Bankruptcy Shark Tank:

Testing the Marketplace of Bankruptcy Ideas with an Expert Panel

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Proposed Chapter 16--Potential New Bankruptcy Code Chapter Designed to Address Financial Distress Caused Primarily by Funded Debt

Title: To amend title 11, United States Code, to add a new Bankruptcy Code chapter relating to the adjustment of debts for borrowed money, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Expedited Reorganization Act of 2025".

SEC. 2. AMENDMENTS.

(a) Applicability of Chapters.—Section 103 of title 11, United States Code, is amended by adding at the end the following:

"(m)(1) Chapters 1 and 16 and the sections identified in section 1602(a) apply in a case under chapter 16.

"(2) Chapter 16 applies only in a case under such chapter.".

(b) Who May Be a Debtor.—Section 109 of title 11, United States Code, is amended by adding at the end the following:

"(i) Only a person, other than an individual, a railroad, an uninsured State member bank, and a corporation organized under section 25A of the Federal Reserve Act which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991, that may be a debtor under chapter 11 and owes, on the date of the filing of the petition, a debt for borrowed money under a loan agreement may be a debtor under chapter 16.".

(c) Effect of Discharge.—Section 524(a)(1) of title 11, United States Code, is amended by striking ", or 1328" and inserting ", 1328, or 1649".

(d) Commencement of Case by a Foreign Representative.—Section 1511 of title 11, United States Code, is amended by adding at the end the following:

"(c) If a foreign representative of a debtor commences a case under chapter 16—

"(1) sections 1520, 1521(a), and 1521(e) do not apply in a case regarding the debtor under chapter 15, while the case commenced by the foreign representative of the debtor under chapter 16 is pending; and

"(2) the foreign representative may not initiate an action under section 1523 in the chapter 16 case.".

(e) Bankruptcy Fees.—Section 1930(a)(3) of title 28, United States Code, is amended by inserting "or under chapter 16 of title 11," before "$1,167".

(f) Trustees and Receivers Suable; Management; State Laws.—Section 959(b) of title 28, United States Code, is amended by inserting at the end of the section the following:

"For purposes of this subsection, the term 'trustee' includes a debtor under chapter 16 of title 11.".

(g) Clerical Amendment.—The table of chapters for title 11, United States Code, is amended by inserting after the item relating to chapter 15 the following:

“16. Adjustment of debts for borrowed money

1601”.

(h) Chapter 16 Bankruptcy.—Title 11, United States Code, is amended by inserting after chapter 15 the following:

“CHAPTER 16—ADJUSTMENT OF DEBTS FOR BORROWED MONEY

“SUBCHAPTER I—GENERAL PROVISIONS

“Sec.

“SUBCHAPTER II—CASE ADMINISTRATION

“SUBCHAPTER III—THE PLAN

“Subchapter I—General Provisions

“1601. Definitions of this chapter

“In a case under this chapter:

“(1) BORROWED MONEY.—The term ‘borrowed money’ includes a reimbursement obligation in respect of a letter of credit.

“(2) CO-OBLIGOR.—The term ‘co-obligor’ means a person, other than an individual, that—

“(A) may be a debtor under this chapter;

“(B) is an affiliate; and

“(C) is liable with the debtor for a claim that the plan classifies in an impaired class under section 1642(b).

“(3) EXIT FINANCING.—The term ‘exit financing’ means—

“(A) a loan or other financing to, or for the benefit of, the debtor under the plan; or

“(B) the purchase of a debt or equity security issued by, or for the benefit of, the debtor under the plan.

“(4) INCLUDED CO-OBLIGOR—The term ‘included co-obligor’ means a co-obligor that—

“(A) has timely made the election under section 1645(d); and

“(B) has not timely withdrawn such election under section 1646(c).

“(5) LOAN AGREEMENT.—The term ‘loan agreement’ means an agreement under which a claim against the debtor or a co-obligor for borrowed money arises, or that evidences such a claim, including a credit agreement, a promissory note, a security constituting or evidencing a claim against the debtor or a co-obligor for borrowed money, a trust or other indenture under which such a security is outstanding, or any security agreement or arrangement or other credit enhancement related to any of the foregoing, including any guarantee by the debtor or a co-obligor of any of the foregoing.

“(5) PROFESSIONAL FEES.—The term ‘professional fees’ means compensation and reimbursement of expenses paid or to be paid to an attorney or other professional person.

“(6) PROPERTY OF THE ESTATE.—Except as provided in section 1625, the term ‘property of the estate’ means property of the debtor.

“(7) QUALIFIED HOLDER.—The term ‘qualified holder’ means a person that is qualified under applicable nonbankruptcy law to participate in the exit financing.

“(8) TRUSTEE.—The term ‘trustee’ means the debtor.

“1602. Applicability of sections

"(a) Applicable Sections.—Sections 301, 305, 306, 342, 349(a), 502(a), 502(b)(1), 502(b)(2), 502(b)(9), 502(e), 502(j), 509, 510(a), 524(e), 553(a)(1), 1109(a), 1125, 1126(a), 1126(b), 1126(e), 1142, 1143, 1144, 1145, and 1146 apply in a case under this chapter.

"(b) Applicability of Definitions.—A term used in a section that applies in this chapter under subsection (a) or section 103(*l*) has the meaning of the term as used in that section, except—

"(1) a term defined under section 1601 has the meaning given the term in section 1601; and

"(2) the term 'affiliate participating in a joint plan with the debtor' as used in section 1145 includes an included co-obligor.

"(c) Claims Under Section 1622.—A reference to a claim filed under section 501 in a section made applicable in a case under this chapter under subsection (a) or section 103(*l*) includes a claim filed or deemed filed under section 1622.

"1603. Right to be heard

"In a case under this chapter, any party in interest, including the debtor, a co-obligor, a creditor, an equity security holder, or any indenture trustee, may raise, and may appear and be heard on, any issue in the case.

"SUBCHAPTER II—CASE ADMINISTRATION

"1621. Schedule of liabilities and co-obligors

"The debtor must file with the petition a schedule of liabilities regarding the claims in each impaired class under the plan that—

"(a) includes for such claims the information required for a schedule of liabilities filed under section 521(a)(1)(B)(i); and

"(b) identifies any co-obligor that is liable with the debtor for such claims.

"1622. Claims

"(a) In General.—A holder of a claim in an impaired class under the plan or an indenture trustee under an indenture under which such claim arises may file a proof of claim.

"(b) Section 1621 Schedule.—Any claim on the schedule filed under section 1621 is deemed filed under subsection (a), unless such claim is listed as disputed, contingent, or unliquidated.

"(c) Other Filers.—If a creditor does not timely file a proof of claim under subsection (a), the debtor, an entity that is liable to the creditor with the debtor, or an entity that has secured the creditor, may file a proof of such creditor's claim.

"(d) Failure to File.—The rights of a holder of a claim that is not in an impaired class under the plan is not, with respect to such claim, affected, modified, or limited by the failure of the holder of the claim to file a proof of the claim in a case under this chapter.

