3.1.3 *Bankruptcy Appellate Process*

The current system which provides two appeals, the first either to a district court or a bankruptcy appellate panel and the second to the U.S. Court of Appeals, as of right from final orders in bankruptcy cases should be changed to eliminate the first layer of review.

3.1.4 *Interlocutory Appeals of Bankruptcy Orders*

28 U.S.C. § 1293 should be added to provide, in addition to the appeal of final bankruptcy orders, for the appeal to the courts of appeals of interlocutory bankruptcy court orders under the following circumstances: (1) an order to increase or reduce the time to file a plan under section 1121(d); (2) an order granting, modifying, or refusing to grant an injunction or an order modifying or refusing to modify the automatic stay; (3) an order appointing or refusing to appoint a trustee, or authorizing the sale or other disposition of property of the estate; (4) where an order is certified by the bankruptcy judge that (x) it involves a controlling issue of law to which there is a substantial difference of opinion, and (y) immediate appeal of the order may materially advance resolution of the litigation, and leave to appeal is

granted by the court of appeals; and (5) with leave from the court of appeals.

3.1.5 *Venue Provisions under 28 U.S.C. § 1408*

28 U.S.C. § 1408(1) should be amended to prohibit corporate debtors from filing for relief in a district based solely on the debtor's incorporation in the state where that district is located.

The affiliate rule contained in 28 U.S.C. § 1408(2) should be amended to prohibit a corporate filing in an improper venue unless such debtor's corporate parent is a debtor in a case under the Bankruptcy Code in that forum. Section 1408(2) should be amended as follows:

> **(2) in which there is pending a case under title 11 concerning such person's affiliate, as defined in section 101(2)(A) of title 11, general partner, partnership, or a partnership controlled by the same general partner.**

The court's discretionary power to transfer venue in the interest of justice and for the convenience of the parties should not be restricted.

Chapter 3: Procedure

3.2.1 *Minimum Amount to Commence a Preference Action under 11 U.S.C. § 547*

11 U.S.C. § 547 should provide that $5,000 is the minimum aggregate transfer to a noninsider creditor that must be sought in a nonconsumer debt preference avoidance action.

3.2.2 *Venue of Preference Actions under 28 U.S.C. § 1409*

28 U.S.C. § 1409 should be amended to require that a preference recovery action against a noninsider seeking less than $10,000 must be brought in the bankruptcy court in the district where the creditor has its principal place of business. The Recommendation applies to nonconsumer debts only.

3.2.3 *Ordinary Course of Business Exception Under 11 U.S.C. § 547(c)(2)(B)*

11 U.S.C. § 547(c)(2)(B) should be amended to provide a disjunctive test for whether a payment is made in the ordinary course of the debtor's business if it is made according to ordinary business terms. The ordinary course of business defense to a preference recovery action under section 547(c)(2) should provide as follows:

> **(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee and such transfer was –**
>
> > **(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or**
> >
> > **(B) made according to ordinary business terms[.]**

3.2.4 *Ad Valorem Tax Priority under 11 U.S.C. § 724(b)*

11 U.S.C. § 724(b) should be amended to exempt from subordination properly perfected, nonavoidable liens on real or personal property of the estate arising in connection with an *ad valorem* tax. Section 724(b) should also require the trustee to marshal unencumbered assets of the bankruptcy estate and surcharge secured claims, if warranted by the circumstances, under section 506(c) prior to subordinating any tax liens under the statute.

3.2.5 *Burden of Proof for Tax Proceedings*

The Bankruptcy Code should be amended to clarify that the burden of proof/persuasion rules and concomitant presumptions in tax controversies which would be applicable under nonbankruptcy law are equally applicable in bankruptcy court proceedings to determine tax liabilities under 11 U.S.C. §§ 502 and 505.

3.2.6 *Exception of Tax Refunds Setoffs under 11 U.S.C. § 362(b)*

11 U.S.C. § 362(b) of the Bankruptcy Code should be amended to allow a governmental unit to setoff an income tax refund that arose prior to the commencement of a Chapter 7 or Chapter 13 case against an 'undisputed' income tax liability of an individual debtor that arose prior to the commencement of the case.

Chapter 3: Administration

3.3.1 *United States Trustee Program*

The Director of the Executive Office for United States Trustees should hold the position of Assistant Attorney General.

The United States Trustee regions should match the number, size and configuration of the federal judicial circuits.

