Office of Management and Budget

Study of Financial Privacy and Bankruptcy

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FINANCIAL PRIVACY IN BANKRUPTCY:
A Case Study on Privacy In Public and Judicial Records

Table of Contents

Executive Summary

INTRODUCTION

In April 2000, President Clinton announced a plan to provide consumers with comprehensive protection of their sensitive financial information. One set of issues was reserved for special study: the implications for personal privacy of the availability of personal financial information in bankruptcy cases. The President's announcement noted that "bankruptcy records contain detailed sensitive information about debtors (including account numbers, social security numbers, account balances, income sources, and payment histories). In addition, aggregation and electronic distribution of this information could lower bankruptcy costs, but it also could make information easily available to neighbors, employers, marketers and predators looking for those most likely to be lured by scams."

The President directed three federal agencies, the Department of Justice, the Department of the Treasury, and the Office of Management and Budget (the Study Agencies), to study how best to handle private entities'[1] access[2] to personal financial information found in bankruptcy court records.

ACCESS AND PRIVACY INTERESTS IN INFORMATION IN BANKRUPTCY

Bankruptcy is a process for adjudicating the debts of an individual or business unable to meet obligations to creditors. In seeking relief, a debtor is required, particularly in cases involving consumer debts, to provide significant amounts of personal information to the courts and trustees, such as schedules of assets and liabilities, current income and expenditures, and a statement detailing the debtor's financial affairs. Current law does not explicitly balance the legitimate needs for general public access to bankruptcy records and debtors' interests in protecting the privacy of their most sensitive financial information. Current law provides that all documents filed with the court in a bankruptcy case are public records and are subject to public examination unless sealed, and places no restrictions on how trustees can handle information about debtors in the course of administering cases.

Although information provided by debtors in consumer bankruptcy is essential to the administration of cases and to the integrity of the bankruptcy system, the comprehensive data

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[1/] For the purposes of this report, the term "private entities" includes the general public, parties in interest, and other non-governmental entities, but does not refer to private bankruptcy trustees appointed under Title 28 U.S.C. § 586(a) or to governmental entities, including law enforcement and regulatory agencies.

[2] The term "access" often is used by the privacy community to denote an individual's access to his or her own records. In this report, however, the Study Agencies use the term "access" to refer more broadly to anyone's access to an individual's records, including access by the general public or a limited category of individuals or entities, as evident from the context of a particular discussion.

provided by debtors contains sensitive personal information, such as Social Security numbers, bank or credit card account numbers, incomes, and detailed listings showing individuals' medical expenses and other regular expenses. This information, if used improperly, can damage a debtor's ability to obtain the financial "fresh start" afforded by bankruptcy, and can be used to perpetrate identity theft and other crimes.

The emergence of new technologies has an impact on both general public access to information in bankruptcy and the debtor's interest in the privacy of such information. Increased use of the Internet and other powerful databases – both in the judicial system and among the general public – is lowering the barriers to access for parties that have an interest in that information. Personal, often sensitive information, now may be accessed and manipulated from a distance and used in ways not envisioned when the rules that currently govern such records were created. This, in turn, heightens the interests of debtors in ensuring that this information is protected from misuse by private entities.

REQUEST FOR PUBLIC COMMENT

To assist preparation of the Study, in July the Study Agencies requested public comment on a series of questions focused on: the types of information collected from individual debtors in bankruptcy; the need for the general public to have access to such information; the privacy interests of debtors; and the impact of technology on the debtor's privacy, general public access, and principles for the responsible handling of personal data. The Study Agencies received and evaluated approximately 40 comments from the creditor industry, the information industry, consumer and privacy advocates, bankruptcy experts, academics, and others.

OUTLINE OF THE REPORT

The body of this report discusses in greater detail the competing interests of private entities in access to a debtor's information in the personal bankruptcy process and the debtor's interest in privacy. It concludes with a set of recommendations on how the system can strike a better balance between these interests. Chapter One introduces the issues and places them in context. Chapter Two describes the consumer bankruptcy process and the types of information collected from debtors during the process. Chapter Three explains the purposes of general public access to bankruptcy records, emphasizing the importance of facilitating the efficient disposition of cases and the need for public trust and accountability in the system. Chapter Four discusses protecting the privacy of the debtor's personal financial information in bankruptcy court filings in the context of access and re-use by private entities.

The report then turns to finding solutions to the conflict between access by the general public and the debtor's privacy. Chapter Five describes models illustrating how the interests of privacy and general public access have been balanced with respect to other collections of personal data. The report covers models that strike different balances between the need for access by the general public to information and interests in privacy. The Study Agencies also considered the need for adoption of "fair information principles" described in the body of the report. Finally,

Chapter Six presents a series of findings and recommendations designed to foster a more appropriate balance between the debtor's privacy and general public access to this information in the bankruptcy process.

LIMITATIONS OF THE REPORT

The purpose of the report is to address the access and re-use by private entities of personal information disclosed in bankruptcy filings. The report's recommendations are not intended to address the access or use of bankruptcy information by governmental entities in connection with their important public responsibilities, or the communication of personal financial information by or to governmental entities for functions they serve. The report also does not address possible First Amendment issues regarding access to information in bankruptcy cases by the public and the news media.

The access and use of bankruptcy information by governmental entities serve important purposes in protecting the integrity of the bankruptcy system, fighting crime and fraud, and addressing other issues of public policy.

CONCLUSIONS

The conclusions of the Study Agencies are divided into findings and recommendations.

The key **findings** of the Study are:

(1) The rights of parties in interest and the fair and efficient administration of cases require that certain personal information be available to the courts, parties in interest and governmental entities;

(2) Ensuring accountability and preventing abuses of the bankruptcy system requires that some personal information filed in bankruptcy cases be available to the general public;

(3) Certain personal information collected from debtors in bankruptcy proceedings is highly sensitive and, in other contexts, is protected by financial privacy laws; and

(4) Information held by government, including the judicial branch, increasingly is being collected, stored, and transmitted electronically. Although the use of electronic systems provides more efficient services, it may create new hazards for the privacy of personal information.

To address these findings, the Study Agencies submit the following **recommendations**:

(1) Balance Interests in Efficiency, Government Accountability and Privacy. The Study Agencies recommend that the goal of protecting personal privacy be given increased

emphasis in the bankruptcy system. Bankruptcy information policy should better balance society's interests in fair and efficient case administration, bankruptcy system integrity, government accountability, and the debtor's privacy. As electronic tools for accessing case information develop and improve, there is an increased need for analysis of access issues to ensure the integrity and proper administration of the system.

(2) The General Public Should Have Access to Core Information. The Study Agencies recommend that the general public continue to have access to some general information so that the public can hold the bankruptcy system accountable. At the same time, the Study Agencies recommend that the general public not have access to certain highly sensitive information that poses substantial privacy risks. This information may include, among other items: Social Security numbers, credit card numbers, loan accounts, dates of birth, and bank account numbers. Similarly, the Study Agencies recommend that schedules that show detailed profiles of personal spending habits and debtors' medical information be removed from the record available to the general public. Finally, the Study Agencies recommend that special attention be given to protecting information regarding entities or individuals who are not parties to the bankruptcy proceeding. This includes detailed personal and financial information regarding non-filing spouses, relatives, or business partners.

(3) Parties in Interest Should Continue to Have Access to Non-Public Highly Sensitive Data, Subject to Re-use and Re-disclosure Limitations. The Study Agencies recommend that parties in interest and potential parties in interest have access to a broad range of information collected in bankruptcy proceedings in order to exercise their rights and responsibilities. When private entities have such access, however, the Study Agencies recommend that they generally be prohibited from reusing or re-disclosing the information for purposes unrelated to administering bankruptcy cases. However, these re-use and re-disclosure limitations should not restrict private entities from continuing to share information with governmental entities, including law enforcement and government regulatory entities. The Study Agencies recommend that as decision makers craft information policy on non-public information, they do so in a way that does not infringe upon the current ability of governmental entities to gain access and use of this information. The Study Agencies also recommend that the detailed information that appears in a bankruptcy filing be available to academics and other researchers on a de-identified basis, while preserving access for parties in interest and governmental entities.

(4) Incorporate Fair Information Principles. The Study Agencies recommend that the bankruptcy system incorporate fair information principles of notice, consent, access, security, and accountability.

BROADER IMPLICATIONS OF THE STUDY

This report focuses on how to balance the need for access to information by private entities and the debtor's interests in the privacy of his or her personal financial information *in the context of bankruptcy cases and proceedings.* The Study Agencies intend, however, that the report's methodology and principles also will contribute to the continuing debates over access to records by the general public and privacy in non-bankruptcy contexts.

For example, one such debate – focusing on judicial records generally – is currently underway. In the judicial branch, accessible files containing information relevant to individual proceedings allow members of the general public and the media to monitor the judicial process closely and prevent abuses of judicial power. At the same time, judicial files – beyond bankruptcy filings in court – also often contain sensitive personal information. For example, personal injury litigation may involve motions, depositions, and interrogatories that contain detailed information about a patient's medical condition, including the results of psychiatric examinations. An individual's privacy concerns may be heightened if that information is made available through a simple name search on the Internet. The Administrative Office of the U.S. Courts has sought public comment on the need to balance accountability and privacy concerns in light of more widespread access to sensitive information in case files.