"(e) Unimpaired Claims.—

"(1) In general.—Notwithstanding section 502(a), a proof of claim filed by a creditor regarding a claim that is not in an impaired class under the plan has no force or effect.

"(2) Rights of the debtor.—Any rights, objections, defenses, offsets, or counterclaims of the debtor relating to a claim described in paragraph (1) are not affected, modified, or limited by the filing of a proof of such claim or the failure to object to a proof of such claim.

"1623. Tolling of time periods

"(a) As each relates to the debtor, to a co-obligor that elects under section 1645(d) to become an included co-obligor, or to claims against the debtor or such co-obligor, each time period specified in sections 547, 548, 549, 550(c), and 553, and each time period in applicable nonbankruptcy law described in sections 544(b) and 546(b), is tolled upon the commencement of a case under this chapter.

"(b) The tolling provided in subsection (a) of this section terminates 7 days after the earliest of—

"(1) the effective date of the plan;

"(2) dismissal of the case; and

"(3) with respect to a co-obligor that elects to be an included co-obligor under section 1645(d) or claims against such co-obligor, withdrawal of such co-obligor's election under section 1646(c).

"1624. Rights of the debtor

"Without notice or a hearing, and regardless of the ordinary course of business of the debtor, the debtor may—

"(1) operate the business of the debtor;

"(2) use, sell, or lease the property of the debtor; or

"(3) obtain credit or incur debt.

"1625. Automatic stay

"(a) Except as provided in subsection (b) of this section, after the order for relief under this chapter, sections 361 and 362 apply only to claims against the debtor, an included co-obligor, or their property that are in an impaired class under the plan. For purposes of this section, the phrase "property of the estate" in section 362 includes property of the debtor or an included co-obligor.

"(b) The stay provided in subsection (a) of this section terminates upon the earliest of—

"(1) the effective date of the plan;

"(2) dismissal of the case; and

"(3) with respect to a co-obligor that elects to be an included co-obligor under section 1645(d) or its property, withdrawal of such included co-obligor's election under section 1646(c).

"1626. Termination or modification of rights and obligations

"(a) Termination or Modification.—Notwithstanding a provision in a contract or applicable nonbankruptcy law, a contract to which the debtor, an included co-obligor, or an affiliate is a party, or any right or obligation of the debtor, an included co-obligor, or an affiliate under any such contract, may not be terminated or modified at any time after the commencement of a case under this chapter solely because of a provision in the contract or applicable nonbankruptcy law that is conditioned on—

"(1) with respect to a contract giving rise to a claim in an impaired class under the plan, the insolvency or financial condition of the debtor, or an included co-obligor at any time before the closing of the case, except that this paragraph does not apply after the case is dismissed;

"(2) the commencement of a case under this title; or

"(3) a change in control of the debtor or an included co-obligor provided for in the plan that occurs on or before the effective date of the plan.

"(b) Denial of Benefits Prohibited.—Notwithstanding a provision in a contract or applicable nonbankruptcy law, a governmental unit may not deny, revoke, suspend, or refuse to renew the eligibility of a person to participate in any governmental program, including a program that provides funding, solely because the person or another person with which the person has been associated is or has been a debtor or an included co-obligor in a case under this chapter.

"1627. Rights of creditors under nonbankruptcy law

"(a) In General.— In a case under this chapter, a provision of this title or any order, process, or judgment of a court enforcing or carrying out any provision of this title does not stay, avoid, modify, or otherwise limit the right of a creditor under applicable nonbankruptcy law to—

"(1) enforce any claim; or

"(2) exercise any rights or remedies with respect to any claim.

"(b) Exceptions.—Subsection (a) does not apply—

"(1) as provided in sections 1625 and 1626;

"(2) to the extent that the rights of holders of claims in an impaired class under a plan confirmed under this chapter are stayed, avoided, modified, or otherwise limited under the plan; or

"(3) in a case commenced under section 1628.

"1628. Commencement of a case under chapter 7 or 11

"(a) In General.—A petition under chapter 7 or chapter 11 may be filed by or against the debtor or a co-obligor under section 301 or 303 at any time during the pendency of a case under this chapter if the debtor or such co-obligor may be a debtor under the chapter under which the petition is filed.

"(b) Suspension of Proceedings.—If an involuntary petition is filed against the debtor or an included co-obligor under section 303 during the pendency of a case under this chapter by a holder of a claim in an impaired class under the plan or by an indenture trustee under an indenture under which such claim arises, all proceedings in the involuntary case are suspended, unless the court orders otherwise for cause.

"(c) Failure to Pay Debt.—If an involuntary petition is filed against the debtor or an included co-obligor under section 303 during the pendency of a case under this chapter, the failure to pay any debt owed on account of a claim in an impaired class under the plan may not be considered for the purpose of determining whether the requirements of section 303(h)(1) are satisfied.

"(d) Exceptions.—Subsections (b) and (c) do not apply in a case under this chapter after the earliest of—

"(1) the date on which a plan is confirmed under this chapter;

"(2) the date on which a case under this chapter is dismissed; or

"(3)(A) 90 days after the date of the filing of the petition under this chapter; or

"(B) a date that is no later than 150 days after the date of the filing of the petition under this chapter, set by the court for cause on the request of a party in interest that is made before the date described in subparagraph (A).

"1629. Dismissal and conversion

"(a) In General.—At any time, on request of the debtor, the court must dismiss a case under this chapter.

"(b) Dismissal for Cause.—The court must dismiss a case under this chapter if—

"(1) the debtor fails to file—

"(A) a plan under section 1641(b); or

"(B) a timely disclosure statement under section 1641(c);

"(2) a plan is not confirmed on the later of—

"(A) 90 days after the filing of the petition under this chapter; or

"(B) a date that is no later than 150 days after the date of the filing of the petition under this chapter, set by the court for cause on the request of a party in interest that is made before the date described in subparagraph (A);

"(3) the court enters an order denying confirmation of a plan because an impaired class of claims has not accepted the plan;

"(4) the debtor files a petition as permitted by section 1628(a); or

"(5) the court orders the lifting of the suspension of an involuntary case under section 1628(b).

"(c) Conversion.—A case under this chapter may not be converted to a case under another chapter.

"SUBCHAPTER III—THE PLAN

"1641. Filing of plan and disclosure statement

"(a) Who May File a Plan.—Only a debtor may file a plan in a case under this chapter.

"(b) When to File.—The debtor must file the plan with the petition.

"(c) Disclosure Statement.—If the debtor intends to solicit acceptances of the plan after the commencement of the case and a disclosure statement approved by the court is required under section 1125 for the solicitation, the debtor must file a disclosure statement with the petition.

"1642. Classification of claims

"(a) In General.—A plan may place a claim in a particular class only if the claim:

(1) is for borrowed money under a loan agreement; and

(2) is substantially similar to the other claims of the class.

"(b) Co-obligors.—A plan may place a claim against a co-obligor in the same class as a claim against the debtor for which the co-obligor is liable with the debtor, but such claim against the co-obligor will be excluded from the class if:

(1) the co-obligor does not timely elect to be an included co-obligor in accordance with section 1645(d); or

(2) the co-obligor timely withdraws its election under section 1646(c).