3.3.2 *Personal Liability of Trustees*

Trustees appointed in cases under Chapter 7, 11, 12 or 13 of the Bankruptcy Code should not be subject to suit in their individual capacity for acts taken within the scope of their duties as delineated in the Bankruptcy Code or by order of the court, as long as the applicable order was issued on notice to interested parties and there was full disclosure to the court.

Chapter 7, 12 and 13 trustees only should be subject to suit in the trustee's representative capacity and subject to suit in the trustee's personal capacity only to the extent that the trustee acted with gross negligence in the performance of the trustee's fiduciary duties. Gross negligence should be defined as reckless indifference or deliberate disregard of the trustee's fiduciary duty.

A Chapter 11 trustee of a corporate debtor only should be subject to suit in the trustee's representative capacity and subject to suit in the trustee's personal capacity only to the extent that the trustee has violated the standard of care applicable to officers and directors of a corporation in the state in which the Chapter 11 case is pending.

Debtors in possession should remain subject to suit to the same extent as currently exists under state or federal law.

3.3.3 *Qualification of Professionals under 11 U.S.C. § 1107(b)*

Section 1107(b) should be amended to provide that a person should not be disqualified for employment under § 327 solely because such person holds an insubstantial unsecured claim against or equity interest in the debtor. Section 327 and § 101(14) should remain unchanged.

3.3.4 *National Admission to Practice*

Admission to practice in one bankruptcy court, usually by virtue of being admitted to practice in the relevant United States District Court, should entitle an attorney, on presentation of a certificate of admission and good standing in another district court, to appear in the other bankruptcy court without the need for any other admission procedure.

The Recommendation will not affect requirements (if any) to associate with local counsel. Similarly, the Recommendation will not change the requirements under state law governing the practice of law and the maintenance of an office for the practice of law. The Recommendation will only amend the local bankruptcy rule or practice requirements governing special admission of attorneys to the bankruptcy court who are otherwise not admitted to the bar of the district court in the district where the bankruptcy court is located to appear in a particular bankruptcy case.

3.3.5 *Fee Examiners*

The Bankruptcy Code should explicitly preclude the appointment of fee examiners as an improper delegation of the court's duty to review and award compensation under 11 U.S.C. § 330. The Recommendation does not affect the court's authority under 11 U.S.C. § 1104(c) to appoint an examiner to investigate and report on certain aspects of a Chapter 11 case, for example, a potential fraudulent transfer or a particularly complicated claims estimation.

3.3.6 *Attorney Referral Services*

11 U.S.C. § 504 should be amended to permit an attorney compensated out of a bankruptcy estate to remit a percentage of such compensation to a bona fide, nonprofit, public service referral program. Such attorney referral program must be operating in accordance with state laws and ethical rules and guidelines governing referrals. The Recommendation does not affect the requirement that all compensation arrangements be disclosed in the application for retention under Fed. R. Bankr. P. 2014 and in the application for compensation under Fed. R. Bankr. P. 2016(a).

Chapter 4: Data Compilation and Dissemination

4.1.1 Establish as policy that all data held by bankruptcy clerks in electronic form, to the extent it reflects only public records as defined in Bankruptcy Code § 107, should be released in electronic form to the public, on demand.

4.1.2 Establish and fund a pilot project to aggregate the data from their various sources, particularly bankruptcy clerks, and make that data available to the public in electronic form, on demand.

4.1.3 Secure limited-duration appointment of a coordinator, who, with the head of the AO's office and the head of EOUST, would be charged with the duty of:

- **(1) making recommendations to increase the accuracy of the debtor's petitions, schedules and statements;**
- **(2) setting the data-collection goals;**
- **(3) coordinating the bankruptcy data-collection efforts of the central reporting agencies; and**
- **(4) reporting on an annual basis to the Congress, the Chief Justice, and the President.**

4.1.4 Establish a bankruptcy data system in which (1) a single set of data definitions and forms are used to collect data nationwide and (2) all data for any particular case are aggregated in the same electronic record.

4.1.5 Maximize the number of documents filed electronically and maximize open-to-the-public remote electronic access to all data for free, or at the lowest possible cost.

Chapter 4: Taxation and the Bankruptcy Code

4.2.1 Clarify provisions of the Bankruptcy Code on providing reasonable notice to governmental units.

4.2.2 Amend the Bankruptcy Code to prescribe that to the extent that a tax claim presently is entitled to interest, such interest shall accrue at a stated statutory rate.

