APPENDIX BB

SELECTED BAPCPA CHANGES AFFECTING CONSUMER BANKRUPTCY PRACTICE ("FLYOVER")

Prepared by[1]:

Henry E. Hildebrand, III
Chapter 13 Trustee
Nashville, Tennessee

Keith M. Lundin
United States Bankruptcy Judge
Middle District of Tennessee

NOTE: *The listing below is intended to only outline or summarize the changes to consumer bankruptcy practice by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Changes to Chapter 13 are detailed elsewhere. The language used to describe some changes is shortened, and terms of art are sometimes reduced from the actual language of the new law. References are to sections of Title 11, as amended.*

1. There are four new definitions in § 101 that are especially important to consumer practitioners:

1) Section 101(10A) defines a new term of art, ***"current monthly income,"*** with reference to the six months preceding the petition month. Current monthly income is the platform for the new "means test" in § 707(b) and for calculating disposable income in § 1325(b).

2) Section 101(12A) defines a ***"debt relief agency"*** to include many bankruptcy practitioners. Sections 526, 527 and 528 impose many new duties and restrictions on bankruptcy practitioners who are debt relief agencies.

3) Section 101(14A) broadly defines ***"domestic support obligation"*** to include alimony, maintenance and support accruing before or after the petition and including postpetition interest. This new definition is used in many sections dealing with dischargeability, priorities, confirmation of plans, etc.

4) Section 101(39A) defines ***"median family income"*** by reference to census data, adjusted by the Consumer Price Index. Many sections of the new Code—including the means test

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in § 707(b) and the disposable income test in § 1325(b)—use median family income as a measuring stick to trigger important consequences.

2. No individual may be a debtor under Title 11 unless, within 180 days before filing the petition, the debtor received an individual or group briefing (including by phone or internet) from an approved non-profit entity that outlined opportunities for credit counseling and assisted the debtor in performing a personal budget analysis. The court may grant an exemption based on the debtor's sworn statement but that exemption expires 30 days after the petition. The briefing is not required if court determines that debtor is incapacitated (mentally), disabled (physically), or active military in a combat zone. § 109(h)(1).

The reference to "briefing" is new. The briefing must both outline the opportunities to obtain credit counseling and assist the debtor in performing a related budget analysis. The exemption is available only if debtor certifies "exigent circumstances" and that the debtor made a request for credit counseling that went unfulfilled for five days. The requirement that a debtor obtain a prefiling briefing is not applicable to a debtor who resides in a district for which a counseling agency is not reasonably able to provide such services as determined by the United States Trustee. This exception is not all together consistent with the congressional directive that the briefing can be by telephone or internet.

3. A bankruptcy petition preparer is specifically prohibited from advising a debtor whether to file, under which chapter to file, whether the debtor will receive a discharge and the debts that would be covered by such discharge, whether the debtor may retain property after the filing, the dischargeability of tax obligations, whether the debtor can or should reaffirm any debt, the characterization of any debt, or information relating to any bankruptcy procedure. § 110(e)(2).

A bankruptcy petition preparer is a Debt Relief Agency, subject to new restrictions, disclosures and penalties in §§ 526, 527 and 528. The Judicial Conference may promulgate guidelines for the maximum fee allowed to a bankruptcy petition preparer. A bankruptcy petition preparer may not collect filing fees and court costs from a debtor.

4. The names of a debtor's minor children may not be disclosed in any document that will become a public record, but children's identities may be maintained in a nonpublic record, available to the judge, the trustee, the U.S. trustee or an auditor. § 112.

The trustee that maintains the name of a minor child is prohibited from disclosing the name to anyone. The Bankruptcy Administrator is not listed as a party to whom the identity of minor children can be disclosed by the court. The court must now maintain a "non-public record" of the names of minor children. The trustee will have to access this nonpublic record to satisfy new noticing responsibilities.

5. Professionals hired by a trustee or committee may be compensated on a fixed fee or percentage fee basis, and are not limited to fees determined on a lodestar basis. § 328(a).

This section clearly permits flat fee compensation for attorneys.

6. Whether a professional is board certified is a factor that may be considered in fixing compensation. § 330(a)(3)(E).

7. The compensation a Chapter 7 trustee shall be treated as a commission. § 330(a)(7).

This section eliminates the argument that a trustee is compensated based on an hourly rate capped by the amounts specified in § 326.

8. The representation of a creditor holding a consumer debt at a Chapter 7 or Chapter 13 meeting of creditors need not be by counsel but may be through an employee or agent of the creditor, and that agent is permitted to represent multiple creditors. This authorization may not be limited by any local or state rule governing the unauthorized practice of law. § 341(c).

This provision ends the argument whether a consumer creditor can appear and question the debtor at a meeting of creditors without an attorney. Permission to appear at a meeting of creditors without an attorney does not extend to creditors holding ***non****-consumer debts.*

9. The court may order the U.S. trustee not to convene a meeting of creditors if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of a case. § 341(e).

Although probably intended to apply only to Chapter 11 cases—reflecting the prepackaged Chapter 11s that have been somewhat successful—the new subsection is not limited to Chapter 11 and could be useful in Chapter 13 cases when the debtor can't physically attend a § 341 meeting. Obtaining acceptances is not a predicate to waiver of the meeting of creditors.

10. Any notice to be given by a debtor to a creditor must include the account number and must be sent to the correspondence address designated by the creditor if the creditor sent two communications to the debtor within 90 days of the petition that included the debtor's current account number and the creditor's correspondence address. § 342(c)(2).

Each notice to a creditor must also contain the debtor's address and the last four (4) digits of the debtor's social security number.

11. In any Chapter 7 case in which the presumption of abuse arises under § 707(b), the clerk must provide notice of the presumption to all creditors within 10 days of the filing of the petition. § 342(d).

This notice is well prior to the time that the United States Trustee must file a report of its review of the petition after the meeting of creditors.

12. Any entity may file *with any bankruptcy court* a "notice of address" for use in all bankruptcy courts in all pending Chapter 7 and Chapter 13 cases—or, for use in particular courts as specified by the creditor. This "notice of address" must be used for all noticing by a court (only) 30 days after filing unless the entity files a (different) "notice of address" in a specific court and case. A

notice of address filed in a specific court and case must be used by the court or by the debtor five days after filing. § 342(e) and (f).