"(c) Claim Secured by Lien.—A claim secured by a lien on property in which the debtor or an included co-obligor has an interest may not be placed in the same class as a claim that:

(1) is secured by a lien on different property in which the debtor or an included co-obligor has an interest, or

(2) is not secured by a lien on property in which the debtor or an included co-obligor has an interest, in either case regardless of the value of the property securing the lien.

"1643. Contents of plan

"(a) In General.—Notwithstanding any otherwise applicable nonbankruptcy law, a plan must—

"(1) subject to section 1642, designate each class of claims under a loan agreement that is impaired under the plan and whether any such class includes claims against included co-obligors;

"(2) specify the treatment of any class of claims under a loan agreement that is impaired under the plan;

"(3) provide that, with respect to each claim or interest, other than a claim in an impaired class of claims under a loan agreement, the plan does not alter the legal, equitable, or contractual rights to which the claim or interest entitles the holder of the claim or interest; and

"(4) provide the same treatment for each claim in a particular impaired class, except to the extent that—

"(A) the holder of a particular claim agrees to a less favorable treatment of the claim; or

"(B) any holder of a claim in the class that had a material role in the negotiation and documentation of the plan is reimbursed for professional fees under subsection (b).

"(b) Professional Fees.—The plan may provide for the reimbursement of professional fees incurred by a creditor in connection with the material role of the creditor in the negotiation and documentation of the plan.

"1644. Impairment of classes of claims

"A class of claims is impaired under a plan, unless, with respect to each claim of the class, the plan does not alter the legal, equitable, or contractual rights to which the claim entitles the holder of the claim.

"1645. Acceptance of plan and co-obligor election

"(a) In General.—

"(1) ACCEPTANCE.—A class of claims has accepted a plan if the plan has been accepted by holders of claims in the class that hold not less than two-thirds in amount of the allowed claims of the class, determined without including the claim of, or the acceptance or rejection of the plan by, any holder described in paragraph (2).

"(2) CREDITORS INELIGIBLE TO ACCEPT OR REJECT.—For the purpose of paragraph (1), the amount of the allowed claims of a class does not include amounts held by—

"(A) a holder that is the issuer, or any affiliate or insider of the issuer, of the debt on which the claim is based;

"(B) a holder that has, by reason of any direct or indirect claim against or equity interest in the debtor, an included co-obligor, or an affiliate of the debtor or an included co-obligor, an interest that is—

"(i) adverse to the interest of the class; and

"(ii) of greater importance and economic value to the holder than the claim of the holder in the class; and

"(C) a holder of a claim designated under section 1126(e).

"(b) Waiver or Transfer of Right.—Notwithstanding any other section of this title or any provision in a contract or applicable nonbankruptcy law, but subject to subsection (c), any waiver or transfer by a creditor to another creditor of the right to accept or reject a plan under this chapter is void.

"(c) Exception.—A provision of a contract that waives or transfers to another creditor the right to accept or reject a plan is effective only if—

"(1)(A) the claim that is the subject of the waiver or transfer does not arise from debt securities that are registered under—

"(i) section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*, 78o(d)); or

"(ii) section 6 of the Securities Act of 1933 (15 U.S.C. 77f); and

"(B) every holder of an allowed claim in the class has agreed to waive or transfer the right to accept or reject a plan; or

"(2)(A) every holder of an allowed claim in the class transferred to an insurer of the claim the right to accept or reject a plan; and

"(B) the insurer described in subparagraph (A) holds the economic interest in the claim described in subparagraph (A).

"(d) Co-obligors.—

"(1) If the plan places a claim against a co-obligor in an impaired class, such co-obligor may elect to become an included co-obligor regarding such claims by stating such election in a writing filed with the court on or before the date creditors in the impaired class must accept or reject the plan or such other date as the court may fix.

"(2) An included co-obligor may withdraw its election under this subsection in accordance with section 1646(c).

"(3) A co-obligor that does not timely elect to be an included co-obligor, or that timely withdraws its election, is not an included co-obligor.

"(4) For purposes of sections 1125 and 1126(b), the solicitation of an election of a co-obligor under this subsection is a solicitation of an acceptance or rejection of the plan.

"1646. Modification of plan

"(a) In General.—

"(1) TIMELINE.—The debtor may modify a plan at any time before confirmation of the plan.

"(2) LIMITATION.—A plan modified under paragraph (1) must meet the requirements under sections 1125, 1642, and 1643.

"(3) EFFECT OF FILING. After the debtor files a modification of such plan, the plan as modified becomes the plan.

"(b) Acceptance or Rejection of Modified Plan.—

"(1) IN GENERAL.—A holder of a claim that has accepted or rejected a plan under section 1645(a) is deemed to have accepted or rejected, as the case may be, a plan that is modified under subsection (a).

"(2) EXCEPTION.—Paragraph (1) does not apply to a holder of a claim described in paragraph (1) if, within the time fixed by the court following the date on which a modification of the plan is filed, the holder changes the acceptance or rejection of the plan under section 1645(a).

"(c) Co-obligor Election with respect to Modified Plan.—

"(1) IN GENERAL.—A co-obligor that has made an election under section 1645(d) regarding a plan is deemed to have made such election regarding such plan as modified under subsection (a).

"(2) EXCEPTION.—Paragraph (1) does not apply to a co-obligor described in paragraph (1) if, within the time fixed by the court following the date on which a modification of the plan is filed, the co-obligor withdraws its election under section 1645(d).

"1647. Disclosure statement hearing

"(a) In General.—If the debtor files a disclosure statement under section 1641(c), the court, after notice and a hearing, may approve the disclosure statement as provided under section 1125.

"(b) Objection.—A party in interest may object to the approval of the disclosure statement under subsection (a).

"1648. Confirmation of plan

"(a) In General.—The court, after notice and a hearing, may confirm a plan only if it meets the requirements specified in subsection (c)(1).

"(b) Objection.—A party in interest may object to confirmation of the plan.

"(c) Plan Requirements.—The plan must meet the following requirements:

"(1) The plan complies with—

"(A) the provisions of this title made applicable by sections 103(l) and 1601; and

"(B) the provisions of this chapter.

"(2) The debtor complies with—

"(A) the provisions of this title made applicable by sections 103(l) and 1601; and

"(B) the provisions of this chapter.

"(3) The plan—

"(A) has been proposed in good faith; and

"(B) has not been proposed by any means forbidden by law.

"(4) Any payment made or to be made by the debtor, an included co-obligor, or an affiliate of a debtor or an included co-obligor to any holder of a claim in a class of claims impaired under the plan, or to a professional employed by such creditor, for services or for costs and expenses or otherwise in connection with the case, or in connection with the plan and incident to the case, has been disclosed.

"(5) With respect to each class of claims—

"(A) the class has accepted the plan; and

"(B) each holder of a claim of the class—

"(i) has accepted the plan; or

"(ii) 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 amount that such holder would so receive or retain from the debtor and all included co-obligors if the debtor and all included co-obligors were liquidated under chapter 7 on such date.