4.2.3 The Commission should submit to the Advisory Committee on Bankruptcy Rules of the Judicial Conference ("Rules Committee") a recommendation that the Federal Rules of Bankruptcy Procedure require that notices demanding the benefits of rapid examination under 11 U.S.C. § 505(b) be sent to the office specifically designated by the applicable taxing authority for such purpose, in any reasonable manner prescribed by such taxing authority.

4.2.4 Conform § 346 of the Bankruptcy Code to IRC 1398(d)(2) election; also conform local and state tax attributes that are transferred to the estate to those tax attributes that are transferred to the bankruptcy estate under IRC § 1398.

4.2.5 Amend 11 U.S.C. § 507(a)(8) and 523(a)(1) to provide for the tolling of relevant periods in the case of successive filings. Thus, in the event of successive bankruptcy filings, the time periods specified in § 507(a)(8) shall be suspended during the period in which a governmental unit was prohibited from pursuing a claim by reason of the prior case.

4.2.6 Amend 11 U.S.C. § 507(a)(8)(ii) to toll the 240-day assessment period for both pre- and post assessment offers in compromise.

4.2.7 Amend the Bankruptcy Code to require "small business debtors" to create and maintain separate bank accounts for trust fund taxes and nontax deductions from employee paychecks. Also, any proposal should provide for sanctions for failure to comply with this Bankruptcy Code requirement.

4.2.8 Amend 11 U.S.C. § 1141(d)(3) to except from discharge taxes unpaid by businesses entities, which nonpayment arose from fraud.

4.2.9 Amend 11 U.S.C. § 362(a)(8) to confine its application to proceedings before the Tax Court for tax periods ending on or prior to the filing of the petition in the bankruptcy case and to permit appeals from Tax Court decisions.

4.2.10 Application of the periodic payment provisions of § 1129(a)(9)(C) to secured tax that would be entitled to priority absent their secured status.

4.2.11 Amend 11 U.S.C. § 545(2) to overrule cases that have penalized the government due to certain benefits for purchasers provided for in the lien provisions of the Internal Revenue Code.

4.2.12 Amend 11 U.S.C. § 503 and 28 U.S.C. § 960 to eliminate the need for a governmental unit to make a "request" to the debtor to pay tax liabilities that are entitled to payment as administrative expenses.

4.2.13 Amend 11 U.S.C. §§ 502(a)(1) and 503(b)(1)(B) to provide that postpetition *ad valorem* real estate taxes should be characterized as an administrative expense whether secured or unsecured and such taxes should be payable as an ordinary course expense.

4.2.14 Amend the Bankruptcy Code to overrule *Investors of The Triangle v. Carolina Triangle Ltd. Partnership (In re Carolina Triangle Ltd. Partnership), 166 B.R. 411 (9th Cir. B.A.P. 1994),* and to ensure that postpetition *ad valorem* real-estate taxes are a reasonable and necessary cost of preservation of the estate.

4.2.15 Amend the Bankruptcy Code to establish that *ad valorem* taxes are incurred by the estate and, therefore, are entitled to administrative expense priority status.

4.2.16 & 4.2.17 Amend the Bankruptcy Code to conform the treatment of state and local tax claims to that treatment provided for federal tax claims by, among others, amending 11 U.S.C. § 346 to conform state and local tax attributes to the federal list in IRC § 1398.

4.2.18 Clarify IRC § 1398 to provide that the bankruptcy estate's income is subject to alternative minimum tax and capital gains tax treatment if otherwise applicable.

4.2.19 Amend the Bankruptcy Code to provide that the term "assessed or assessment" as used in 11 U.S.C. §§ 362(b)(9) and 507(a)(8) shall mean "that time at which a taxing authority may commence an action to collect the tax."

4.2.20 Amend 11 U.S.C. § 1125(b) to establish standards for tax disclosures in a Chapter 11 disclosure statement.

4.2.21 Clarify 11 U.S.C. § 726(a)(1) to provide that a taxing authority must file a claim for a priority tax before the final order approving the trustee's report is entered by the court.

4.2.22 Conformity of Chapter 13 plans with provisions of the Bankruptcy Code: Requirement to file returns.

4.2.23 Whether an income tax return prepared by the taxing authority should be considered a filed income tax return for purposes of the Bankruptcy Code.

4.2.24 Dismissal and injunction against filing subsequent case where court determines that a Chapter 13 debtor is abusing the bankruptcy process.