This is likely to become one of the most problematic provisions of the new law. There is no protocol within or among the bankruptcy courts to carry out these new requirements.

13. Notice provided to a creditor—by the debtor or by the court—inconsistent with the new rules in § 342 shall not be effective until the notice has been "brought to the attention" of the creditor. If the creditor "designates a person or organizational subdivision" to receive bankruptcy notices and has a reasonable procedure to deliver notices to such person or subdivision, then a notice has not been "brought to the attention" of the creditor until the designated person or subdivision receives the notice. § 342(g)(1).

The door is open for a creditor to file a national designation of a Clerk in the Fourth Degree, buried in a suburban office complex somewhere outside of Vladivostok.

If notice is not effective, many events and deadlines—for example, the automatic stay, the time to object to exemptions, the deadline for filing a nondischargeability complaint, or the deadline to file a claim—may be impacted.

Creditors can claim that notice is not effective until "brought to the attention" under § 342(g)(1) only if they establish "reasonable procedures" so that notices are delivered to the designated person or organizational subdivision. Courts will determine whether procedures are reasonable.

14. No monetary penalty for violation of the stay under § 362(a) or for failure to turnover property under §§ 542 and 543 may be imposed on a creditor unless the action or failure takes place after the creditor has received notice effective under § 342. § 342(g)(2).

This could be interpreted as a shelter for creditors to violate the stay with impunity until they receive "official" notice at the designated address, including required account numbers, etc. Arguably, a phone call or faxed petition won't do unless it gets to the "designated person or organizational subdivision" described above. Did they forget about the codebtor stay in § 1301?

15. Upon conversion from Chapter 13, valuations of property and of allowed secured claims in the Chapter 13 case apply only if conversion is to Chapter 11 or 12, not to Chapter 7. § 348(f)(1)(B).

16. Upon conversion from Chapter 13, any creditor with security at the petition continues to be secured by "that security," unless the full amount of "such claim" was paid before conversion, notwithstanding any valuation or determination of an allowed secured claim during the Chapter 13 case. § 348(f)(1)(C)(i).

17. Unless a prebankruptcy default was fully cured under the plan before conversion, the default has its non-bankruptcy effect "in any proceeding under this title or otherwise." § 348(f)(1)(C)(ii).

18. Except in a Chapter 11 or 13 (12?) case refiled after dismissal under § 707(b), the automatic stay with respect to "action taken" expires with respect to the debtor (only) 30 days after the petition if the debtor had another case pending within one year and that prior case was dismissed. The court can continue the stay, after a hearing that must be completed within 30 days, only if the latest case was filed in good faith "as to the creditors to be stayed." As to all creditors, there is a (rebuttable) presumption of a lack of good faith if:

1) the debtor had more than one previous case pending within one year; or
2) a previous case was dismissed within the preceding year, after the debtor failed to—
   (a) file or amend required documents without substantial excuse;
   (b) provide adequate protection ordered by the court; or
   (c) perform the terms of a confirmed plan, or—
3) there has not been a substantial change in the financial or personal affairs of the debtor since dismissal of the last case, or any reason (not?) to conclude that the latest case will be concluded with a Chapter 7 discharge or a confirmed, fully performed plan.

There is a (rebuttable) presumption of lack of good faith as to any creditor that filed a relief stay request in a previous case if, at dismissal of the previous case, the request was still pending or had been resolved by terminating, conditioning or limiting the stay. § 362(c)(3)

> *If a case was dismissed because the debtor worked out a "debt repayment plan," the presumption of bad faith does not apply in any subsequent case. Rebutting the presumption requires "clear and convincing" evidence.*

19. "Other than [in?] a case refiled under section 707(b)," no automatic stay arises if the debtor had two or more cases pending within the previous year, but were dismissed. Upon request of any party, the court shall enter an order confirming that no stay is in effect. Within 30 days of the filing of the petition, any party can request the court to impose a stay only by demonstrating that the latest filing is in good faith. There are the same (rebuttable) presumptions that the filing is not in good faith as discussed immediately above with respect to § 362(c)(3), except the words used in § 362(c)(4) are not exactly the same as in § 362(c)(3), including the expansion of prior cases to encompass any case under this title. § 362(c)(4).

> *Because the rebuttable presumption of bad faith refiling arises if the debtor has had "2 or more" cases pending, in* ***every*** *case where there is no stay under § 362(c)(4), the case will start with a presumption of bad faith.*

20. The stay expires 60 days after a request for relief unless a "final decision" is rendered. The 60 days can be extended by agreement or upon findings of good cause. § 362(e)(2).

21. The stay terminates as to personal property that secures a claim or that is leased if the debtor fails to timely file a proper statement of intent or fails to take action to implement the statement of intent within the time prescribed in § 521(a)(2). If the debtor fails to timely reaffirm or redeem, the stay terminates automatically and the property exits the estate. § 362(h) and § 521(a)(2)

> *Upon motion of the trustee, made within 45-days after the meeting of creditors, the court may prevent the automatic termination of the stay for the debtor's non-compliance. If no*

statement of intent is filed, the trustee must move within 30 days of filing. There are overlapping and perhaps conflicting 30-day and 45-day periods in § 521(a)(2) and (6).

22. The automatic stay does not apply to the withholding of income that is property of the estate or property of the debtor for the payment of a domestic support obligation pursuant to a judicial or administrative order *or statute*. Under § 101(14A), domestic support obligation includes debts accruing before or after the petition, even if assigned to a government unit, but does not extend to support obligations arising only by statute. § 362(b)(2)(C).

This new exception to the automatic stay empowers support creditors to disrupt the repayment of debt in a Chapter 13 case. It remains to be seen whether an income deduction order under § 1325(c) can limit this new stay exception.

23. The automatic stay does not apply to the withholding suspension or restriction of a driver's, professional, occupational or recreation license as specified in 42 U.S.C. § 466(a)(16)—upon nonpayment of support. § 362(b)(2)(D).

Additional leverage for support creditors to disrupt the plan in a Chapter 13 case.

24. The automatic stay does not apply to the interception of tax refunds to collect support obligations. § 362(b)(2)(F).

The ability of a support creditor to intercept tax refunds without stay relief will impact any Chapter 13 plan dependent upon tax refunds for funding. Perhaps a confirmed plan provision dedicating tax refunds to the plan would trump this exception to the stay.