"(C) Subparagraph (B) does not apply to a holder of a claim in an impaired class if—

"(i) the claims in the class are secured by a lien on property in which the debtor or an included co-obligor has an interest, unless the lien is of inconsequential value; and

“(ii) the plan modifies the rights of the holders of the claims described in clause (i) with respect to the liens described in clause (i) only in a manner that could be accomplished under any applicable loan agreement with the consent of the holders that have accepted the plan.

“(6)(A) The plan provides that every payment described in subparagraph (B) must be—

“(i) made to every holder of a claim in the class, regardless of whether the holder has accepted the plan; and

“(ii) in an amount that is proportionate to the allowed claim of the holder in relation to the allowed claims of all holders in the class.

“(B) A payment described in this clause—

“(i) is any consent fee or other payment made or to be made, under the plan or otherwise, to any holder of a claim in an impaired class of claims on account of such claim in connection with the solicitation of acceptances or rejections of a plan, or otherwise in relation to the plan; and

“(ii) does not include professional fees described in section 1643(b).

“(7)(A) Except as provided in subparagraph (B), the plan does not provide for the payment of any fee or other remuneration to any holder of a claim in an impaired class of claims in connection with any exit financing.

“(B) The plan may provide for the payment of a fee or other remuneration to a holder of a claim in an impaired class of claims in connection with exit financing if the plan provides that every qualified holder of a claim in such impaired class of claims has an opportunity, regardless of whether the holder has accepted the plan, to—

“(i) participate in the exit financing in an amount that is proportionate to the allowed claim of the qualified holder in relation to the allowed claims of all qualified holders in the class; and

“(ii) receive the fee or other remuneration in an amount that is proportionate to the allowed claim of the qualified holder in relation to the allowed claims of all qualified holders in the class.

“(8)(A) 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

“(B) the plan provides for the payment of the fees described in subparagraph (A) on the effective date of the plan.

“1649. Effect of confirmation

“(a) In General.—The provisions of a plan confirmed under section 1648(a) bind the debtor, all included co-obligors, and all holders of claims in classes impaired by the plan.

“(b) Discharge.—Except as provided in the plan or the order confirming the plan, the confirmation of the plan discharges the debtor and all included co-obligors from any liability on a claim in an impaired class under the plan, regardless of whether—

“(1) a proof of the claim is filed or deemed filed under section 1622;

“(2) the claim is allowed under section 502; or

“(3) the holder of the claim has accepted the plan.

“1650. Closing and reopening cases

“(a) In General.—Promptly after the effective date of the plan, the court must close the case.

“(b) Reopening of Case.—A case may be reopened in the court in which the case was closed under subsection (a) to—

“(1) accord relief to the debtor or an included co-obligor; or

“(2) for other cause.”.

SEC. 3. RULE AMENDMENTS.

The Judicial Conference of the United States, in accordance with section 2075 of title 28 of the United States Code, shall propose amended Federal Rules of Bankruptcy Procedure to implement this Act, including for the provision of notice:

(a) to all holders of claims in each class that is impaired under the plan, and such other persons as the court may order, of the time fixed for (1) filing a proof of claim under section 1622 of this title, (2) filing objections and the hearing to consider approval of a disclosure statement, and (3) filing objections and the hearing to consider confirmation of a chapter 16 plan;

(b) to all creditors and equity security holders of the debtor, and such other persons as the court may order, of the order for relief; and

(c) to all co-obligors, of (1) the order for relief, (2) the time fixed for filing objections and the hearing to consider approval of a disclosure statement, (3) the time fixed for filing objections and the hearing to consider confirmation of a chapter 16 plan, and (4) the time fixed for making the election under section 1645(d) and for withdrawing that election in the event of a plan modification under section 1646(c).

National Bankruptcy Conference
Executive Summary of 2025 Chapter 16 Proposal

The National Bankruptcy Conference ("NBC") is a voluntary, nonpartisan, not-for-profit organization composed of about sixty of the nation's leading bankruptcy judges, academics, and practitioners. It has provided advice to Congress on bankruptcy legislation for nearly eighty years.

In 2015, the NBC proposed adding a new chapter to the Bankruptcy Code that would more efficiently resolve financial distress caused primarily by a company's funded debt. Specifically, this new chapter, "chapter 16," would be a summary proceeding for the limited purpose of modifying the rights of one or more classes of claims for borrowed money under an indenture or other loan agreement. In short, chapter 16 would be a streamlined version of chapter 11, but only claims for "borrowed money" under "loan agreements" (*e.g.*, bonds, credit lines, and guarantees thereof) could be impaired or otherwise affected by the plan. All other claims against the debtor (*e.g.*, trade, personal injury, and employees) would be unimpaired and not subject to any automatic stay.

The primary purpose of chapter 16 is to address unanimity requirements for debt modification, including those imposed by many credit agreements, indentures, and section 316 of the Trust Indenture Act. These requirements make out-of-court workouts difficult and may force chapter 11 filings even when an overwhelming majority of the holders of a class of funded debt support a modification of its terms, and the debtor does not otherwise need relief under the Bankruptcy Code. Chapter 16 would provide a quicker, lower-cost alternative to chapter 11 in these circumstances. It also would provide a U.S. alternative to foreign restructuring schemes, which are often perceived as more streamlined, efficient, and cost-effective than chapter 11.

Since its initial 2015 proposal, the NBC has revisited and refined the chapter 16 proposal to reflect changes in both restructuring practice and capital markets. The following summary highlights some of the key provisions of the NBC's current chapter 16 proposal, including changes made that introduced in 2015:

Who May Be A Debtor. A non-individual (*e.g.* corporation, LLC, or partnership) that is eligible for chapter 11 and owes debts for borrowed money under a loan agreement. *Section 2(b) (amending 11 U.S.C. § 109)*.

Petition. Only voluntary petitions. *Section 2(h), proposed § 1602 (incorporating 11 U.S.C. § 301, but not § 303).*

Single Filer For Affiliated Groups Permitted; "Included Co-Obligors". *This is a proposed change from the 2015 proposal.* In order to streamline the process and reduce potential costs and disruptions, the revised proposal allows a single member of an affiliated corporate group to file a chapter 16 petition for the purpose of modifying not only its own obligations under one or more loan agreements, but also those of other, non-filing members of the affiliated group that are co-liable for the same obligations. The filing debtor may elect to include non-filed affiliates (defined as "included co-obligors") in the restructuring, provided that the affiliates are co-liable with the debtor for borrowed money under a loan agreement and would otherwise be eligible for chapter 16 (*i.e.*, non-individuals that are eligible for chapter 11). *Section 2(h), proposed § 1601(1) & (3) (definitions of "co-obligor" and "included co-obligor") & § 1621 (debtor must identify co-obligors in the schedules filed with the petition).*

The included co-obligors effectively would be treated the same as the debtor and subject to the same rights and limitations imposed by chapter 16. However, because it is possible that some affiliates will not be aligned with the debtor (*e.g.*, a partially-owned subsidiary with independent management), an affiliate may elect not be included in the restructuring, in which case it generally will receive none of the benefits or burdens.[1] *Section 2(h), proposed § 1645(d).*

As with the chapter 16 debtor, the non-filed included co-obligors would not be discharged or otherwise released of any liability other than loan agreement claims that are impaired under the plan. Indeed, chapter 16 expressly prohibits broader third-party releases or injunctions. *Section 2(h), proposed §§ 1626, 1627.*

Effect Of Filing.