State and local governments are also faced with this challenge. Generally speaking, state and local governments operate under an open records system. As a result, one can visit a state or local government office and view personal property records, tax records, marriage licenses, recreational licenses, and professional licenses, among other personal data. As more of this information becomes available electronically to remote and largely anonymous users, private entities easily can gain access to the intimate details of an individual's life by compiling a profile of that individual based on a wide range of public record data.

These areas – judicial records and state and local government records – are ripe for further study. The Study Agencies hope that the methodology and principles applied in this bankruptcy study may be drawn upon by researchers looking at public records and privacy more broadly.

1. INTRODUCTION: BANKRUPTCY DATA IN CONTEXT

1(a) Clinton Administration Initiatives to Protect Financial Privacy

On April 30, 2000, President William J. Clinton announced a legislative proposal to provide American consumers with comprehensive protections for their sensitive personal financial data. Building on the foundation of strong new financial privacy protections signed into law as part of financial services modernization legislation in 1999, this effort featured as its centerpiece the proposed Consumer Financial Privacy Act. This proposed legislation was designed to close gaps in existing laws, provide consumers with choice about the use of their data within rapidly growing and diversifying financial conglomerates, and provide special protections for the use of medical data and detailed information about individuals' overall spending habits. In announcing the proposed legislation, the President said: "your information doesn't belong to just anyone; every consumer and every family deserves choices about how their personal information is shared."

At the same time, the President identified one area for additional examination by the Administration, directing the Department of Justice, the Department of the Treasury, and the Office of Management and Budget to conduct a study of the privacy issues raised by the availability of personal financial information in bankruptcy cases to the general public. A release announcing this study said:

> Bankruptcy records contain detailed, sensitive information about debtors (including account numbers, social security numbers, account balances, income sources, and payment histories). Aggregation and electronic distribution of this information could lower bankruptcy costs, but it also could make information easily available to neighbors, employers, marketers and predators looking for those most likely to be lured by scams.[3]

In response to the President's directive, the Study Agencies considered three broad issues. First, the personal information about debtors collected in bankruptcy cases includes types of information that were the subject of the Administration's financial privacy initiative. At present, debtors filing for bankruptcy are required to submit substantial amounts of personal information to courts and trustees. This information is crucial to several functions of the bankruptcy system, including providing notice to interested creditors and other parties, facilitating the administration of bankruptcy cases, protecting creditors' rights, and allowing the general public to monitor the functioning of the bankruptcy system. At the same time, the data submitted by debtors contains highly sensitive personal financial information that, if used improperly, could damage a debtor's ability to regain a solid financial footing, and could be used to perpetrate identity theft or other fraud. The potential for misuse of this data raises questions about appropriate boundaries for its dissemination, particularly since the same financial information openly available in bankruptcy files is often legally protected from disclosure when held by financial institutions in other contexts.

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[3] *See* Federal Register Notice Requesting Public Comment on Financial Privacy and Bankruptcy, 65 *Fed. Reg.* 46735 (July 31, 2000). Available at http://www.usdoj.gov/ust/privacy/privacy.htm.

A second issue addressed by the study is the dramatic change in access by the general public to information in bankruptcy cases. In particular, private bankruptcy trustees, interested in providing improved access to information in bankruptcy cases, have begun planning for a data center to collect information from trustees and disseminate this information electronically in compiled form to creditors who subscribe to the data center. As part of their system development, they are seeking input on what safeguards should be included to protect the personal financial information contained in bankruptcy files from re-use by creditors that subscribe to the data center.

Third, concerns about the collection and use of personal data have been accentuated by proposals to collect information electronically for easier, faster, and less expensive dissemination in bankruptcy proceedings. In the age of the Internet, where anonymous remote access and dissemination of large amounts of information is possible, new questions arise regarding how to safeguard personal privacy interests without inappropriately compromising access to information crucial to the efficient functioning of the bankruptcy system.

This report explores these and other issues and offers recommendations for consideration by decision makers and participants in the bankruptcy system about how to strike an appropriate balance between the values of government accountability, fair and efficient case administration, and personal privacy. It focuses on access to the information provided by debtors as part of their initial filing commencing a bankruptcy case, i.e., the identifying information about the debtor and the details about the debtor's financial condition provided to the court or bankruptcy trustee as part of the administration of the case. The report also focuses on the way in which dissemination of this information to private entities through electronic databases can heighten the legitimate interests of debtors in their financial privacy.[4]

1(b) Privacy in Public and Judicial Records

This study's discussion of access by private entities to data in personal bankruptcy court files occurs against the backdrop of an ongoing, broader debate over privacy in public and judicial records. Public accountability is a fundamental characteristic of the American system of government. The primary vehicle for preserving that accountability has been the open, public nature of the U.S. system of executive and judicial record keeping. In the judicial branch,

[4] The Study Agencies recognize that bankruptcy information often can be obtained not only from data contained in court files, but also, for example., from observation of bankruptcy proceedings and from materials filed with the court in connection with dispositive motions -- in which case the information may form, in part, the basis for a court's adjudication. These alternative ways in which information may be disclosed in bankruptcy proceedings present somewhat different privacy concerns and may raise significant common-law access and First Amendment questions that typically are not as pronounced in a case where the records are not used as a specific basis for adjudication. This report does not address those questions, nor possible First Amendment issues that could arise if there were undue restrictions on the public and the media in accessing bankruptcy case information.

accessible files containing information relevant to individual proceedings allow members of the public and the media to monitor the judicial process closely and prevent abuses of judicial power. State and local governments also generally make their records available to the general public to enhance accountability.

However, the rapid growth of information technology has raised concerns about the sensitivity of some of the information traditionally contained in public files. A presumption that all information should be a matter of public record raised fewer privacy concerns when such information was on paper in courthouses and other government offices, was time-consuming to access, and more difficult to compile and analyze. Internet databases that provide instantaneous access to all who seek it may change the calculus regarding the advantages and disadvantages of keeping vast amounts of information in public files in the future.

Some parts of the judiciary currently are reviewing how best to balance the need to make court records publicly available against individuals' interests in protecting personal privacy. The Administrative Office of the U.S. Courts has sought public comment on the need to balance accountability and privacy concerns in light of more widespread access to sensitive information in case files.[5] Given the current debate, this report is timely in addressing issues related to one area of the discussion, general public access to personal financial information in bankruptcy cases. It may also serve as a useful resource for policymakers addressing other issues of privacy in public and judicial records.

1(c) Privacy and Corporate Bankruptcy

Although this report deals solely with personal bankruptcy proceedings, the Study Agencies note the growing controversy regarding the disposition of customer information held by companies that file for bankruptcy. In one instance, a retailer of significant size attempted to treat information about customers in its files as an asset that may be sold to raise money to pay creditors in a corporate bankruptcy. The retailer sought to sell its customer database despite assurances to its customers that their purchasing and other data would be kept confidential and would not be sold or transferred to outside entities.

The case involving the retailer and similar proceedings highlight significant uncertainties regarding the treatment of personal financial data in corporate bankruptcy, including: the ownership of data in corporate databases; the rules governing the transfer of data during changes of corporate ownership; and the rights of consumers to control their personal data on an ongoing basis, beyond the time at which data is supplied or collected. The sensitivity – as well as the sheer volume – of data involved in this kind of situation merits further attention. This report is focused on information involved in personal bankruptcy proceedings, and will not address these corporate

[5] *See* Administrative Office of the U.S. Courts Press Release: *Judiciary Seeks Public Comment on Internet Access to Court Documents* (November 13, 2000). Available at http://www.privacy.uscourts.gov/Press.htm.

bankruptcy issues directly. However, the Study Agencies believe that these issues should be examined carefully in the future in an ongoing effort to better understand the privacy interests at stake in all types of bankruptcy proceedings.

1(d) Outline of the Report

This report discusses in greater detail the competing interests of access by the general public and the debtor's privacy in the personal bankruptcy process and concludes with a set of recommendations on how the system can strike a better balance between these interests. Chapter One introduces the issues and places them in context. Chapter Two describes the consumer bankruptcy process and the types of information collected from debtors during the process. Chapter Three explains the purposes of general public access to bankruptcy records, emphasizing the importance of facilitating the fair and efficient disposition of cases and the need for public trust and accountability in the system. Chapter Four discusses reasons for protecting the debtor's privacy of personal financial information from access by the general public in the specific context of consumer bankruptcy.

The report then turns to identifying solutions to the conflict between general public access and the debtor's privacy. Chapter Five describes models illustrating how the interests of privacy and general public access have been balanced in other contexts in which personal information is collected. The report covers models that strike different balances between the need for access by the general public to information and interests in privacy. The Study Agencies also considered the need for adoption of fair information principles. Finally, Chapter Six presents a series of findings and recommendations designed to foster a more appropriate balance between the debtor's privacy and general public access to information in the bankruptcy process.