25. The automatic stay does not apply to the creation or perfection of a statutory lien for *ad valorem* taxes on personal property or taxes upon real property when a governmental unit assesses the taxes after the filing of the petition. § 362(b)(18).

26. The automatic stay does not apply to the consensual withholding of a debtor's wages to repay a loan from a qualified pension, profit sharing, stock bonus or thrift savings plan. A Chapter 13 plan cannot "materially alter" the terms of a pension loan and "any amounts" required to repay such a loan are excluded from disposable income. § 362(b)(19) and § 1322(f).

27. The court may grant relief from the automatic stay as to real property, that precludes application of the stay for two years in any subsequent bankruptcy case, if the petition was part of a scheme to hinder, delay *and* defraud creditors that included the unauthorized transfer of the real estate or involved multiple bankruptcy filings, if the relief stay order is properly recorded under state law. § 362(d)(4) and § 362(b)(20).

Section 362(d)(4) requires recording for the relief stay order to have its two-year affect; the stay exception in § 362(b)(20) does not mention recording of the prior stay relief order. Ambiguously, the court can grant relief from "such order" based on changed circumstances or good cause under either section.

28. The automatic stay does not apply to enforcement of a lien against real property if the debtor is ineligible by virtue of a prior dismissal under § 109(g), or when the filing violates a court order in a prior case that prohibited the filing. § 362(b)(21).

> *There is no mention in new § 362(b)(21) of ineligibility under other sections, such as under new § 109(h).*

29. If a judgment for possession of residential property was obtained against the debtor prepetition, the judgment must be indicated "on the bankruptcy *petition"* together with the name and address of the lessor. If a lessor of residential property obtained a judgment for possession before the petition, the automatic stay does not apply to the *continuation* (only!) of an eviction or unlawful detainer action:

1) *immediately,* without relief from the stay in § 362(a)(3), unless the debtor files—
   (a) "with the petition," a "certification,"
      (i) whether a judgment for possession of residential property was obtained before the petition; *and*
      (ii) that under nonbankruptcy law, the debtor would be permitted to cure the monetary default that gave rise to the judgment for possession *after* that judgment was entered; *and*
      (iii) that the debtor deposited with the (bankruptcy?) court clerk any rent that would become due within 30 days after the petition; *and*
   (b) within 30 days of the petition, a (second) certification that the debtor has cured the entire monetary default that gave rise to the judgment for possession;
2) *upon court order,* after a hearing that must be held within 10 days of the lessor's objection to any certification by the debtor;
3) *immediately,* without relief from the stay in § 362(a)(3), if the court sustains an objection of the lessor to any certification by the debtor;
4) *30 days after the petition,* if the debtor files the first certification, but not the second. § 362(b)(22) and (*l*).

> *Section 362(b)(22) must be read with section 362(l) and is internally inconsistent, partially redundant and substantially incomprehensible. Best advice: if you can, file* before *a judgment for possession of leased property. In a Chapter 13 case, you may have until confirmation to assume a residential lease but the stay won't protect the debtor if there was a prepetition judgment for possession unless the debtor negotiates the maze in new § 362(b)(22) and (l). Don't forget to include the lessor's name and address on* both *the petition and on any certification filed under § 362(l).*

30. The stay of an eviction action (only!) does not apply, if a landlord files a certification that:

1) an eviction action has been filed based on the debtor's endangerment of residential property or illegal use of controlled substances on the property; or
2) that the debtor has endangered the property or used or allowed use of controlled substances on the property in the 30 days before the certification. § 362(b)(23) and (m).

31. The stay does not prevent the setoff of a prepetition tax refund against a prepetition tax liability. § 362(b)(26).

32. Only "actual damages" can be imposed for violation of stay by a creditor acting in the good faith belief that the stay terminated under § 362(h) due to the failure of the debtor to file or perform the statement of intent. § 362(k)(2).

33. A Chapter 7 debtor may assume a lease of personal property if the trustee does not and the creditor consents. Assumption imposes liability on the debtor, not on the estate. § 365(p)(2).

34. The stay is not violated by a lessor negotiating with a Chapter 7 debtor after the debtor gives notice in writing that the debtor desires to assume a lease of personal property. § 365(p)(2).

> *Similarly, it does not violate the discharge injunction in § 524 for the lessor to contact the debtor about conditions for assumption after notice from the debtor.*

35. If a lease of personal property is not assumed in the Chapter 13 plan, at the conclusion of the hearing on confirmation, the lease is deemed rejected and the stay and the codebtor stay are terminated as to the property. § 365(p)(3).

36. Granting a utility an administrative expense priority is not adequate assurance of payment under § 366 and the stay does not prevent a utility from recovering or setting off a prepetition deposit without notice or court order. § 366(c)(1)(B).

37. In Chapter 13 cases, the bar date for a tax claim is 60 days after the filing of any return respecting that tax required to be filed by new § 1308. § 502(b)(9).

38. The court may reduce a dischargeable unsecured claim by up to 20% if the creditor unreasonably refused to negotiate an alternative payment schedule proposed by an approved credit-counseling agency. The repayment proposal must have offered at least 60% of the debt and must have been made at least 60 days prior to the petition. § 502(k).

> *The debtor must prove by "clear and convincing" evidence that the refusal "to consider" (sic: negotiate?) was unreasonable and that the proposed alternative payment schedule was made at least 60 days before the petition.*

39. The value of goods received by the debtor in the 20 days before the petition in the ordinary course of the debtor's business is a new administrative expense. § 503(b)(9).

40. Property taxes incurred by the estate—whether secured or unsecured and without regard to personal liability—are administrative expenses; governmental units need not file a "request" to have an allowed administrative expense for any tax incurred by the estate. § 503(b)(1)(B)(i).

> *Obvious question: How will trustees know to pay a property tax that is an administrative expense for which no request is filed?*

41. In individual Chapter 7 and 13 cases, the value of personal property securing an allowed claim shall be replacement value on the date of the petition without deduction for sale or marketing costs.

For goods acquired for personal, family or household purposes, replacement value means the price a retail merchant would charge for property of that kind given its age and condition. § 506(a)(2).