No Estate Or Estate-Related Restrictions. No estate is created upon the filing, and chapter 16 does not incorporate most Code provisions that govern the operation and disposition of property of the estate, such as §§ 363, 364, and 365. *Section 2(h), proposed § 1602.* No avoiding powers are vested in the estate or debtor. *Id.* The Code's provisions governing employment and compensation of professionals also do not apply.

Limited Automatic Stay. The automatic stay does not apply, except with respect to claims against the debtor and included co-obligors for borrowed money under the loan agreements that are proposed to be impaired under the plan. *Section 2(h), proposed § 1625. This is a proposed change from the 2015 proposal, which had no automatic stay whatsoever.*

No Effect On Rights Of Creditors Except For Loan Agreement Claims. No creditor rights or executory contracts are affected by the filing, except for (i) claims for borrowed money under the loan agreements that are to be impaired under the plan, and (ii) *ipso facto* contractual rights that may be triggered by the filing. *Section 2(h), proposed §§ 1626, 1627.* No stays of non-borrowed money claims (even temporary ones) are permitted (and are in fact expressly prohibited).

Tolling Of Avoidance Actions. Bankruptcy and non-bankruptcy periods to avoid transfers and obligations are tolled during the chapter 16 case. *Section 2(h), proposed § 1623.*

The Plan.

[1] An exception to this involves the treatment of *ipso facto* defaults caused by the debtor's chapter 16 filing, which are excused as to all of the debtor's affiliates, regardless of whether they are "included co-obligors." *Section 2(h), proposed § 1626.*

Only Debtor May File. *Section 2(h), proposed § 1641.*

Filed With The Petition. *Section 2(h), proposed § 1641.*

Classification And Impairment Of Loan Agreement Claims Only. The plan may classify only claims against the debtor and included co-obligors for borrowed money under loan agreements (*e.g.*, primary obligations and guarantees under notes, indentures, and credit agreements). No other types of claims (*e.g.*, trade, tort, and employees) may be classified or impaired by the plan.

Disclosure Statement And Solicitation. Generally the same rules as in chapter 11. A disclosure statement is required if the debtor is going to solicit acceptances during the case (prepetition solicitation is also permitted as in chapter 11). *Section 2(h), proposed § 1602 (incorporating § 1125) & §§ 1641, 1647.*

Acceptance. 2/3 in dollar amount, but no numerosity requirement. Votes of insiders and holders who have interests that are adverse to the class because of other economic interests are not counted. *Section 2(h), proposed § 1645.*

Confirmation. No cram down – all impaired classes must accept the plan. Confirmation requires include good faith and best interests test, which is applied on a consolidated basis for the debtor and all included co-obligors. *Section 2(h), proposed § 1648.*

Deadline To Confirm. Generally 90 days, which may be extended by the Court to no more than 150 days. *Section 2(h), proposed § 1629.*

Effect Of Confirmation. Impaired loan agreement claims against the debtor and included co-obligors are discharged, except as provided in the plan.

Notice And Related Rule Amendments. *This is a proposed addition to the 2015 proposal. Section 3* would direct the Judicial Conference to promulgate rules to provide notice to (a) impaired creditors of the bar date, the disclosure statement hearing, and the confirmation hearing, (b) all creditors and equity holders of the commencement of the case, and (c) co-obligors of the commencement of the case, the disclosure statement hearing, and confirmation hearing, and the deadline to elect to be included co-obligors. These would be the minimum notice requirements, and the court may order such notices also to go to "such other persons as the court may order."

SECTION BY SECTION SUMMARY:

Section 1: Title of Act.

Section 2: Amendments to existing Code sections.

(a) Only chapters 1 and 16 apply in a chapter 16 case (chapters 3, 5, and 11 do not apply, except as expressly provided in section 1601(a)).

(b) Eligibility for chapter 16 is the same as for chapter 11, except (i) an individual cannot be a debtor, and (ii) the debtor must have debt for borrowed money under a "loan agreement" (defined in proposed section 1602 as including a credit agreement or indenture).

(c) Adds reference to chapter 16 in section 524(a)(1) effect-of-discharge provision.

(d) Amends section 1511 to change the effects of recognition of a foreign proceeding when the foreign representative invokes chapter 16; ensures that recognition does not cause the application of various Code provisions that are excluded from chapter 16.

(e) Imposes filing fee for a chapter 16 case equal to fee for chapter 11 case.

(f) Treats a debtor under chapter 16 as a "trustee" for purposes of 28 U.S.C. § 959(b).

(g) Amends table of contents for U.S. Code.

(h) Adds chapter 16.

1601: Additional or modified definitions for chapter 16.

1602 Incorporates various provisions of chapters 3, 5, and 11, but ***excludes*** among others: (i) involuntary cases (§ 303), (ii) trustees and examiners (§§ 321-326, 1104-1105), (iii) official committees (§ 1103), (iv) retention and compensation of professionals (§§ 327-331), (v) adequate protection and the automatic stay (§§ 361-362, *but see* limited automatic stay in § 1625), (vi) court approval for sales (§ 363), (vii) court approval for financing (§ 364), (viii) treatment of executory contracts and leases (§ 365), (ix) creation of an estate (§ 541), and (x) the avoiding powers (§§ 544-551).

1602: Additional or modified definitions for chapter 16.

1603: Right to be heard – similar to section 1109.

1621: Debtor shall file schedules of the impaired loan agreement claims and identify co-obligors.

1622: Proofs of claim are only filed by creditors in impaired class and do not need to be filed if listed on the debtor's schedules (other than listed as disputed, contingent, or unliquidated).

1623: Tolls avoiding power limitation periods during a chapter 16 case.

1624: Debtor may operate its business, whether or not in ordinary course.

1625: The automatic stay will only apply to claims against the debtor and included co-obligors for borrowed money under loan agreements that are to be impaired under the plan.

1626: Overrides application of *ipso facto* clauses vis-à-vis the debtor and its affiliates (i) as to all parties, if based upon the filing of the chapter 16 case, and also (ii) as to impaired creditors, if based upon the debtor's or included co-obligor's insolvency or financial condition. Prohibits governmental revocation or suspension based upon chapter 16 filing.

1627 Unimpaired creditors' rights are not affected, except as provided in section 1626, or if a chapter 7 or 11 case is commenced for the debtor.

1628: Chapter 16 does not preclude the filing of a chapter 7 or 11 case (including an involuntary case). However, an involuntary case commenced by impaired creditors is suspended, unless the court orders otherwise (this suspension will end if a chapter 16 plan is confirmed, the chapter 16 case is dismissed, or it is more than 90 days after the commencement of the chapter 16 case, unless the court extends the time for cause up to 150 days after the commencement of the case).