1(e) Limitations of the Study

The purpose of the report is to address the general public access to personal information disclosed in bankruptcy filings and the re-use of that information. The report's recommendations on these issues are not intended to address the access or use of bankruptcy information by governmental entities, including for law enforcement, government debt collection, and regulatory activities, in connection with their important public responsibilities, or the communication of bankruptcy information by or to governmental entities for functions they serve.

Governmental entities use bankruptcy information in a variety of contexts. If a government entity has a claim in a bankruptcy case, it will be a "party in interest" and will obtain information related to the case in the same manner as any other party in interest. Governmental entities, including law enforcement, also may need access to bankruptcy information in other contexts, such as representing the interests of the federal government, in the investigation and prosecution of bankruptcy fraud, tax fraud and other crimes, and for regulatory and civil enforcement. Private entities also may have an obligation or desire to share information with governmental entities in connection with one or more of these or similar purposes. Significantly, the needs of law enforcement and other legitimate governmental uses are afforded exceptions

from statutes and regulations governing privacy, or may be allowed broader rights of access and use than private parties.[6]

The access to and use of bankruptcy information by governmental entities serve important purposes in protecting the integrity of the bankruptcy system, detecting and prosecuting non-bankruptcy related crimes, and addressing issues of public policy. Indeed, the Study Agencies are not aware of any alleged abuse of bankruptcy information by government agencies. This report is not intended to address these needs, nor should it be considered as recommending any change in current policy in this regard.

2. BANKRUPTCY LAW AND PERSONAL INFORMATION IN BANKRUPTCY

This chapter provides an overview of the consumer bankruptcy process, including a description of the kinds of information a debtor must provide during a consumer bankruptcy case and how that information is made available to the general public. This chapter also describes two major financial privacy laws as they relate to information in the bankruptcy system.

2(a) Overview of the Consumer Bankruptcy Process

Bankruptcy is a judicial process for adjudicating the debts of an individual or a business unable to meet obligations to creditors. A bankruptcy case is a collective proceeding involving a debtor and the debtor's creditors. There are five types of bankruptcy cases provided for under the Bankruptcy Code, two of which – Chapter 7 and 13 cases – commonly are referred to as consumer bankruptcies.

Chapter 7 and 13 Cases

A Chapter 7 proceeding, sometimes referred to as "Liquidation," involves a court-supervised procedure by which a trustee collects the assets of the debtor's estate, reduces them to cash, and makes distributions to creditors, subject to the debtor's right to retain certain exempt property and the rights of secured creditors. In many Chapter 7 cases, there is little or no money available from the debtor's estate to pay creditors. As a result, there are few issues or disputes, and the debtor is normally granted a "discharge" of most debts without objection. This means that the debtor will no longer be personally liable for repaying the debts.

In a Chapter 13 proceeding, sometimes referred to as "Adjustment of Debts of an Individual With Regular Income," the debtor usually remains in possession of the property of the estate and makes payments to creditors through the trustee, based on the debtor's anticipated income over the life of a plan that is approved by the court, usually three to five years. Unlike in proceedings under Chapter 7, the debtor does not receive an immediate discharge of debts. The

[6] *See, e.g.,* Privacy Act, 5 U.S.C. § 552a(b)(7); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat 1338, 1438 (1999) (15 U.S.C. § 6802(e)(5)).

debtor must complete the payments required under the plan before the discharge is received. The debtor is protected from lawsuits, garnishments, and other creditor action while the plan is in effect. Thus, a Chapter 13 proceeding often enables the debtor to keep a valuable asset, such as a house.

Appointment of The Trustee

Chapter 7 and Chapter 13 trustees are not federal employees, but rather are private individuals appointed pursuant to Title 28 U.S.C. § 586(a), and supervised by the Department of Justice.

Following a Chapter 7 filing, an impartial case trustee is appointed by the United States trustee, or in Alabama and North Carolina, the Bankruptcy Administrator, to administer the case and liquidate the debtor's nonexempt assets.[7] If, as is often the case, all of the debtor's assets are exempt or subject to valid liens, there will be no distribution to unsecured creditors. Typically, as mentioned above, most Chapter 7 cases involving individual debtors are "no asset" cases. If the case appears to be an "asset" case at the outset, unsecured creditors who have claims against the debtor must file their claims with the clerk of court within 90 days after the first date set for the first meeting of creditors called under § 341 of the Bankruptcy Code.[8]

Upon the filing of the Chapter 13 petition, an impartial trustee is appointed to administer the case.[9] If the number of cases so warrants, the United States trustee or Bankruptcy Administrator may appoint a standing trustee to serve in all Chapter 13 cases in a district.[10] A primary role of the Chapter 13 trustee is to serve as a disbursing agent, collecting payments from debtors and making distributions to creditors.[11] In a Chapter 13 case, unsecured creditors who have claims against the debtor must file their claims with the court within 90 days after the first date set for the meeting of creditors.[12] The debtor must file a plan for the repayment of creditors.[13]

Meeting of Creditors

A "meeting of creditors," commonly referred to as a "341 meeting" is usually held 20 to 40 days after the petition is filed. The debtor must attend this meeting, at which creditors may appear and ask questions regarding the debtor's financial affairs and property.[14] The trustee also attends this meeting and the debtor must provide the trustee with financial records requested by the trustee.

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[7] 11 U.S.C. § 701.
[8] Fed. R. Bankr. Proc. 3002(c).
[9] 11 U.S.C. § 1302.
[10] 28 U.S.C. § 586(b).
[11] 11 U.S.C. § 1302.
[12] Fed. R. Bankr. Proc. 3002(c).
[13] 11 U.S.C. §§ 1321, 1322.
[14] 11 U.S.C. § 343.

Confirmation of the Plan (Chapter 13)

After the meeting of creditors is concluded, the bankruptcy judge must determine at a confirmation hearing whether the debtor's plan for repayment of creditors is feasible and meets standards for confirmation set forth in the Bankruptcy Code.[15] Within thirty days after the filing of the plan, even if the plan has not yet been approved by the court, the debtor must start making payments to the trustee.[16] If the plan is confirmed by the bankruptcy judge, the Chapter 13 trustee commences distribution of the funds received in accordance with the plan "as soon as practicable."[17]

Discharge

A discharge in a Chapter 7 or Chapter 13 case releases the debtor from personal liability for discharged debts and prevents the creditors owed those debts from taking any action to collect the debts against the debtor or his or her property. In most Chapter 7 cases, unless a complaint has been filed objecting to the discharge or the debtor has filed a written waiver, the discharge will be granted relatively early in the case, that is 60 to 90 days after the date first set for the meeting of creditors.

A Chapter 13 debtor is entitled to a discharge upon successful completion of all payments under the confirmations plan.[18] In return for the willingness of the Chapter 13 debtor to undergo the discipline of a repayment plan of three to five years, a broader discharge is available under Chapter 13 than in a Chapter 7 case. As a general rule, the debtor is discharged from all debts provided for by the confirmation plan or disallowed, except certain long-term obligations (such as a home mortgage), debts for child support, and debts for most government funded or guaranteed educational loans or benefit overpayments.[19]

Adversary Proceedings and Contested Matters

In addition to the bankruptcy process described above, there are two types of litigation that may arise in the course of a bankruptcy proceeding: *adversary proceedings* and *contested matters*. Adversary proceedings resemble ordinary federal court civil lawsuits. They include most actions: to recover money or property; to determine the validity, priority, or extent of a lien; to determine the debtor's right to a discharge in bankruptcy or the dischargeability of a particular debt; and to obtain an injunction or other equitable relief, as well as several other categories of important suits.

The procedures and practice in an adversary proceeding are similar to those in an ordinary civil action in the federal district court. The Federal Rules of Civil Procedure are made applicable for the most part, being incorporated verbatim by reference or sometimes with modifications to

[15] 11 U.S.C. §§ 1324, 1325.
[16] 11 U.S.C. § 1326(a)(1).
[17] 11 U.S.C. § 1326(a)(2).
[18] 11 U.S.C. § 1328(a).
[19] 11 U.S.C. § 1328(a).

accommodate special bankruptcy requirements. Thus, an adversary proceeding involves the filing of a complaint, an answer, and the other pleadings and motions permitted by the civil rules. The discovery rules, the rules governing trial, judgment, and provisional and final remedies are all made applicable in whole or to a considerable extent.

Bankruptcy litigation that is not an adversary proceeding is defined as a "contested matter." Examples of contested matters include: objections to claims or to the debtor's asserted exemptions; disputes concerning relief from the automatic stay, or the debtor's right to use a secured party's collateral, or to assume or reject an executory contract; and proceedings involving objections to confirmation of a repayment plan under the rehabilitation Chapters of the Bankruptcy Code.