Remember: § 506 does not apply at confirmation of a Chapter 13 case with respect to some purchase money claims under the hanging sentence at the end of § 1325(a).

42. Allowed unsecured (only!) claims for domestic support obligations—whether assigned to a governmental unit, or not—are first priority; the administrative expenses of a trustee—including a standing trustee under § 1302—"shall be paid" before a domestic support claim "to the extent" the trustee administers assets available for payment of the support claim. § 507(a)(1).

If the compensation and expenses of a Chapter 13 trustee determined under 28 U.S.C. § 586 are characterized as administrative expenses under § 503(b), there may be a new limit on payment of compensation and expenses when there is an allowed domestic support obligation.

43. There is a new tenth priority for claims for death or personal injury *resulting from* drunk driving or use of drugs while operating a motor vehicle. § 507(a)(10)

This new priority has implications for Chapter 13 cases because of § 1322(a)(2). The new priority is worded differently and is not coextensive with the exception to discharge in § 523(a)(9), applicable at completion of payments in a Chapter 13 case under § 1328(a)(2).

44. The priority "look back period" of 240 days from assessment of taxes is suspended for any period in which an offer in compromise was pending or a stay was in effect. § 507(a)(8)(A).

45. An "otherwise applicable time period" for priority treatment of taxes under § 507(a)(8) is suspended for any period in which collection was prevented by nonbankruptcy law or by stay in a prior case or by the existence of a confirmed plan, plus an additional 90 days. § 507(a)(8)(G).

46. Tax claims get interest at "nonbankruptcy law" rates whenever interest or present value is due a tax claimant. § 511.

47. Unless the court orders otherwise, debtors must file copies of "all payment advices or other evidence of payment" received by the debtor from an employer in the 60 days prior to the filing. The failure to file payment advices is one ground for "automatic dismissal" on the 46th day under § 521(i). § 521(a)(1)(B)(iv).

The payment advice obligation appears to apply only in cases where the debtor is an "employee".

48. Debtors must file a statement of "monthly net income" that shows how that amount was calculated. § 521(a)(1)(B)(v).

In contrast, new § 707(b)(2)(C) requires of Chapter 7 debtors (only) a new statement of the debtors "current monthly income"—a term of art defined in § 101(10A) by reference

to the six months preceding the petition. Interim Rule 1007(b)(6) requires Chapter 13 debtors to file a Statement of Current Monthly Income.

49. Debtors must file a statement showing any "reasonably" anticipated increase in income or expenditures within the year after filing. § 521(a)(1)(B)(vi).

50. Debtors must file a certificate from the approved, nonprofit budget and credit counseling agency that describes the services (briefing?) provided to the debtor and the debtor must file a copy of the debt repayment plan, if any created prior to filing. § 521(b).

*The certificate is **not** an eligibility requirement; the briefing itself is. The nature of the briefing and exemption for "exigent circumstances" are in § 109(h). The briefing requirement does not apply to incapacitated, disabled or combat zone debtors.*

51. "Not later than 7 days before the date first set for the first [*sic*] meeting of creditors," Chapter 7 and Chapter 13 debtors "shall provide" to the trustee a copy (or transcript) of the federal income tax return for the tax year ending immediately before the petition, for which a return was filed. At the same time, the debtor must provide a copy (or transcript) of the return to any creditor that timely requests it. The court "shall dismiss" the case if the debtor fails to comply. § 521(e)(2)(A), (B) and (C).

Chapter 13 debtors have additional tax return filing responsibilities in new § 1308. To avoid dismissal, the debtor must demonstrate that the failure to comply was due to circumstances beyond the control of the debtor.

52. At the request of the court, U.S. trustee, or any party in interest, individual Chapter 7, 11 and 13 debtors must file with the court tax returns (or transcript) at the same time filed with taxing authorities, for each tax year ending while the case is pending, and for any return for a tax year ending within three years before the petition for which no return has been filed. Amendments to returns are treated the same. § 521(f).

There are additional tax return responsibilities in Chapter 13 cases in § 1308.

53. Debtors must file a "record" of any interest in an educational IRA or a qualified state tuition program. § 521(c).

54. If requested by the trustee or the U.S. trustee, a debtor must provide a photographic ID or other personal identifying information that establishes the debtor's identity. § 521(h).

55. In voluntary Chapter 7 and 13 cases, the case is "automatically dismissed" on the 46th day after the petition if the debtor "fails to file all of the information required under [§ 521](a)(1)." Debtor must seek extension within the 45 days after petition. Trustee can also seek extension, but (curiously) on trustee's motion court must find that debtor made good faith attempt to file payment advice information required by § 521(a)(1)(B)(iv). § 521(i).

"Automatic" dismissal is undefined and incomprehensible. Section 521(a)(1) filing requirements are intricate, detailed and the dismissal triggered "automatically" by failure to file exactly everything will be invisible until a party in interest requests entry of an order of dismissal. Determining whether an automatic dismissal has occurred requires the exercise of substantial judgment and implicates notice and a hearing.

The absence of a dismissal order leaves open the time in which an aggrieved party can appeal since Rule 8002(a) provides that a notice of appeal must be filed within "10 days of the entry of the judgment, order, or decree appealed from." Since the dismissal is "automatic," the aggrieved party —usually the debtor—apparently can appeal up to 10 days after an order is ultimately entered.

56. On request of taxing authority (only), court shall convert or dismiss case if, within 90 days after the request, the debtor fails to file a tax return that becomes due after the petition. § 521(j).

57. Chapter 7 debtor must perform statement of intention within 30 days of first date set for meeting of creditors. § 521(a)(2)(B).

Stay terminates if debtor fails to timely file or perform statement of intention. See § 362(h) and compare the language inserted after § 521(a)(6).

58. Chapter 7 debtor "shall . . . not retain possession" of personal property subject to a purchase money "interest" unless within 45 days of the "first meeting of creditors" the debtor either reaffirms or redeems the property. § 521(a)(6).

Stay terminates and property ceases to be property of the estate if debtor fails to act within 45 days unless trustee moves within that 45 days for court determination that property has "consequential value or benefit" for estate and court orders adequate protection of creditor's interest. In a nonsequitor, if the debtor fails to act within 45 days under § 521(a)(6) with respect to leased, rented or bailed property, any ipso facto clause is effective under § 521(d).