1629: Debtor has right to dismiss case. Case shall be dismissed if plan is not confirmed within 90 days (unless extended for cause up to 150 days), or if confirmation is denied because an impaired class has rejected the plan. Case cannot be converted.

1641: Only debtor can file plan, which must be filed with the petition.

1642: Claims must be classified with similar claims, but similar claims against the debtor and included co-obligors may be included in a single class. Cannot classify an undersecured creditor's deficiency claim with unsecured creditors.

1643: Plan shall (i) designate impaired classes (which can only be claims arising under or relating to a loan agreement), (ii) specify treatment of impaired classes, (iii) leave unimpaired all other creditors, and (iv) provide for the same treatment for all creditors in each impaired class (except those creditors who participated in plan process may receive reimbursement of fees).

1644: Claim is impaired unless the plan leaves unaltered the legal, equitable, and contractual rights to which such claim entitles the holder of such claim.

1645: Plan must be accepted by creditors holding at least 2/3 in amount of claims in each impaired class (no numerosity requirement, and 2/3 requirement excludes votes of insiders and affiliates, and of parties that have a conflicting interest that is "adverse to the interest of the class" that is "of greater importance and economic value to the holder than the claim of the holder in the class"). Limits waivers and transfers of right to vote. Co-obligors may elect to be included co-obligors under the plan.

1646: Debtor may modify a plan at any time before confirmation, but may not if the plan as modified fails to meet the requirements of sections 1642 and 1643.

1647: If the debtor solicits acceptances postpetition, the debtor must file a disclosure statement with the petition and the court must approve it.

1648: Court shall confirm the plan only if (i) the debtor and plan comply with the applicable Code requirements, (ii) plan is proposed in good faith and not be any means prohibited by law, (iii) payments made to holders of impaired claims and their professionals are disclosed, (iv) each impaired class has accepted the plan (no cram down), and (v) the best interests test is satisfied as to each holder of a claim in an impaired class (except with respect to value given up with respect to lien rights that also could have been given up by a vote of the class outside of the chapter 16 case). In the event there are included co-obligors, the best interests test is applied on a consolidated basis. Consent fees and exit financing fees must be offered to all creditors in class.

1649: Plan binds the debtor, included co-obligors, and holders of impaired claims. Impaired claims are discharged except as provided in the plan.

1650: Court shall close case after effective date. Case may be reopened.

Section 3. Directs the Judicial Conference to promulgate rules to provide notice to (a) impaired creditors of the bar date, the disclosure statement hearing, and the confirmation hearing, (b) all creditors and equity holders of the commencement of the case, and (c) co-obligors of the commencement of the case, the disclosure statement hearing, and confirmation hearing, and the deadline to elect to be included co-obligors. These would be the minimum notice requirements, and the court may order such notices to also go to "such other persons as the court may order."

Student Loan Dischargeability-Possible Change in Dischargeability Standard

Student Loan Dischargeability

Prepared for the National Conference of Bankruptcy Judges Annual Meeting 2026

DOE / DOJ Guidance Regarding Student Loan Bankruptcy Litigation

Guidance Text:
https://www.justice.gov/d9/pages/attachments/2022/11/17/student_loan_discharge_guidance_-_guidance_text_0.pdf

Fact Sheet:
https://www.justice.gov/d9/pages/attachments/2022/11/17/student_loan_discharge_guidance_-_fact_sheet_0.pdf

Attestation Form: https://www.justice.gov/civil/media/1316521

Sample Scenario: https://www.justice.gov/d9/pages/attachments/2022/11/17/appendix_b_-_sample_scenario.pdf

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Statutory Reform - Proposals

119th Congress (2025-2026)

The Student Loan Bankruptcy Improvement Act of 2025 (H.R.4444): proposes eliminating the word "undue" from § 523(a)(8).

The Private Student Loan Bankruptcy Fairness Act of 2025 (H.R.423): proposes to remove private student loans from § 523(a)(8).

Previously Introduced

The Student Borrower Bankruptcy Relief Act of 2024: proposed to repeal § 523(a)(8).

The FRESH START Through Bankruptcy Act of 2021: proposed to eliminate the need for debtors to satisfy the undue hardship standard provided their student loans had been in repayment for at least ten years.

Select Scholarship

Data About Bankruptcy Filers

PAMELA FOOHEY, ROBERT M. LAWLESS, & DEBORAH THORNE, DEBT'S GRIP: RISK AND CONSUMER BANKRUPTCY (2025) (chapter 6 details student loan debt disaggregated by the race of filers and chapter 7 details student loan debt disaggregated by gender and single or married/partnered status of filers).

Assessing the DOE / DOJ Guidance Regarding Student Loan Bankruptcy Litigation

Belisa Pang, Matthew Adam Bruckner, & Dalié Jiménez, *The Missing Cases: Student Loan Discharge in Bankruptcy After Reform* (draft dated April 15, 2026), https://ssrn.com/abstract=6532660.

Belisa Pang, Dalié Jiménez, & Matthew A. Bruckner, *Full Discharge Ahead? An Empirical First Look at the New Student Loan Discharge Process in Bankruptcy*, 41 EMORY BANKR. DEV. J. 259 (2025).

Jason Iuliano, *Bridging the Student Loan Bankruptcy Gap*, 99 AM. BANKR. L.J. 414 (2025).

Matthew Adam Bruckner, *New Guidance on Student Loan Relief*, 34 NORTON J. BANKR. L. & PRAC. 168 (2025).

Proposing Changes to DOE Guidance or 11 U.S.C. § 523(a)(8)

Pamela Foohey, Aaron Ament, & Daniel Zibel, *Changing the Student Loan Dischargeability Framework: How the Department of Education Can Ease the Path for Borrowers in Bankruptcy*, 106 MINN. L. REV. HEADNOTES 1 (2021).

Brook E. Gotberg, Matthew Bruckner, Dalié Jiménez, & Chrystin Ondersma, *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. COLO. L. REV. 183 (2020).

Dalié Jiménez, Matthew A. Bruckner, Pamela Foohey, Brook Gotberg, & Chrystin D. Ondersma, Comments of Academics to Department of Education's RFI Regarding Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings (Docket No. Ed–2017–Ope–0085) (May 22, 2018), https://ssrn.com/abstract=3183893.

Analyzing 11 U.S.C. § 523(a)(8) and Student Loan Discharge Standards

John Patrick Hunt, *Student Loan Purpose and the* Brunner Test, 15 HARV. L. & POL'Y REV. 237 (2020).

Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 101 (2020).

Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277 (2019).

Dalié Jiménez, *A Tortuous History: The Student Loan Exception to Discharge* (draft dated April 10, 2014), https://ssrn.com/abstract=3544267 (detailing the various times that Congress has enacted laws restricting the dischargeability of student loans in bankruptcy and the statements in the congressional record supporting those legislative changes).

Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009).

John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L.J. 245, 265–76 (2006) (analyzing policy justifications for U.S. approach to student loan discharge).