2(b) Personal Information Collected from the Debtor

Both Chapter 7 and Chapter 13 cases begin with the debtor filing a petition in a bankruptcy court serving the area where the debtor lives.[20] In addition to the petition, the debtor is required to file with the court schedules of assets and liabilities, current income and expenditures, and executory contracts and unexpired leases, as well as a statement answering detailed questions about the debtor's financial affairs.[21] To complete the Official Bankruptcy Forms that make up the petition and schedules, a debtor must compile:

- a list of creditors and the amount and nature of their claims;
- the source, amount, and frequency of the debtor's income;
- a list of all of the debtor's property; and
- a detailed list of the debtor's monthly living expenses, such as, food, clothing, shelter, utilities, taxes, transportation, and medical expenses.

Many items, such as insurance policies and annuities, must be itemized and valued and the policy numbers disclosed. If a debt is a charge account or related to a credit card, the account number must be provided in addition to the name and address of the creditor. In addition, the schedule of current income must include the names, ages, and relationships of all dependents of the debtor. The debtor's Social Security number also appears on the front of the voluntary petition.[22] A debtor who fails to make full and complete disclosure risks denial of a discharge[23] and criminal penalties.[24]

Bankruptcy Rules also contain provisions regarding information about the debtor that must be filed with the court. Rule 3001(c) requires that an original or duplicate of any writing

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[20] 28 U.S.C. § 1408.
[21] 11 U.S.C. § 521(1).
[22] *See* Official Form 1. The specific information required on the bankruptcy petition, related schedules, and statement of financial affairs is included in Appendix II.
[23] 11 U.S.C. § 727(a).
[24] 18 U.S.C. § 152 (imposing criminal sanctions on persons who knowingly and fraudulently give false information, withhold information, conceal property, or present a false proof of claim in connection with a bankruptcy case).

that is the basis of a claim against a debtor be filed with the proof of claim. Pursuant to this rule, a variety of documents containing personal financial information may be filed with the bankruptcy court. Under Rules 1005 and 9004(b) the bankruptcy petition and every other document filed by the debtor must contain the title of the case, which includes the debtor's Social Security number and tax identification number.[25]

As discussed above, the debtor is required to attend the meeting of creditors, at which time supplemental information may be obtained through examinations of the debtor by the trustee or creditors, who appear and ask questions regarding the debtor's financial affairs. Rule 2004 provides for further examination of the debtor or of other entities on order of the court. A Rule 2004 examination permits a broad range of inquiry into all matters relevant to the debtor's financial affairs, which includes an inquiry into the validity of a creditor's disputed claim. Rule 2004 is designed to enable the parties in interest and primarily the trustee, to conduct an examination in addition to the examination of the debtor at the meeting of creditors regarding matters that relate to the general administration of the estate, including matters relating to the debtor's right to a discharge of an individual debt. Although transcripts of these examinations can be made, they are not routinely made a part of the court record. Similarly, the documents produced are not typically made a part of the record until used in litigation.

2(c) Access to the Debtor's Personal Information

General Public Access Under Bankruptcy Code § 107(a)

Under § 107(a) of the Bankruptcy Code, information filed in a bankruptcy case generally becomes part of the public record. Section 107(a) provides:

> Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.[26]

Section 107(a) essentially codifies for the bankruptcy courts the common law right of general public access to court records. The legislative history of § 107 makes it clear that *all* documents filed with the bankruptcy court are subject to public review.[27] In practice, therefore, any paper filed with the court in a bankruptcy case is subject to public inspection unless sealed (see discussion below).

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[25] Official Bankruptcy Form 16B (Short title) modifies the definition of the title of the case in Rule 1005 for many documents.

[26] 11 U.S.C. § 107(a). As discussed further below, § 107(b) provides for certain exceptions to this general rule.

[27] H.R. Rep. No. 595, 95th Cong., 1st Sess. 317-318 (1977); S. Rep. No. 989, 95th Cong, 2d Sess. 30 (1978).

Under the Bankruptcy Code, therefore, public disclosure issues are resolved under §107.[28] Consequently, some courts take the position that a bankruptcy court need not balance the equities in deciding a general public access issue because Congress already did so when it enacted §107.[29] Pursuant to this approach, a bankruptcy court would focus on whether the information at issue falls under an exception to access set forth in §107(b), which is discussed further below.

The mandatory nature of §107(a) and the comprehensiveness of documents subject to it, therefore, may afford bankruptcy courts less flexibility in resolving disclosure issues than courts operating solely under the common law doctrine of general public access, which leaves a determination regarding the presumptive right of general public access to the discretion of the trial court.[30]

Access by Parties In Interest Under Bankruptcy Code § 704(7)

Under § 704(7) of the Bankruptcy Code, a trustee appointed in a bankruptcy case has a statutory duty to provide information concerning a debtor's estate and its administration at the request of any party in interest.[31] A bankruptcy trustee also is subject to fines and forfeiture of office for refusing a party in interest a reasonable opportunity to inspect documents and accounts relating to a debtor's estate.[32] There are no statutory limitations on further dissemination of the information provided by the trustee, but the court retains discretion to limit disclosure in situations where protection is warranted.

2(d) Limits on Access to the Debtor's Personal Information

Limits on Access Under Bankruptcy Code § 107(b)

As described above, there are some limitations under §107 as to what material becomes part of the public record. Specifically, §107(b) provides:

> (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may:
>
> > (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
> > (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.

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[28] *See generally* Mark D. Bloom, et al., *Reorganizing in a Fish Bowl: Public Access vs. Protecting Confidential Information,* 73 Am. Bankr. L. Rev. 775 (Fall 1999); William T. Bodoh & Michelle M. Morgan, *Protective Orders in the Bankruptcy Court: The Congressional Mandate of Bankruptcy Code Section 107 and its Constitutional Implications*, 24 Hastings Const. L. Q. 67, 76-81 (Fall 1996).

[29] *See In re Orion Pictures Corporation*, 21 F.3d 24, 27 (2d Cir. 1994); *In re In re Phar-Mor, Inc.*, 191 B.R. 675, 679 (Bankr. N.D. Ohio 1995).

[30] *See, e.g., United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997); *United States v. Amodeo,* 71 F.3d. 1044, 1047-50 (2d Cir. 1995).

[31] 11 U.S.C. § 704(7).

[32] 18 U.S.C. § 154.

Whether certain information at issue falls under the §107(b) exception is a question of fact to be determined by the court.[33] Section 107(b) is generally viewed as a restriction on the general public's right of access warranted only when dissemination of the subject information risks substantial and serious harm and there is no less intrusive means of protection.[34] Some bankruptcy courts apply a balancing of interests approach even when information is sought that falls squarely within a §107(b) exception.[35]

Limits On Access Under Bankruptcy Rule 7005

Bankruptcy Rule 7005, which incorporates Federal Rules of Civil Procedure 5 (Federal Rule 5) also provides some limit on access to documents filed in adversary proceedings in bankruptcy court. Federal Rule 5 provides:

> Rule 5. Serving and Filing Pleadings and Other Papers
> . . .
> (d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

Federal Rule 5 provides some protection to personal information that is disclosed in discovery, but not used in the course of litigation. However, Bankruptcy Rule 7005, which incorporates Federal Rule 5, applies only to *adversary* proceedings in bankruptcy court. Many issues in bankruptcy court, such as the validity of claims and exemptions, are litigated as contested matters and not as adversary proceedings. Because there is no prohibition against filing discovery materials obtained during the course of contested matters, additional personal financial information may become part of the court record.

2(e) Judicial Branch Policy on General Public Access to Case Files

Case files are maintained by the clerk of court as the official record of litigation in the federal courts. As a general rule the public case file consists of all pleadings, orders, notices, exhibits, and transcripts filed with the clerk of court. It is currently standard practice that case files are open for inspection and copying during normal business hours. There is also a general presumption that court files are available to anyone upon request. Courts do not make access

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[33] 2 Collier on Bankruptcy, ¶107.03[2] (Matthew Bender 15th Ed. Revised).
[34] *See* 2 Collier on Bankruptcy, ¶107.03[1] (Matthew Bender 15th Ed. Revised); *Krause v. Rhodes*, 671 F.2d 212, 219 (6th Cir. 1982); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Ad Hoc Protective Committee for 10% Debenture Holders v. Itel Corp. (In re Itel Corp.)*, 17 B.R. 942 (B.A.P. 9th Cir. 1982).
[35] *See In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 433 (S.D.N.Y. 1993); *In re Continental Airlines*, 150 B.R. 334, 339-341 (D. Del. 1993).

determinations based on the status of the requestor. The federal judiciary also offers various electronic public access (EPA) services that allow the public to gain quick access to official court information and records from outside the courthouse.

Disputes over access to case files are addressed on a case-by-case basis by individual judges. Judges address privacy interests in case files mainly through discretionary sealing of files or documents. Although judges may act on their own initiative, sealing of case files usually occurs on a case-by-case, or document-by-document, basis in response to a motion to seal.