59. The court must provide a copy of the debtor's Chapter 13 plan within five days after receiving a request by a creditor and may impose a reasonable cost for providing it. § 521(e)(3)(B).

60. If requested in a Chapter 13 case, on the later of 90 days after the end of a tax year or one year after the petition, if no plan is confirmed, the debtor must file a statement of income and expenditures for the tax year most recently concluded. Same requirement applies annually after confirmation if requested. § 521(f)(4)

This applies only to the debtor. New statement must identify any person "responsible" for support of a dependent and any person who "contributed" to the household.

61. Exemptions are determined by state law for the state in which the debtor was domiciled for 730 days prior to the petition. If the debtor has not been domiciled in a single state for 730 days, exemptions are determined by state of domicile for the majority of the 180 days that *preceded* the 730-day period. § 522(b)(3)(A).

Debtors' attorneys must know exemptions of all states since any state could be providing exemptions for a debtor that has moved within two years. Debtors rendered ineligible for "any exemption" by the new domiciliary requirement may use the federal exemptions. Debtors may become eligible for federal exemptions even if residing in an opt-out state. This was not advertised.

62. A qualified IRA is exempt up to $1,000,000. § 522(n).

The court can increase this limitation "if the interests of justice so require."

63. The value of property subject to a homestead exemption is reduced to the extent attributable to the value of property that a debtor disposed of with actual intent to hinder, delay or defraud a creditor within 10 years of the petition if the property would not have been exempt at the time of the transfer. § 522(o).

Debtors will need to disclose transfers made to build exempt equity in homesteads within 10 years. Payments on mortgages from nonexempt assets, with actual intent to hinder, delay or defraud creditors would be excluded from the homestead exemption.

64. Qualified retirement funds are exempt. § 522(b)(4).

Even when the IRS has not made a determination of the exempt character of the retirement funds, the debtor may establish that the fund is in "substantial compliance with the applicable requirements" of the Internal Revenue Code. Rollovers would also retain their exempt character.

65. Redundantly, the definition of "household goods" for purposes of lien avoidance under § 522(f) is limited to clothing, furniture, appliances, one radio, one television, one VCR, one personal computer, children's furniture and toys, kitchenware, linens and medical equipment and supplies. "Household goods" specifically does not included works of art, other electronic entertainment equipment with an aggregate value of more than $500, antiques, jewelry with an aggregate value of more than $500, (except a wedding ring), motorized vehicles or recreational devices and tractors. § 522(f)(4).

Lien avoidance is now a large mess. Nonpurchase money security interests in jewelry, wearing apparel or appliances are still avoidable to protect an exemption because these items were only excluded from the definition of household goods.

66. Homestead exemptions elected under state law are capped at $125,000 if the debtor acquired the property within 1,215 days of the petition. The cap applies without regard to when the debtor acquired the property if the debtor violated the securities laws or incurred a debt for physical injury or death from any criminal act or intentional tort within the preceding five years. § 522(p).

This limitation is not applicable to the principal residence of a family farmer. Also, the cap is increased by the amount transferred from a previous principal residence, acquired prior to the 1,215-day period.

67. The presumption of fraud for nondischargeability purposes is lowered to $500 for luxury goods or services incurred within 90 days of filing and cash advances aggregating more that $750 within 70 days. § 523(a)(2).

68. The exception to discharge for student loans was expanded to all student loans as defined by IRC § 221(e)(1). Student loans by for profit and nongovernmental entities are now excepted from discharge. § 523(a)(8)(B).

69. Debts incurred to pay taxes to any governmental unit are nondischargeable, not simply Federal taxes. § 523(a)(14A).

70. Loans to a pension fund are nondischargeable in Chapter 7 cases. § 523(a)(18).

71. The nondischargeability of a non-support domestic obligation under § 523(a)(15) is no longer dependent upon the timely filing of a complaint under § 523(c). The "greater hardship" exception to the exception has been eliminated. § 523(c) and § 523(a)(15).

Debtors can discharge a non-support domestic obligation in a Chapter 13 case.

72. Reaffirmation agreements require extensive new disclosures that outline the rights of the debtor and specify the amount of the debt reaffirmed, additional charges or costs imposed upon the debtor, the annual percentage rate, the simple interest rate and, if elected by the creditor, the repayment schedule. If secured, the disclosure must describe the property to which the lien attaches and the original purchase price (if the security interest is not a purchase money interest, the disclosure must contain the amount of the original loan). The disclosure must include a statement that the debtor has the right to consult an attorney, that the reaffirmation agreement must be filed with the court before it becomes effective, and that the debtor has the right to rescind the reaffirmation within 60 days of filing. A debtor must file a statement in support of the reaffirmation agreement and the debtor's attorney must certify that the agreement does not impose an undue hardship upon the debtor. A reaffirmation agreement is presumed to impose a hardship if the debtor's expenses including the payments on reaffirmed debts are greater than the debtor's income. When the presumption arises, the debtor's attorney must affirm that the debtor can make the payments. Except for debts reaffirmed with a *credit union,* the court must review all reaffirmation agreements when the presumption of undue hardship applies. The court must review all reaffirmations when the debtor was not represented in the negotiation of the agreement. Although reaffirmation agreements must be executed prior to the entry of a discharge, there is no deadline for filing the reaffirmation agreement—it just cannot be enforced until the 60-day period has passed. § 524(k).

The law seems to recognize that attorneys can elect not to represent the debtor in connection with reaffirmation and trigger a court hearing. Even though there is no deadline for filing the agreement, the hearing on the reaffirmation must occur prior to discharge.

73. With conditions that threaten to neutralize this new remedy, the willful failure to credit payments in accordance with a confirmed plan is a violation of the discharge injunction if the failure to properly credit and an act to collect cause material injury to the debtor. § 524(i).

> *Awkwardly, the posting by creditors of payments consistent with a Chapter 13 plan is mandated by this new provision. This new section addresses the chronic problem of a Chapter 13 debtor curing a mortgage default only to discover that the creditor failed to properly credit the payments.*

74. The discharge injunction is not applicable to a creditor with a lien on the debtor's residence seeking or obtaining periodic payments in lieu of pursuing its *in rem* rights. § 524(j).