Key Judicial Decisions Setting Student Loan Discharge Standard

Brunner v. N.Y. State Higher Education Services Corporation, 831 F.2d 395, 396 (2d Cir. 1987) (holding that debtors must show that (1) they "cannot maintain, based on current income and expenses, a 'minimal' standard of living" for themselves and their dependents if required to repay their loans; (2) "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans," and (3) they have made "good faith efforts to repay the loans.").

Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775 (8th Cir. 2009) (outlining the "totality of the circumstances" standard, requiring the evaluation of the debtor's past, present, and future financial resources, living expenses, and other relevant circumstances).

Tetzlaff v. Educ. Credit Mgmt. Corp., 794 F.3d 756, 759–60 (7th Cir. 2015) (discussing the requirement to establish a "certainty of hopelessness" to show undue hardship under *Brunner*).

Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley), 494 F.3d 1320, 1326 (11th Cir. 2007) (noting there must be "certainty of hopelessness" to establish undue hardship under *Brunner*).

Brightful v. Pennsylvania Higher Education Assistance Agency (In re Brightful), 267 F.3d 324, 328-29 (3d Cir. 2001) ("[D]ischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment.") (quoting *In re Briscoe*, 16 B.R. 128, 131 (Bankr. S.D.N.Y.1981)).

Select Recent Judicial Decisions Regarding Student Loan Discharge

Hoehn v. US Dept. of Ed. (In re Hoehn), 672 B.R. 411 (Bankr. S.D. Ohio 2025) (denial of discharge).

Hargrave v. Educ. Credit Mgmt. Corp. (In re Hargrave), 671 B.R. 94 (Bankr. D. Kan. 2025) (partial discharge).

Garcia v. US Dept. of Ed. (In re Garcia), 670 B.R. 484 (Bankr. W.D. Tex. 2025) (denial of discharge).

Hendel v. Pa. Higher Ed. Assistance Agency, 669 B.R. 757 (Bankr. E.D. Pa. 2025) (denial of discharge).

Ester v. Educ. Credit Mgmt. Corp. (In re Ester), 657 B.R. 655 (Bankr. N.D. Okla. 2024) (discharge of entire balance).

Longo v. Discover Bank (In re Longo), 654 B.R. 1 (Bankr. D. Conn. 2023) (partial discharge of private student loan).

Bankruptcy Code Section 546(e), Safe Harbor for Securities Transactions and Leveraged Buyouts:

Possible Narrowing of the Defense

Selected Bibliography: Bankruptcy Code Section 546(e) — The Safe Harbor for Securities Transactions and Leveraged Buyouts

Prepared for the National Conference of Bankruptcy Judges Annual Meeting 2026

Scholarly Articles

David Gray Carlson, *The Safe Harbor for Leveraged Buyouts in Bankruptcy*, 99 AM. BANKR. L.J. 306 (2025).

Peter V. Marchetti, *Section 546(e) Redux — The Proper Framework for the Construction of the Terms Financial Institution and Financial Participant Contained in the Bankruptcy Code After the U.S. Supreme Court's Holding in* Merit, 43 CARDOZO L. REV. 1107 (2022).

Lawrence Ponoroff, *The Resiliency of the Equality of Creditors Ethos in Bankruptcy*, 30 AM. BANKR. INST. L. REV. 1 (2022).

Katie Drell Grissel, *Merit Management Group, LP v. FTI Consulting, Inc.: Narrowing the § 546(e) Safe Harbor*, 13 VA. L. & BUS. REV. 19 (2019).

Ralph Brubaker, *Understanding the Scope of the §546(e) Securities Safe Harbor Through the Concept of the "Transfer" Sought to Be Avoided*, 37 Bankruptcy Law Letter No. 7 (July 2017).

Seminal Judicial Decisions

In re Mallinckrodt, 674 B.R. 296 (Bankr. D. Del. 2025).

Petr v. BMO Harris Bank N.A. (*In re BWGS, LLC*), No. 23-1931 (7th Cir. Mar. 15, 2024).

Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC v. ZCM Asset Holding Co. (Bermuda) Ltd., No. 12-01512 (Bankr. S.D.N.Y. Nov. 20, 2023).

In re Nine West LBO Securities Litigation, 482 F. Supp. 3d 187 (S.D.N.Y. 2020), *aff'd in part, rev'd in part*, No. 1:20-md-02941 (2d Cir. Nov. 27, 2023).

Halperin v. Morgan Stanley Investment Management (*In re Tops Holding II Corp.*), No. 7:20-ap-08950 (Bankr. S.D.N.Y. Oct. 12, 2022).

Deutsche Bank Trust Co. Americas v. Large Private Beneficial Owners (*In re Tribune Co. Fraudulent Conveyance Litigation*) (*Tribune II*), 946 F.3d 66 (2d Cir. 2019).

Merit Management Group, LP v. FTI Consulting, Inc., 138 S. Ct. 883 (2018).

Geltzer v. Mooney (*In re MacMenamin's Grill Ltd.*), 450 B.R. 414 (Bankr. S.D.N.Y. 2011).

Kirschner v. Agoglia (*In re Refco Inc.*), 461 B.R. 181 (Bankr. S.D.N.Y. 2011).

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Texas Appeals Court Wary of Reviving Trustee's $100M Claim, LAW360 (May 5, 2026).

Ben Zigterman, *Morgan Stanley, Tops Trustee Duel Over Dividends Clawback*, LAW360 BANKRUPTCY AUTHORITY (Feb. 10, 2025).

Alex Wittenberg, *Split 2nd Circ. Partially Revives Nine West Buyout Fraud Suit*, LAW360 (Nov. 27, 2023). Emlyn Cameron, *Bankruptcy Judge Won't Ax Madoff Trustee's Clawback Case*, LAW360 (Nov. 20, 2023).

Emlyn Cameron, Bankruptcy Judge Won't Ax Madoff Trustee's Clawback Case, LAW360 (Nov. 20, 2023).

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Matthew Gold, Dov Kleiner & Marc Rosen, *Nine West Clawback Ruling Fortifies Bankruptcy Safe Harbor*, LAW360 (Sept. 28, 2020).

Charles Oellermann & Mark Douglas, *Structuring LBO Payments After NY Ch. 11 Ruling*, LAW360 (Aug. 13, 2020).

Justin Ellis & Lauren Dayton, *Key Issues in Potential High Court Fraudulent Transfer Case*, LAW360 (Oct. 23, 2020). Ingrid Bagby, Eric Waxman & Anthony De Leo, *Tribune Ruling Charts Course for Bankruptcy Safe Harbor*, LAW360 (Jan. 15, 2020).

PROPOSED AMENDMENTS TO BANKRUPTCY CODE'S SAFE HARBOR PROVISIONS

Congress reacted to ameliorate risk to the smooth functioning of the securities markets created by the denial in *Seligson v. New York Produce Exchange*, 394 F. Supp. 125 (S.D.N.Y. 1975) of a clearing association's motion for summary judgment in an action to avoid margin payments that passed through it. Congress determined that market intermediaries would be unable to adjust to the uncertainty and delay of litigation over their potential transferee liability rand therefore required a safe harbor from most avoidance risk. This has led, through several amendments, to the current version of Bankruptcy Coe section 546(e).