The federal courts are moving swiftly to create electronic case files, and to provide general public access to those files through the Internet. This transition from paper files to electronic files is transforming the way case file documents may be used by attorneys, litigants, courts, and the public by providing new access capabilities. The creation of electronic case files means that the ability to obtain documents from a court case file no longer will depend on physical presence in the courthouse where a file is maintained. Increasingly, case files may be viewed, printed, or downloaded remotely by anyone, at any time, through the Internet.

Electronic files are being created in two ways. Many courts are creating electronic images of all paper documents that are filed. Other courts are receiving electronic court filings over the Internet directly from attorneys, so that the original file is no longer a paper file, but a collection of the electronic documents filed by the attorneys and the court. Over the next few years electronic filing, as opposed to making electronic images of paper documents, will become more common as most federal courts begin to implement a new case management system, called Case Management/Electronic Case Files (CM/ECF). That system gives each court the option to create electronic case files by allowing lawyers and parties to file their documents over the Internet. CM/ECF also allows the courts to combine electronic images with other electronic documents to create a complete electronic case file.

The courts plan to provide general public access to electronic files, both at the courthouse through public computer terminals, and remotely, through their Internet websites. The web-based systems will contain both the dockets (a list of the documents filed in the case) and the actual case file documents.

2(f) National Data Center Policy on Access to Case Files

The National Association for Chapter Thirteen Trustees (NACTT) is in the process of establishing a National Data Center (NDC) that will make case information maintained by the private trustees assigned to the debtor's bankruptcy case available over the Internet to parties in interest. The NDC has indicated that it will contract with the private trustees regarding transmission of the information and will provide debtors notice that parties in interest will have Internet access to their case information. In addition, by signing the contract, private trustees agree to investigate and rectify errors in the data reported should errors be discovered. To protect against parties in interest re-disclosing debtor information to outsiders, the NDC also will contract with creditors to ensure that they only use this information with respect to bankruptcy claims, and to prohibit the selling or re-disclosing of debtor information. Finally, the NDC has asserted that it will establish and maintain a secure electronic database to prevent unauthorized access, and limit accessibility of debtors' sensitive information.

2(g) Financial Privacy Statutes That May Apply In Bankruptcy Proceedings

In addition to the Bankruptcy Code and other bankruptcy rules and policies, there are two general financial privacy statutes that may have relevance to the collection and use of information in the bankruptcy process: the Fair Credit Reporting Act and the Gramm-Leach-Bliley Act.

2(g)(i) The Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA)[36] governs certain kinds of financial and other personal information included within the definition of a "consumer report." This generally includes information bearing on any one or more of the following characteristics of an individual: credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living (the seven factors), where the information is intended to be used as a factor in establishing the individual's eligibility for credit or insurance, for employment purposes, or for any other purpose permitted under the FCRA.[37] An entity that collects this type of information may be deemed to be a "consumer reporting agency" under the FCRA, and as such, subject to certain restrictions on its use and disclosure of the information.

Information about a bankruptcy debtor's bank cards, auto loans and leases, mortgages, and student loans, including credit limits, payment histories, and high credit balances – all of which may be made available in a bankruptcy case – is precisely the type of information covered by the FCRA. However, since the FCRA does not apply unless this information is used or expected to be used in order to make credit, employment or other types of decisions about an individual specified in the FCRA, the use of this information to administer the bankruptcy process is not likely to implicate the FCRA. Nonetheless, if an entity regularly collects the type of personal information described above from bankruptcy court records and other phases of the bankruptcy process and communicates it for any of the purposes covered by the FCRA, that entity may be deemed to be a consumer reporting agency subject to the FCRA. The FCRA then would govern the processing of the information by the entity that collected it, by organizations that furnish the information to the entity, and by recipients of the information, i.e., users of consumer reports.

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[36] 15 U.S.C. §§ 1681 et seq.

[37] *See* 15 U.S.C. § 1681a(d)(1). These permissible purposes are limited to situations where the consumer report is: (1) provided in response to a court order or grand jury subpoena; (2) made pursuant to the consumer's written instructions; (3) used in connection with a credit transaction, insurance underwriting or other transaction initiated by the consumer, such as leasing an apartment if there is a legitimate business need for the report; or (4) used for employment purposes. A report may also be provided when the consumer has applied for a government benefit, when the user intends to offer credit or insurance to consumers meeting specified criteria, or in specified circumstances involving a legitimate business need (such as to review an account to determine if the consumer continues to meet the terms of the account). *See* 15 U.S.C. § 1681b(a).

2(g)(ii) Gramm-Leach-Bliley Act of 1999

Title V of the Gramm-Leach-Bliley Act of 1999 (GLBA)[38] limits the extent to which banks, insurance companies, or other financial institutions[39] may disclose personal information about consumers[40] with whom they do business. As discussed further below, the GLBA's disclosure limitations appear to have limited application to information about a debtor generated in a bankruptcy case because much of that information is made part of the public record and, therefore, is outside the scope of the GLBA's limits on disclosure. Moreover, the GLBA does not restrict a financial institution's ability to disclose information to its affiliates.[41] Consequently, the GLBA does not appear to provide comprehensive legal protections for debtors' privacy interests in the bankruptcy context.

It is important to note, however, that the GLBA's financial privacy provisions are in the early stage of implementation, and full compliance with their requirements is not required until July 1, 2001.[42] Consequently, many interpretive issues that are likely to arise – such as how the law applies to information generated in the bankruptcy process – have not ripened to the point where the agencies charged with administering the law have had the opportunity formally to address them. Nonetheless, it is possible to discuss the GLBA's requirements generally and to identify specific issues that may bear on how the law applies in the bankruptcy context.

The GLBA provides that before a financial institution may disclose nonpublic personal information about a consumer to a non-affiliated company, the institution must give the consumer notice of the types of companies that may receive the information and the opportunity to prevent (i.e., opt out of) the disclosure.[43] In general, nonpublic personal information is any personally identifiable financial information about the consumer, other than publicly available information.[44] Nonpublic personal information includes not only specific information about an individual's finances – such as annual income, outstanding loans, and payment history – but also any identifying information – such as an individual's Social Security number, address and

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[38] *See* GLBA, tit. V, 113 Stat. 1436-1445 (15 U.S.C. § 6801 *et seq.*).

[39] Under subtitle A of title V of the GLBA, a financial institution generally is any banking institution, securities entity (such as a broker-dealer, mutual fund, or investment adviser), or insurance company, as well as any other business that engages in activities that are financial in nature under section 4(k) of the Bank Holding Company Act of 1956. *See* 15 U.S.C. § 6809(3); 12 U.S.C. § 1843(k).

[40] Under the GLBA, a consumer is an individual who obtains from a financial institution financial products or services to be used primarily for personal, family, or household purposes. *See* GLBA sec. 509(9) (15 U.S.C. § 6809(9)).

[41] The FCRA, however, requires financial institutions to give individuals notice and the opportunity to block the sharing of certain information among affiliated companies. *See* 15 U.S.C. § 1681a(d)(2)(A)(iii).

[42] The federal regulators for the various categories of financial institutions subject to the GLBA have issued comparable implementing regulations that require full compliance beginning July 1, 2001. *See* 65 *Fed. Reg.* 35161 (June 1, 2000) (Federal Reserve Board, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, Office of Thrift Supervision); 65 *Fed. Reg.* 40333 (June 29, 2000) (Securities and Exchange Commission); 65 *Fed. Reg.* 31721 (May 18, 2000) (National Credit Union Administration;) 65 *Fed. Reg.* 33645 (May 24, 2000) (Federal Trade Commission). Implementing regulations of the various State insurance regulators are still pending.

[43] *See* GLBA secs. 502, 503 (15 U.S.C. §§ 6802, 6803).

[44] 65 *Fed. Reg.* 35198 (June 1, 2000)(to be codified at 12 C.F.R. § 40.3(n)).

telephone number – that is obtained by a financial institution for the purpose of providing a financial product or service to the individual.[45] In addition, the fact that an individual has obtained a financial product or service from a financial institution as a consumer, or has a customer relationship[46] with a financial institution, is nonpublic personal information if it is not publicly available.[47]

If the consumer exercises his right to opt out of the disclosure of his nonpublic personal information, the financial institution must honor the consumer's opt-out direction until the consumer revokes it.[48] Furthermore, the opt-out direction applies to any nonpublic personal information collected by the financial institution that is related to the institution's customer relationship with the consumer, even if the customer relationship has terminated.[49] Consequently, the opt-out direction continues to be effective as to nonpublic personal information collected by a financial institution as a party in interest in a bankruptcy proceeding filed by one of its customers or former customers.[50]

Although a debtor's opt-out direction continues to apply during the bankruptcy process, it generally does not apply to information that is publicly available.[51] A financial institution may consider information to be publicly available if the institution reasonably believes that the information is lawfully made available to the general public from, among other sources, federal government records.[52] As discussed above, documents filed in bankruptcy cases are generally available for public inspection pursuant to § 107(a) of the Bankruptcy Code[53] and current judicial branch policy. These documents include the identities of a debtor's creditors and detailed information about his assets and liabilities. Consequently, the existence of a debtor's customer relationship with a financial institution and the details of that relationship become publicly available as a result of a bankruptcy filing and, therefore, would not be subject to the debtor's right to opt-out of disclosure by the financial institution.[54]

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[45] A consumer's account numbers and access codes for credit card, deposit, and transaction accounts also are nonpublic personal information. The GLBA bars a financial institution from disclosing this type of information to non-affiliated companies for marketing purposes, except in certain limited circumstances. *See* 15 U.S.C. § 6802(d); *See, e.g.,* 65 *Fed. Reg.* 35203 (June 1, 2000) (to be codified at 12 C.F.R. § 40.12).