> *The law creates a safe harbor for a mortgage servicer to send advices and payment books to the debtor even if the debt has been discharged. The activity permitted must be within the ordinary course of business between the debtor and the servicer.*

75. "Debt relief agencies" include attorneys that provide bankruptcy assistance to persons with consumer debt and nonexempt assets worth less than $150,000. DRAs are required to do what they promise and are prohibited from making statements or advising a debtor to make statements that are untrue (or "upon the exercise of reasonable care, should have been known" to be untrue or misleading. DRAs are prohibited from advising an assisted person to incur more debt in contemplation of bankruptcy. State consumer protection agencies are empowered to enforce these provisions and if a DRA violates the rules, actual damages can be recovered on behalf of the assisted person. Attorneys' fees can be awarded. § 526.

> *Debt Relief Agencies are not limited to debtors' counsel. For no obvious reason DRA does* ***not*** *include providing bankruptcy assistance to an individual with more than $150,000 of nonexempt property.*

76. DRAs must disclose the costs of services, must provide all clients a written notice of their rights and obligations, must enter into a written contract within five days of first providing bankruptcy services and provide a copy to the client, must disclose that an attorney may not be necessary to file a bankruptcy, and must maintain copies of all disclosures for two years. § 527 and § 528.

> *Some of the written disclosures and notices are detailed in the statute and the disclosures given to a debtor must be "substantially similar". The prescribed notices may be modified, "to the extent applicable".*

77. A DRA must disclose in advertising: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." Advertising must not mislead a consumer to believe that credit counseling is offered rather than bankruptcy assistance. § 528.

> *If the DRA is assisting creditors, for example, a firm that assists landlords in pursuing their rights in bankruptcy, the mandated statement in advertising may be misleading or totally false.*

78. Funds deposited in an education individual retirement account or in a tuition credit or certificate more than a year prior to the filing of the bankruptcy are not property of the estate. For funds deposited between two years and one year before filing, the maximum amount excluded from the estate is $5,000. § 541(b)(5) and (b)(6).

> *Funds deposited within the year prior to bankruptcy are property of the estate. The benefit applies to the debtor's child, stepchild, grandchild or step grandchild.*

79. Pawned property is not property of the estate if timely redemption is not exercised. § 541(b)(8).

80. In determining what must be paid to unsecured creditors in a Chapter 13 case, funds withheld from wages as contributions to a pension or retirement plan are excluded from disposable income. § 541(b)(7).

81. A payment to a creditor in accordance with an alternative repayment plan created by a credit-counseling agency is not recoverable as a preference. § 547(h).

82. Payment of a domestic support obligation is not recoverable as a preference. § 547(c)(7).

83. The relation-back period for enabling loans in § 547(c)(3) is extended from 20 days to 30 days. § 547(c)(3)(B).

84. The look-back for recovery of a fraudulent conveyance is lengthened from one year to two years. § 548(a)(1).

85. Chapter 7 and Chapter 13 trustees must notify the holders of the right to use the services of a support enforcement agency, must disclose the address and phone number of the appropriate agency, must explain the rights of the support creditor and must notify the support agency of the name, address and telephone number of the holder. §§ 704(c)(1) and 1302(d).

> *To satisfy these new duties, trustees will need new disclosures from debtors.*

86. The "abuse" test for access to Chapter 7 is only applicable on the request of the U.S. trustee, (or Bankruptcy Administrator) or the court when the debtor's current monthly income is less than applicable median family income. A presumption of abuse is not available when the debtor has current monthly income that is equal to or less than applicable median family income. § 707(b)(1), (b)(6) and (b)(7).

> *Median family income is as "calculated and reported" by the Bureau of the Census per § 101(39A). "Family" and "household" in § 707(b)(6) and (7) are not defined. Section 707(b) is applicable to cases "filed . . . under this Chapter." It is uncertain whether the abuse test applies to a case filed under Chapter 13 and later converted to Chapter 7.*

87. The presumption of abuse applies in Chapter 7 cases when the debtor's current monthly income:

less "scheduled" contract payments due to secured creditors over five years divided by 60,
less arrearages or "any additional payments" which would be necessary in a Chapter 13 plan for the debtor to keep possession of a house, car or other necessary property, divided by 60,
less priority debts divided by 60,
less the expenses specified by the IRS in its National Standards and Local Standards,
less actual expenses in the categories of Other Necessary Expenses specified by the IRS,
less health and disability insurance expenses and a health savings account,
less "family violence" expenses,
less up to 5% additional expense for food,
less up to 5% additional expense for clothing,
less the actual monthly costs of caring for an elderly, chronically ill or disabled household or family member, even if not a dependent,
less the actual expenses of administering a Chapter 13 case not to exceed 10% as determined by the U.S. trustee,
less up to $1500 per year actual expenses for school for each dependent child under 18, divided by 12,
less additional costs for home energy expenses

is equal to or greater than $167 or is equal to or greater than $100 *and* greater than 25% of the debtor's non-priority, unsecured debts. § 707(b)(2).

> *"Current monthly income" (CMI) is the average monthly income of the debtor (or, in a joint case, of the debtor and the debtor's spouse) over the 6 months prior to the month of filing. It excludes social security benefits and unemployment compensation.*
>
> *Some of the expenses require documentation, such as the additional allowances for food or clothing, or the monthly cost of care and support for an elderly, ill or disabled family member. Presumption can be rebutted by "special circumstances" including serious medical condition or active duty in Armed Forces.*
>
> *Section 707(b) does not deduct pension loan payments from CMI to determine whether a Chapter 7 case is abusive. Section 362(b)(19) provides that the automatic stay does not stop such withholdings and § 1322(f) excludes pension loan repayment from disposable income in a Chapter 13 case.*
>
> *The court may not consider whether the debtor has made or continues to make charitable contributions when abuse is asserted under § 707(b)(1). There does not appear to be a cap on the deduction of charitable contributions in the abuse test calculation in Chapter 7 cases. There is a 15% of gross income cap on charitable contributions for Chapter 13 debtors with CMI less than applicable median family income.*

88. Disabled veterans are excepted from "means testing" if "indebtedness occurred" while on active duty. § 707(b)(2)(D).

This is the only use of "means testing" in the new law.