4.2.25 Create a method by which a trustee may obtain a safe harbor and certainty regarding the nature, amount, and consequences of debt discharged.

4.2.26 Amend IRC § 1398(e)(3) to provide that a debtor should be treated as an employee of the bankruptcy estate as to payments by the estate of estate assets to the debtor for services performed.

4.2.27 & 4.2.28 Tax treatment of the sale by the estate of a debtor's homestead: Availability of capital gain exclusion on sale of residence to the trustee of an individual debtor.

4.2.29 Whether changes are needed in IRC §§ 108 and 382 with respect to the issuance of stock for debt.

4.2.30 Whether IRC § 1001 should be modified to provide for parallel tax treatment of recourse and nonrecourse debt.

4.2.31 Tax treatment of abandonment of property by an estate to the debtor.

4.2.32 Application of § 505(b) discharge to estate as well as to the debtor, successor to the debtor, and trustee where taxing authority does not audit.

4.2.33 Bifurcation for claim filing purposes of a corporate tax year that straddles the petition date.

4.2.34 Requirement of periodic payment for deferred payments of tax under § 1129(a)(9) and designation of interest rate used while making those deferred payments.

4.2.35 Authority of bankruptcy courts to grant declaratory judgments on prospective tax issues in Chapter 11 plans of reorganization.

4.2.36 Whether payment of prepetition nonpecuniary loss tax penalties in Chapter 11, 12, and 13 cases should be subordinated to payment of general unsecured claims.

4.2.37 Whether a substitute for return shall constitute a filed return for purposes of dischargeability issues.

Chapter 4: Chapter 9 - Municipal Bankruptcy Relief

4.3.1 ***Incorporation of the Securities Contract Liquidation Provisions - 11 U.S.C. §§ 555, 556, 559 & 560***

The securities contract liquidation provisions in 11 U.S.C. §§ 555, 556, 559 & 560 should be applicable in Chapter 9 cases and should be added to the list contained in section 901(a).

4.3.2 ***Chapter 9 Petition as Order for Relief***

Section 921(d) should be deleted. Section 921(c) authorizes the court to dismiss a Chapter 9 petition for (1) lack of good faith; or (2) failure to meet the requirements of title 11. Deletion of section 921(d) will eliminate the statutory conflict between section 301 providing that a voluntary petition constitutes an order for relief and section 921(d) authorizing the court to order relief only if the petition is not dismissed under section 921(c). Deletion of section 921(d) will also conform Chapter 9 to all other chapters of the Bankruptcy Code where a voluntary petition is the order for relief.

4.3.3 ***Eligibility of Municipalities to Serve on Creditors' Committees***

11 U.S.C. § 101(41) should be amended to permit municipalities to serve on creditors' committees in Chapter 9 cases under the provisions of 11 U.S.C. § 1102.

4.3.4 ***Elimination of 11 U.S.C. § 921(b)***

Section 921(b) should be deleted. Bankruptcy judges should be appointed to preside over Chapter 9 cases in the same manner as they are appointed to supervise all other cases under the Bankruptcy Code.

4.3.5 *Inclusion of "Employees" in 11 U.S.C. § 922(a)*

11 U.S.C. § 922(a)(1) should be amended to provide stay protection to nonresident "employees" of municipalities that have filed for Chapter 9 relief. Section 922(a)(1) should read:

> **(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer, employee, or inhabitant of the debtor that seeks to enforce a claim against the debtor[.]**

4.3.6 *Treatment of Municipal Obligations in Chapter 9*

Chapter 9 should be amended to provide comparable protection to all types of tax-exempt obligations sold in the municipal marketplace. The Recommendation will not affect the right of a municipality to use special revenues for the provision of necessary municipal services.

Chapter 4: Chapter 12 - Bankruptcy Relief for Family Farmers

4.4.1 *Sunset Provision and Chapter 12 Eligibility*

The sunset provision should be eliminated. Chapter 12 should be made a permanent addition to the Bankruptcy Code. Section 101(18) should be amended to increase the aggregate debt limits to $2,500,000. The other eligibility requirements in section 101(18) should remain unchanged.

4.4.2 *Direct Payment Plans*

28 U.S.C. § 586(e) should be amended to clarify that the calculation of the standing trustee's percentage fee should be based upon the aggregate of those payments "made under the plan" on account of claims impaired or modified by operation of bankruptcy law regardless of who makes the payment.