[46] A customer relationship is a continuing relationship between a consumer and a financial institution under which the financial institution provides one or more products or services to the consumer that are to be used primarily for personal, family, or household purposes. *See, e.g.,* 65 *Fed. Reg.* 35197 (June 1, 2000)(to be codified at 12 C.F.R. § 40.3(i)(1)).

[47] 65 *Fed. Reg.* 35198 (June 1, 2000)(to be codified at 12 C.F.R. § 40.3(o)(2)(C)).

[48] *See, e.g.,* 65 *Fed. Reg.* 35202 (June 1, 2000) (to be codified at 12 C.F.R. § 40.7(g)(1)).

[49] *See, e.g.,* 65 *Fed. Reg.* 35202 (June 1, 2000) (to be codified at 12 C.F.R. § 40.7(g)(2)).

[50] *See, e.g.,* 65 *Fed. Reg.* 35202 (June 1, 2000) (to be codified at 12 C.F.R. § 40.7(g)(2)).

[51] *See* GLBA sec. 509(4)(B) (15 U.S.C. § 6809(4)(B)). In some cases, a consumer's opt-out direction will apply to publicly available information, such as where it is made part of a list of consumers that is derived from nonpublic personal information. *See, e.g.,* 65 *Fed. Reg.* 35198 (June 1, 2000)(to be codified at 12 C.F.R. § 40.3(n)(2)(i)).

[52] *See, e.g.,* 65 *Fed. Reg.* 35199 (June 1, 2000) (to be codified at 12 C.F.R. § 40.2(p)(1)(i)).

[53] 11 U.S.C. § 107(a).

[54] The one exception may be in the case of account numbers and account codes for a debtor's transaction accounts. The GLBA generally prohibits financial institutions from disclosing this information to nonaffiliated companies for marketing purposes, without regard to whether the information is publicly available. *See* 15 U.S.C. § 6802(d); *See, e.g.,*65 *Fed. Reg.* 35203 (June 1, 2000) (to be codified at 12 C.F.R. § 40.12).

In contrast, other financial information about the debtor that is generated in a bankruptcy case may be available only to parties in interest. For instance, in a Chapter 13 case, a debtor's record of making payments to a trustee pursuant to a payment plan generally is not the type of information that would be included in a document filed with the court. The trustee may provide this information to the parties in interest, however, so that they may verify that the trustee is distributing payments in accordance with the terms of the plan. This type of information probably would not be considered to be publicly available under the GLBA and, therefore, might be subject to a debtor's right to opt-out of disclosure of the information.

In sum, the GLBA's disclosure limitations appear to have limited applicability in the bankruptcy context because a large amount of information detailing a debtor's customer relationship with a financial institution becomes part of the public record in a bankruptcy proceeding and, therefore, is outside the scope of the GLBA.

3. THE NEED FOR GENERAL PUBLIC ACCESS TO FINANCIAL INFORMATION IN BANKRUPTCY

This chapter examines the need for access by the general public to financial information in bankruptcy proceedings. In particular, this chapter reviews the two main purposes of access: facilitating the fair and efficient disposition of cases, and promoting public trust and accountability in the bankruptcy system.

3(a) Facilitating the Fair and Efficient Disposition of Bankruptcy Cases

As discussed above, a debtor must file with the bankruptcy court schedules listing assets, income, liabilities, the names and addresses of all creditors, and the amount owed to each creditor. This information generally is necessary for the identification and collection of assets and the proportionate distribution to creditors that is central to the bankruptcy process.

The clerk of court uses the information contained in the debtor's schedules to notify all listed creditors that the debtor has filed a bankruptcy petition. Once the creditors receive notice, they are required to file proofs of claim in order to share in any distribution from the debtor's property. Creditors use the account numbers and the Social Security number provided by the debtor to positively identify the debtor, whose name may be similar to that of other account holders. Account balance information submitted by the debtor allows the creditor to compare the amount the debtor thinks he or she owes the creditor with the creditor's own records. In addition, by looking at the amount of the debtor's other liabilities, the nature of those liabilities, and the debtor's assets and income, the creditor can evaluate what if any dividend it will receive on its claim.

The information in the schedules and the statement of financial affairs also allows the trustee to challenge unjustified claims by creditors, investigate possible misconduct by the debtor before and during the bankruptcy, and recover claims that the bankruptcy estate may have against third parties, including entities who may have received fraudulent transfers or preferential payments from the debtor during the period immediately before bankruptcy.

At the end of the liquidation process, individual debtors normally receive a "discharge" of all pre-bankruptcy claims against them, except for certain non-dischargeable claims, such as support of dependents or taxes. Any party in interest, including creditors and the trustee in bankruptcy, may object to the discharge of a particular claim or to the debtor's general discharge, on grounds such as fraud by the debtor (e.g., that debtor failed to disclose all assets). If a timely objection is made, the bankruptcy court will hold a hearing. The financial information contained in the debtor's schedules and statement of affairs is important in the determination by a trustee, creditor, or law enforcement investigator of whether a debtor has tried to defraud a single creditor such that a specific claim should not be discharged or whether the debtor has tried to defraud all creditors such that the debtor should be denied a general discharge.

In a Chapter 13 case, the trustee will use the information in schedules filed by the debtor to determine whether the debtor is eligible for relief under Chapter 13 and whether the debtor's repayment plan meets the requirements of the Bankruptcy Code. The creditors will use the information to determine whether to object to confirmation of the plan.

3(b) Promoting Public Trust and Accountability in the Bankruptcy System

Section 107(a) of the Bankruptcy Code codifies the general public's right under common law to inspect and copy public documents, including judicial records.[55] The right of general public access to court case files is a subset of the more general public "right to know" about the workings of government. The courts have consistently recognized the salutary purposes of general public access, focusing on the public's need to ensure judicial fairness and accountability. Courts have noted, for example, that general public access to court records: "allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system";[56] "diminish[es] possibilities for injustice, incompetence, perjury and fraud"; and promotes "a more complete understanding of our judicial system and a better perception of its fairness."[57]

4. PRIVACY INTERESTS IN FINANCIAL INFORMATION IN BANKRUPTCY

This chapter examines the protection of personal financial information and the special privacy interests of debtors.

4(a) Privacy Interests in Financial Information

Privacy is considered by many Americans to be a fundamental right. Over time, the legal framework protecting individual privacy has evolved to respond to changes in the way sensitive personal information is obtained, retained, and used. Personal financial records, which can include lists of purchases, bank account numbers, and other unique identifiers, contain some of the

[55] *See* 2 Collier on Bankruptcy, ¶107.01 (Matthew Bender 15th Ed. Revised).
[56] *In re Continental Illinois Securities Litigation*, 732 F.2d 1303, 1308 (7th Cir. 1984).
[57] *Republic of the Philippines v. Westinghouse Electric Corp.,* 949 F.2d 653, 660 (3d Cir. 1991)

most sensitive information about individuals. If used unscrupulously, this information can cause substantial harm.

In a world of paper records and unaffiliated financial institutions, which characterized the U.S. financial system for most of its history, financial privacy concerns were relatively minor. Information on individuals was difficult to obtain, was not widely shared among institutions, and was not generally used as an asset for marketing or other purposes. Today, however, three major developments are raising new concerns about protection of personal financial information.

First, financial information now flows much more rapidly, and in much greater volumes, than ever before. An ordinary desktop computer is now significantly more powerful than the mainframe of 30 years ago, and can store, manipulate, and analyze far more information at vastly lower costs. Advances in telecommunications allow this information to be sent anywhere in the world instantaneously, at similarly low costs. These technological developments have created opportunities for the sharing of information among institutions that were scarcely envisioned even a few years ago. In addition, the advent of large databases available through the Internet creates new opportunities for access by the general public to information about individuals, often without the subject's knowledge or consent. The free flow of information that is now possible offers many advantages in economic efficiency and individual well-being. At the same time, it poses potential new threats to a debtor's privacy.

A second key change is the growing integration and consolidation among financial services providers. Interstate banking and branching have allowed banks to grow larger than ever before, and the removal of regulatory restraints has allowed financial services organizations to enter lines of business that were previously off limits. Banks, for example, may now affiliate with firms ranging from travel agencies to health insurance providers. This integration will allow firms and consumers to benefit from "economies of scale," in which the provision of related financial services together can better meet consumers' demands at a lower cost. But these economies stem, in part, from an ability to share consumer data across affiliated entities – and that sharing also raises legitimate privacy concerns.