89. When presumption of abuse does not apply or is rebutted, the court is instructed to consider "whether the debtor filed the petition in bad faith," or (whether?) "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." § 707(b)(3).

Curiously, the rejection of a personal services contract is a specific circumstance to consider.

90. Debtor's attorney must reimburse trustee's prosecution costs, including attorney fees, if § 707(b) motion is granted and attorney violated rule 9011 in filing the case under Chapter 7. Civil penalties may also be imposed. § 707(b)(4).

91. Debtor's attorney's signature on petition is certification of reasonable investigation of the circumstances, pleading or motion and that the attorney has no knowledge after an inquiry that the information provided is incorrect. Penalties if the attorney is wrong. § 707(b)(4)(C).

92. If "party in interest" other than trustee or U.S. trustee loses a § 707(b) motion, debtor may be awarded costs, including attorney fees, if the movant violated Rule 9011 or there was no reasonable investigation and the motion was coercive in purpose. § 707(b)(5)

Small businesses are protected from these sanctions.

93. The U.S. trustee must review all materials filed by all Chapter 7 debtors, and not later than ten days after the meeting of creditors, file a statement whether the presumption of abuse is triggered. The court must provide this statement to all creditors within five days of filing. If the debtor has CMI in excess of applicable median family income, the U.S. trustee must either file a motion to dismiss or convert or file a statement of reasons why the motion is not appropriate, within 30 days. § 704(b).

94. On motion of the victim of a "crime of violence" ("an offense that has as an element the use, attempted use or threatened use of physical force against the person or property of another") or the victim of a "drug trafficking crime" ("any felony punishable under the Controlled Substances Act or Maritime Drug Law"), the court may dismiss a voluntary Chapter 7 case unless the debtor needs Chapter 7 to satisfy a domestic support obligation. § 707(c).

*The test is the best interest of the **victim** rather than the traditional view that bankruptcy should proceed if it is in the best interests of **creditors**.*

95. A debtor may redeem property only by paying the allowed secured claim in full at the time of redemption. § 722.

Redemption financing remains an effective way of "cramming down" an automobile lien to the value of the collateral in Chapter 7 cases.

96. Debtor is denied discharge if the debtor fails to complete an educational course concerning personal financial management. § 727(a)(11)

97. A Chapter 7 debtor is not eligible for discharge in a case filed within eight years of the filing of a prior Chapter 7 case in which the debtor received a discharge. § 727(a)(8).

98. At discharge, the Chapter 7 trustee must notify the holder of a domestic support obligation and the applicable state child support agency of the last known address of the debtor, the address of the debtor's employer, the name of each creditor holding a debt not dischargeable under § 523(a)(2), (4) or (14A), and all debts reaffirmed. § 704(c).

99. At discharge, a Chapter 13 trustee must give notice to the holder of a domestic support obligation of the debtor's last known address, the address of the debtor's employer, and the name of every creditor that holds a claim that is not discharged under § 523(a)(2) or (4) or that is reaffirmed. § 1302(d)(1).

100. A domestic support obligation holder "may request" the last known address of the debtor from a creditor with nondischargeable debt or a debt that was reaffirmed. § 1302(d)(2).

A creditor that provides this information to a support creditor is immune from liability.

101. If a Chapter 13 debtor fails to file a tax return under § 1308, the court shall dismiss or convert the case. § 1307(e).

102. It is a ground for conversion or dismissal of a Chapter 13 case that the debtor has failed to pay a domestic support obligation that first becomes payable after the filing of the petition. § 1307(c)(11).

103. New § 1308 contains many new tax return responsibilities for Chapter 13 debtors, including that all returns "required" for the four years ending on the petition date have been filed with the taxing authority by the day before the first scheduled meeting of creditors. The Chapter 13 trustee may "hold open" the meeting of creditors for limited periods to allow the debtor to file unfiled returns. § 1308; *see also* § 521(e), (f), (g) and (j).

104. If a Chapter 13 debtor proposes to pay all disposable income for a period of five years, the plan may pay less than 100% to the holder of a domestic support obligation assigned to a governmental unit under § 507(a)(1)(B). § 1322(a)(4).

105. A Chapter 13 plan may provide for the payment of interest accruing postpetition on any unsecured claim that is nondischargeable but only if the plan pays all allowed claims in full. § 1322(b)(10).

This opens the door to limited classification of nondischargeable debts.

106. If the CMI of the debtor and the debtor's spouse combined is greater than applicable median family income, the Chapter 13 plan may not provide for payments over a period longer than five years. § 1322(d)(1).

> *Debtors with CMI less than applicable median family income may not provide for payments over a period longer than three years except, for cause, the court can approve a period up to five years.*

107. A Chapter 13 plan may not materially alter the terms of a pension loan described in § 362(b)(19) and the amount required to pay such a loan is excluded from disposable income. § 1322(f).

108. A hearing on confirmation of a Chapter 13 plan must take place no sooner than 20 days and not later than 45 days after the meeting of creditors. § 1324(b).

> *The court can hold a confirmation hearing earlier than 20 days if in the best interests of creditors and no creditor objects. Many "early confirmation" jurisdictions will seek an earlier date unless a party objects. Notice could be provided in the notice of the commencement of the case. There is no provision for a later confirmation hearing.*

109. A Chapter 13 plan must provide that a secured creditor retain its lien until payment of the entire underlying debt, or discharge. § 1325(a)(5)(B)(i).

110. Periodic payments to a secured creditor must be in equal monthly amounts, and sufficient to provide adequate protection. § 1325(a)(5)(B)(ii).

> *The concept of "adequate protection" is now applicable to the payments proposed to secured creditors at confirmation. The use of pro rata distributions to secured claim holders in Chapter 13 would be ended, although the amount of monthly payments may vary from creditor to creditor. Equal payments may collide with the adequate protection requirement.*

111. Confirmation of a Chapter 13 plan is conditioned that the debtor has paid all domestic support obligations that first became payable after the petition. § 1325(a)(8).

112. A Chapter 13 plan cannot be confirmed unless the debtor has filed all tax returns required by new § 1308. § 1325(a)(9).