The current statutory scheme: 11 U.S.C. § 546(e) creates a safe harbor from the avoidance of transfers, except those made with actual fraudulent intent, as follows:

"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 (or for the benefit of) a commodity broker, ***forward contract merchant***, stockbroker, ***financial institution***, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, ***forward contract merchant***, stockbroker, ***financial institution***, financial participant, or securities clearing agency, ***in connection with*** *a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract*, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title."

11 U.S.C. § 101(22) defines "financial institution" broadly, including "an entity that is a commercial or savings bank . . . [or] trust company . . ." and not by the type of service performed by such institution. Moreover, the definition also includes the following: "**[W]hen any such . . . entity is acting as agent or custodian for a customer (whether or not a 'customer', as defined in section 741)** ***in connection with a securities contract*** **(as defined in section 741)** ***such customer***."

11 U.S.C. § 101(26) has a similarly broad definition of "forward contract merchant" without the equivalent of the last clause of section 101(22).

11 U.S.C. §§ 101(38) and (51A) define "margin payment" and "settlement payment" broadly.

11 U.S.C. § 741(7) defines "securities contract" broadly, indeed circularly.

PROBLEM: Notwithstanding *Merit Mgmt. Grp., Inc. v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018), courts construe the mere involvement of a "financial institution" (and arguably would do the same for a "forward contract merchant") in one step of a challenged multi-step transaction as triggering the section 546(e) safe harbor for multiple the steps in the transaction, even if the avoidance and recovery of the ultimately challenged transfer would have little to no effect on the continued functioning of the security, commodity, repo or forward contract markets. They do so either by noting that *Merit* specifically did not decide whether the bolded language of 11 U.S.C. § 101(22), quoted above, that deems a customer (including a debtor) of a financial institution to be a safe harbored "financial institution," or by collapsing the multi-step transfer to a transfer to or by or for the benefit a safe-harbored entity. *Deutsche Bank & Trust Co. Americas v. Large Private Beneficial Owners* (*In re Tribune Co. Fraudulent Transfer Litig.*), 946 F.3d 66 (2d Cir. 2019); *Holiday v. Credit Suisse (USA) LLC* (*In re Boston Generating, LLC*), (2d Cir. 2024).

SOLUTION 1:

Delete 11 U.S.C. § 546(e) in its entirety. Instead, securities and commodities marketplaces may rely on the "mere conduit" doctrine, the definition of "transfer" in 11U.S.C. § 101(54), and courts' interpretations of "initial," "immediate" and "mediate" transferee in 11 U.S.C. § 550 to protect agents, intermediaries and market makers and thus the underlying markets while reviving the avoidance power against the targeted recipients of such transfers whose potential liability will not lead to systemic market risk. After all, we have had decades of litigation uncertainty over the meaning and scope of section 546(e) and its related definitions, including multiple trips to the federal courts of appeal and the U.S. Supreme Court. Nevertheless, has there been any evidence of that uncertainty creating a systemic risk to the markets? Pretty clearly, the answer is "no".

Issue: Logical concern that a *Seligson* risk of a "market freeze" would remain because of factual disputes about whether a purported transferee/agent is a mere conduit.

SOLUTION 2:

Delete bolded language above in 11 U.S.C. §§ 546(e) and 101(22).

Issue A: Simply eliminating "financial institutions" and "forward contract merchants" as protected parties still leaves such entities subject to *Seligson* risk when they perform conduit or agent services.

Issue B: Simply eliminating "in connection with" breaks the safe harbor's tie to the type of conduct that Congress meant to protect, that is, conduct in acting as an intermediary in effectuating such transactions. Nevertheless, "in connection with" has been consistently construed broadly, to apply the safe harbor to any transfer coming at the end of a series of integrated steps as long as one of those steps involved a safe harbored transfer or can be collapsed into a protected transfer. A narrower phrase tying the exempt party's role to the transaction at issue is required.

Possible Issue C?: If the targeted transferee receives an otherwise avoidable transfer but its role is not limited being a conduit, agent, etc., does the avoidance of the transfer pose a systemic risk to the market? If so, then the line drawing problem posed by *Seligson* still applies to any modification of the safe harbor that tries to confine its protection to public markets, because of the difficulty of defining a "public market". I argue that such a risk, if it exists, is ameliorated by the constraints of the Bankruptcy Code's enforcement process to protect good faith transferees and does not outweigh the centuries old policy of avoiding transfers.

Final Notes on possible SOLUTION 2: I know of no valid reason to treat the customer of a financial institution acting as a protected conduit, agent, market maker etc. the same way as its conduit, agent, market maker, as does the last clause of 11 U.S.C. § 101(22)'s definition of "financial institution". It has been argued that financial institutions that guaranty shorts or margin loans may have been intended beneficiaries of this drafting, but if that is the case the safe harbor gives them protection that other guarantors do not have, including absolving them of the need to perform to due diligence.

SOLUTION 3

Delete 11 U.S.C. § 546(e) – (g) and amend 11 U.S.C. § 550 by adding new section (b) below as follows and re-lettering the rest of the section:

> "(b) The trustee may not recover under subsection (a) of this section from (i) a commodity broker, financial participant, stockbroker, or securities clearing agency, in each case acting in such capacity with respect to a transfer that would otherwise

be governed by such section (a), or (ii) a financial institution or forward contract merchant, in each case acting as an agent or broker for the initial transferee of such transfer or the entity for whose benefit such transfer was made with respect to a transfer that would otherwise be governed by such section (a), or the immediate or mediate transferee of such transfer with respect to a transfer, in each case that is (A) a margin payment as defined in section 101, 741, or 761 of this title, or a settlement payment as defined in section 101 or 741 of this title, made by or to (or for the benefit of), a transferee that is made to effectuate a securities contract, as defined in section 741(7), commodities contract, as defined in section 761(14), or forward contract, (B) made by or to (or for the benefit of) a repo participant or financial participant, in connection with any repurchase agreement, or (C) made by or to (or for the benefit of) a swap participant or financial participant, under or to effectuate any swap agreement, in each case that is made before the commencement of the case and is not a transfer avoided under 11 U.S.C. § 548(a)(1)(A)."

In addition, 11 U.S.C. § 502(d) would be amended by the following language in bold:

"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 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, 550, or 553 of this title**, except to the extent any entity or transferee is exempt from recovery under section 550(b) of this title**."

Last, unless anyone can show a valid purpose for it, the phrase in bold in 11 U.S.C. § 101(22) above, which includes the customer of a financial institution in the definition of "financial institution" would be deleted.

<u>Issue</u>. Does limiting the safe harbor for financial institutions and forward contract merchants only to those acting their capacity as agent or broker with respect to the transfer at issue subject them to the *Seligson* risk? I argue that it does not because they can structure their role to fit within the safe harbor under well-defined agency principles and therefore match their risk with the relatively modest compensation that they charge.