A third change is the increasing use of electronic means of purchasing and payment. Americans' increasing use of credit cards, debit cards – and more recently electronic bill payment – in lieu of cash now allows financial services companies to collect enormous amounts of detailed information about an individual's transactions. Until recently, neither institutions nor individuals were able to create detailed lifestyle portraits using such information.

The creation of electronic case files and the electronic collection and dissemination of bankruptcy information are in their earliest stages. Data on the actual harm resulting from these developments are relatively scarce. However, these developments could create a risk for possible misuse or objectionable re-use. As the comment submitted on behalf of 20 State Attorneys General noted, "the ready availability of such information, particularly when it may be easily obtained and copied from electronic filings that can be accessed from the Internet, greatly increases the concerns about the uses to which the data might be put. . . . The ability to obtain

large amounts of information at low cost makes the use of bankruptcy data for commercial purposes economically feasible in ways that were not possible when the data had to be hand-gathered in person from individual clerk's offices."

The consequence of each of these developments can be better targeting of financial products to individual consumers, which can lower prices and improve service. However, these trends also may increase the risks of illegal, discriminatory, or invasive uses of highly sensitive personal information. Included among the concerns raised by the State Attorneys General and privacy advocates are:

Identity Theft. More widespread availability of information such as Social Security numbers, credit card numbers, and other personal identifiers create greater opportunities for unscrupulous individuals to commit identity theft.

Predatory Lending. Greater sharing of information within and among financial institutions could lead to an increase in the use of such information by unscrupulous lenders. For example, marketers engaged in predatory lending may use this information to target especially vulnerable debtors. Although limiting access to detailed personal information in bankruptcy filings will not by itself eliminate predatory lending practices, it is one step that can be taken to address this problem.

4(b) Special Privacy Interests of Debtors in Bankruptcy

Beyond these general financial privacy concerns, the bankruptcy process raises some particular issues involving the handling of financial information. Much of the data available to the general public from a bankruptcy proceeding generally is not readily available from other sources. This includes: bank account numbers and funds in those accounts; Social Security numbers; market value of real property; market value of automobiles; employment income; cash on hand; alimony and other support due; alimony and other support owed; account numbers with creditors and amount owed to creditors; and medical expenditures, among other information. Although credit reporting agencies currently are permitted to provide some financial information to private entities and individuals, they are subject to specific regulations and penalties for improper disclosure. The comprehensive nature of the information required in bankruptcy proceedings, and the fact that such information is often restricted in other contexts, suggests that there may be reasons to reconsider the current system, which allows unrestricted access to such data by the general public.

In addition, debtors in bankruptcy face a combination of two circumstances that may make them particularly vulnerable to misuse of data available about them. First, debtors in bankruptcy are by definition facing extraordinary financial difficulties. Many end up in the bankruptcy system in order to relieve pressure from collection agents and others who threaten to repossess homes and other real property. As noted in a recent joint report of the Treasury Department and the Department of Housing and Urban Development, such consumers often are

targeted for credit offers on unfavorable terms, exacerbating a cycle of financial trouble.[58] Second, once a debtor enters bankruptcy, he or she cannot receive a bankruptcy discharge for another seven years under Chapter 7, or three years under Chapter 13. Consequently, if an individual coming out of bankruptcy falls victim to a predatory practice and lands once again in financial difficulty, he or she will have no recourse to the bankruptcy system to protect basic assets such as a home.

5. MODELS FOR BALANCING PRIVACY AND ACCESS

5(a) Introduction – Case-by-Case Determinations

In determining how the competing interests in access to information and protection of personal financial information may be balanced in the consumer bankruptcy process, it is helpful to compare the approach embodied in current bankruptcy law to approaches used in other contexts.

The federal bankruptcy statutes and case law under them reflect a case-by-case approach to balancing access by the general public and protection of personal financial information, with that balance weighted heavily in favor of access for the general public and parties in interest, except as to "scandalous or defamatory" information. Under common law in non-bankruptcy cases, there is a presumption that court records are open to the public, though courts exercise discretion in balancing interests in access by the general public and individual privacy interests, and may seal records or grant protective orders upon the showing of a compelling interest.[59] Similarly, with respect to federal executive branch records, the courts use a balancing test under the Freedom of Information Act to weigh individuals' interests in preventing "clearly unwarranted invasions of personal privacy" from the disclosure of personal information in government records, versus the general public's interest in access to records in order to shed light on the workings of the government.[60]

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[58] *See* Curbing Predatory Home Mortgage Lending: A Joint Report, U.S. Department of Housing and Urban Development and U.S. Department of Treasury at 72 (June 2000).

[59] *See e.g., United States v. Beckham*, 789 F.2d 401, 409-15 (6th Cir. 1986)(trial court "must set forth substantial reasons for denying" access to its records).

[60] 5 U.S.C. §552(b)(6); *see U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 772 (1989). In *Reporters Committee,* a case involving a database of information summarized in a criminal "rap sheet," the Supreme Court recognized a privacy interest in information that is publicly available through other means, but is "practically obscure." The Court specifically noted:

> the vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

489 U.S. at 764. In weighing the public interest in releasing personal information against the privacy interests of individuals, the Court identified a public interest in access to information that would "shed light on the conduct of any Government agency or official," 489 U.S. at 773, not information about a particular private citizen. The Court also noted "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information." 489 U.S. at 770.

5(b) Rules Based Models

As an alternative to calling on the courts or others to determine whether personal information should be disclosed or kept private, one could also use a "rules-based approach," which would generally apply across the board. Each of the following models for balancing access by the general public and the debtor's privacy can be viewed on a continuum from a fully open to a full closed system of information management. Although there are many differences in the particulars of such sets of rules, they usually combine elements of three basic conceptual models, which restrict access by the general public to information based upon: 1) the content of the information; 2) the identity of the recipient of the information; or 3) the recipient's intended use of – or ability to use – the information.

This section briefly describes these three conceptual models for access and gives examples of how they are reflected in particular statutes or rules. It then outlines a set of generally recognized "fair information principles" that may provide additional guidelines for the implementation of any of these models. Finally, it illustrates how the access models and fair information principles are combined in practice into hybrid approaches that achieve a balance between the protection of personal information and access appropriate to a particular situation.

Limits on Access to Information Based on the Content of the Information

One approach to protecting personal information is to limit access by the general public based on the content of the information. Some types of information may be considered more sensitive than others because of the consequences that may result from disclosure of the information. For instance, disclosure of personal health information or genetic information may result in inappropriate discrimination against an individual in credit or employment decisions. Disclosure of certain personal identifiers or financial account information, such as an individual's Social Security number, may facilitate identity theft.

The Administration has recognized a number of categories of sensitive information and has taken steps to establish enhanced protections in these areas, including: consumer financial information, Social Security numbers, individual health information, and information collected from children on the Internet. There are several federal laws that incorporate enhanced privacy protections for these categories of information. The Administration has also proposed additional protections for personal information held by financial institutions. For instance:

- The GLBA, which generally allows financial institutions to share consumers' personal financial information with non-affiliated companies under specified conditions, places stricter limits on sharing of account numbers and account codes for a consumer's transaction accounts.

- The President's proposed Consumer Financial Privacy Act (introduced in both the House and Senate in May of 2000) would amend the GLBA to impose stricter limits on financial institutions' disclosure of consumers' health information and information about a consumer's personal spending habits.[61]

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[61] *See* H.R. 4380, 106th Cong, 2d Sess. secs. 3, 4 (2000); S. 2513, 106th Cong, 2d Sess. secs. 3, 4 (2000).

- The Children's Online Privacy Protection Act limits the circumstances in which web-site operators may collect personally identifiable information from children on the Internet.[62]

- The Driver's Privacy Protection Act of 1994 (DPPA), which limits the extent to which state departments of motor vehicles may disclose information about individuals in motor vehicle records, places stricter limits on disclosure of an individual's photograph or image, Social Security number, and medical or disability information than on other personal information contained in such records.[63]

Limits on Access to Information Based on the Identity of the Recipient

Another approach to protecting personal information is to limit the categories of entities eligible to receive the information. A particular industry, market, or activity may be structured in a manner that makes identity-based distinctions feasible or desirable. The current bankruptcy system, with its distinction between "parties in interest" and all other private individuals and entities, illustrates how such divisions can be made in statute or regulation. A clear example is provided by the GLBA, which limits the conditions under which a financial institution may disclose consumers' personal financial information to entities that are not affiliated with the financial institution. Disclosures of such information to affiliated companies, in contrast, are not restricted.[64]

Most federal laws that limit access by recipient also explicitly limit the purpose for which recipients may use the information, as discussed in the next section. Even where a law does not impose an explicit purpose limitation on the recipients, there may be an implicit limitation on how they use the information, based on other laws that govern their conduct.[65]