113. Section 506 shall not apply to a claim provided for under § 1325(a)(5) if the creditor holds a purchase money security interest in a motor vehicle *acquired* for "personal use" of the debtor within 910 days of the petition or a security interest in any other thing of value incurred within one year of the filing. § 1325(a).

> *The limitation on the use of § 506 does not preclude "acceptance" of a Chapter 13 plan that does "cram down" a purchase money security interest under § 1325(a)(5)(A). "Acceptance" might include failure to object after adequate notice. It is not clear whether*

the collateral would preclude a deficiency claim. Commercial or business vehicles would still be subject to § 506 if purchased more than one year before petition.

114. For all Chapter 13 debtors, "disposable income" must be paid to *unsecured* creditors only. In other words, the "reasonably necessary" deductions for expenses include payments to secured creditors and lessors. § 1325(b)(1)(B).

New § 1325(b) does not use the phrase "nonpriority unsecured" that is used in § 707(b)(2).

115. For Chapter 13 debtors with current monthly income greater than applicable median family income, "amounts reasonably necessary to be expended—" are determined in accordance with the abuse test in § 707(b)(2)(A) and (B).

The determination of a Chapter 13 debtor's disposable income begins with "current monthly income" received by the debtor, reduced by any amount received for child support, foster care, or disability payments for a dependent child. For debtors with CMI below applicable median family income, the "reasonably necessary" test still applies to determine expense deductions. The expenses deductible by a Chapter 13 debtor with CMI greater than applicable median family income are mathematically determined in accordance with the abuse test in § 707(b)(2)(A) and (B) without regard to reasonableness or necessity. For all debtors, current monthly income is an average of the debtor's income for six months ***prior*** *to filing. The amount determined by multiplying disposable income by applicable commitment period must be paid to "unsecured creditors"—which can include priority unsecured creditors.*

116. For Chapter 13 debtors with CMI less than applicable median family income, domestic support obligations that become payable after the petition are deducted to arrive at disposable income. § 1325(b)(2).

117. A Chapter 13 plan cannot be confirmed unless the petition was filed in good faith. § 1325(a)(7).

Under prior law, the good faith test addressed the plan, not the case filing. Some courts implied a good-faith filing requirement. The law now clearly precludes confirmation unless the Chapter 13 case was filed in good faith.

118. Within 60 days of the petition, a Chapter 13 debtor must provide lessors of personal property and purchase money secured creditors reasonable evidence of insurance. The proof of insurance requirement continues for as long as the debtor retains possession of the property. § 1326(a)(4).
119. A Chapter 13 debtor must commence payments within 30 days of the petition. § 1326(a)(1).

120. Unless the court orders otherwise, a Chapter 13 debtor must pay directly to lessor of personal property lease payments that become due after the petition and provide the trustee proof that payments were made. § 1326(a)(1)(B).

The court can order preconfirmation payments through the trustee to enhance the accuracy of payments and claims.

121. Unless the court orders otherwise, a Chapter 13 debtor must pay directly to a purchase money secured creditor payments that are sufficient to provide adequate protection of the portion of the obligation becoming due after the petition and must provide to the trustee proof that such payments were made. § 1326(a)(1)(C).

Courts should order otherwise else reconciliation of amounts paid to claims filed will be difficult, if not impossible.

122. A Chapter 13 plan must provide payments to a Chapter 7 trustee awarded compensation "due to" dismissal or conversion of a prior case pursuant to § 707(b). Payments to the trustee are prorated not exceeding the greater of 5% of the payments to unsecured creditors divided by 60 or $25 per month. § 1326(b)(3).

This compensation of a Chapter 7 trustee can be collected in a subsequent Chapter 13 case even if discharged in a prior bankruptcy case.

123. No more than 10 days prior to the entry of a discharge under § 1328, the court must hold a hearing after notice to determine whether the debtor may be subject to securities fraud liability or other criminal or civil liability limiting the debtor's homestead under § 522(q). § 1328(h).

124. To receive a discharge, the Chapter 13 debtor must certify that all amounts due to a domestic support obligation are fully paid. § 1328(a).

125. No Chapter 13 discharge is available for domestic support claims, taxes the debtor should have withheld, fraudulent, unfiled or late filed tax obligations, fraud and misrepresentation claims, unlisted debts, defalcation debts, some DWI obligations and restitution or damages from a civil action due to willful or malicious injury to a person. § 1328(a)(2).

The Chapter 13 superdischarge is greatly reduced. Non-support domestic obligations and unpaid but timely filed taxes are still dischargeable. There will now be two additional types of taxes in Chapter 13: dischargeable priority taxes (income taxes less than three years old and taxes assessed within 240 days of filing), and nondischargeable nonpriority taxes (older unfiled taxes or taxes based on fraudulent returns).

126. A Chapter 13 discharge is not available if the debtor received a discharge in a Chapter 7, 11 or 12 case filed within four years of the filing of the current Chapter 13 case. § 1328(f)(1).

The Chapter 20 option is still available if the debtor does not need a discharge in the subsequent Chapter 13 case.

127. Although ambiguously worded, a Chapter 13 discharge is not available if the debtor received a discharge in a previous Chapter 13 case filed within two years of the filing of the current case. § 1328(f)(2).

128. The Chapter 13 discharge is conditioned that the debtor has completed an educational course concerning personal financial management approved by the U.S. trustee. § 1328(g).

> *Many Chapter 13 Trustees will be providing approved instructional courses, funded through the trustee's percentage fee.*

129. A debtor may modify a confirmed plan to purchase health insurance or to reflect a change in the cost of health insurance. § 1329(a)(4).

> *The debtor may be required to prove that health insurance was actually obtained. Note that there is a new cross-reference to § 1325(b) in § 1329(a)(4)—suggesting that the disposable income test applies at modification after confirmation.*

130. The format of final reports must be uniform, as prescribed by the Attorney General and must contain the following information under 28 U.S.C. § 589b.

The length of time the case was pending
The assets that were abandoned
The assets that were exempted
All receipts and disbursements in the case
The expenses of administration
The claims asserted
The claims allowed
Distribution to claimants
Claims discharged without payment
The date of confirmation of the plan
The date of each modification of the plan
The date of all defaults by the debtor

> *The meaning of some of these terms is unclear—such as the difference between claims asserted and claims allowed. Clearly trustees must maintain more detailed records to generate a final report that includes the listed information.*