Limits on Access to Information Based on a Recipient's Use of the Information

Another method for protecting the debtor's privacy interests in personal information is to restrict the purposes for which the information may be disclosed to another entity and/or the purposes for which the information may be re-used and re-disclosed by recipients. There are several federal laws governing the use, collection, or disclosure of personal information that reflect this approach to some degree. These include:

- The Privacy Act of 1974, which generally permits a federal agency to collect, use, and disseminate only such information about an individual as is relevant and necessary to accomplish a purpose of the agency set forth in a statute or Executive Order.[66]

- The GLBA, which specifies certain purposes for which financial institutions may

[62] *See* Pub. L. 105-277, div. C, title XIII, 112 Stat. 2681-728 (Oct. 21, 1998).
[63] *See* 18 U.S.C. 2721(a), (b) (as amended by Pub. L. No 106-346, sec. 309 ___Stat. ___ (Oct. 23, 2000)).
[64] *See* GLBA secs. 502, 503 (15 U.S.C. §§ 6802, 6803).
[65] For example, where the recipient of personal information about an individual is a fiduciary to the individual, the recipient likely is subject to a legal duty to refrain from appropriating the information for its own benefit.
[66] *See* 5 U.S.C. § 552a(e)(1).

disclose consumer's personal financial information to non-affiliates without a consumer's permission, and the purposes for which such information may be re-disclosed.[67]

- The Right to Financial Privacy Act, which identifies the purposes for which a federal agency may obtain an individual's financial records from a financial institution without following certain procedures specified in the statute.[68]

- The DPPA, which specifies the permissible purposes for which state departments of motor vehicles may disclose information about individuals in motor vehicle records to any person or entity, as well as the permissible purposes of any resale or re-disclosure of the information.[69]

- The FCRA, which specifies the permissible purposes for which consumer reporting agencies may sell individual's credit reports to other entities.[70]

Although these laws address bodies of information created for a variety of different purposes, they all generally allow the use or disclosure of information for one or more of the following purposes:[71]

- law enforcement/legal compliance
- use in judicial proceedings
- fraud prevention
- protection of public or individual safety
- research

In sum, statutes based on the purpose limitation model establish a general rule prohibiting or placing conditions on the collection, use, or disclosure of personal information, except where those activities are done for one or more purposes specified in the statute.

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[67] *See* 15 U.S.C. § 6802(b)(2), (e); see, e.g., 65 Fed. Reg. 35203, 35204 (June 1, 2000) (to be codified at 12 C.F.R. §§ 40.11, 40.13).

[68] *See* 12 U.S.C. §§ 3402-3413.

[69] *See* 18 U.S.C. § 2721(a)-(c) (as amended by Pub. L. No 106-346, sec. 309 ___Stat. ___ (Oct. 23, 2000)).

[70] *See* 15 U.S.C. § 1681b(a).

[71] *See* 5 U.S.C. § 552a(b) (Privacy Act of 1974); 12 U.S.C. 3413 (Right to Financial Privacy Act); GLBA sec. 502(e) (to be codified at 15 U.S.C. § 6802(e)); § 18 U.S.C. 2721(a), (b) (as amended by Pub. L. No 106-346, sec. 309 ___Stat. ___ (Oct. 23, 2000))(DPPA); 15 U.S.C. §§ 1681b, 1681u (FCRA).

5(c) Fair Information Principles

As noted above, "fair information principles" (FIPs) do not provide a rationale for the dissemination of particular types of information to particular groups. However, once policymakers have decided which entities have a right to receive which information, FIPs provide important guidance for implementing privacy policies in a manner that is consistent and transparent. FIPs first were articulated in a Health, Education, and Welfare Commission report on privacy in 1973. In 1980, the Organization for Economic Cooperation and Development also established requirements for protecting privacy built around a comprehensive set of FIPs. As discussed in the next section, several existing statutory schemes governing repositories of personal information incorporate one or more of these principles, which are:

- Notice - Entities collecting personal data from individuals should provide them notice about what uses will be made of that information and/or for what purpose.

- Limitation on Collection - Entities should limit the data they collect to what is necessary to their purpose.

- Limitation on Use - Entities should not disclose data for purposes other than those specified, except as authorized by law.

- Choice - Entities should provide, where appropriate, choice as to how their information will be used and/or disclosed, particularly when the information is being used or disclosed beyond the stated purpose of the information collection.

- Access - Individuals should have reasonable access to the information that entities hold about them. They also should have the right to request correction or deletion of incorrect information.

- Security - Entities should ensure that the personal data they collect is secure from unauthorized access and disclosure. This includes not only network security, but also physical security of data (e.g., locked cabinets where appropriate) and personnel security (e.g., limiting access to personnel whose functions require such access).

- Accountability - There should be an enforcement or other mechanism to ensure that entities are held accountable for complying with these principles.

5(d) Hybrid Models

Existing federal laws that govern collection, maintenance, and disclosure of databases of personal information usually are hybrids of the various models discussed above. As a starting point, these laws often specify a category of information to which special requirements – such as access limitations and security standards – will apply. The limitations on private entities' access to the information may include one or more of the FIPs, such as requiring notice and choice for an

individual before his personal information is disclosed, as well as limitations on the use of the information, once disclosed. Existing laws also may incorporate other FIPs, such as the right for consumers to review their information and have errors corrected. In addition, existing federal laws governing collection, use, and disclosure of personal information usually include mechanisms for ensuring the accountability of those who maintain the databases at issue, through regulatory enforcement and/or private rights of action.

For example, the GLBA and the FCRA each reflect a combination of these approaches: as with many other statutes governing privacy, GLBA includes an exception to access and re-use restrictions to allow information to be shared for law enforcement and other governmental purposes, when statutory standards have been met;[72] and FCRA similarly allows the protected information to be shared for law enforcement and governmental purposes.

GLBA

Type of Information Covered:

- Personally identifiable financial information about a consumer, other than publicly available information, held by the consumer's financial institution

- Any list, description, or other grouping of consumers (and the publicly available information pertaining to them, such as their addresses) that is derived using any personally identifiable financial information that is not publicly available, such as account numbers

Eligible Recipients/Notice & Choice:

- A financial institution may disclose a consumer's information to:
  - any affiliated company
  - any non-affiliated company, provided the consumer receives notice of the disclosure and does not opt out

- Non-affiliated companies may re-disclose the information to other non-affiliated companies described in the notice given to the consumer

Purpose Limitations:

- A financial institution may disclose a consumer's information to non-affiliated companies without the consumer's permission for purposes such as:
  - to effect, administer, or enforce a transaction authorized by a consumer
  - to protect the confidentiality or security of the financial institution's records
  - to protect against or prevent actual or potential fraud, unauthorized transactions,

[72] *See* GLBA sec. 502(e)(5) (15 U.S.C. § 6802(e)(5)).

claims, or other liability

- ♣ Entities that receive information for one of the permissible purposes specified above generally may re-disclose or re-use the information only to carry out the activity for which the disclosure initially was made

Security:

- ♣ Financial institutions are required to ensure the security, integrity, and confidentiality of customer records

Accountability:

- ♣ Federal financial regulators may take a range of enforcement actions, including cease-and-desist orders, restitution orders, and civil money penalties, against institutions that fail to comply with the consumer financial privacy requirements of the GLBA

FCRA

Type of Information Covered:

- ♣ Consumer report information -- i.e., personal data bearing on an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, where the information is collected or communicated to be used to make determinations about the individual, such as eligibility for credit, insurance, employment, or for other purposes permitted by the FCRA

Eligible Recipients:

- ♣ Consumer reporting agencies may provide consumer reports to entities that intend to use the information for a permissible purpose

Purpose Limitations:

Permissible purposes for the disclosure of consumer reports include:

- ♣ In response to a court order or grand jury subpoena
- ♣ In accordance with the written instructions of the consumer who is the subject of the report
- ♣ For child support collection purposes, if requested by an appropriate state or local agency
- ♣ For specified business purposes, such as:
  - ▸ in connection with a credit transaction or insurance underwriting involving the individual
  - ▸ to determine the individual's eligibility for a license or other government benefit
  - ▸ in connection with an offer of credit or insurance to individuals meeting specified

criteria
- in other specified circumstances involving a legitimate business need in connection with a transaction initiated by the consumer

Individuals' Access and Correction Rights:

- An individual may obtain a copy of the information in his or her file at a consumer reporting agency and may dispute the accuracy and completeness of the information

Security:

- Consumer reporting agencies must have procedures to verify the identities of recipients of consumer reports and the permissible purposes for which the reports will be used

Accountability:

- The FCRA provides for enforcement by federal agencies and the States, and permits private rights of action by consumers

The relative complexity of the various requirements of the GLBA and the FCRA demonstrates the challenge of accommodating the interests of all parties that may have a stake in how various types of personal information are collected, maintained, and disseminated. These laws also make clear that different approaches and combinations of approaches may be appropriate in different contexts. This is particularly the case where a database contains a number of different types of information, some of which may be more sensitive than others.

The personal information about a debtor collected and aggregated in the course of a consumer bankruptcy proceeding may be one of the most comprehensive databases of information ever created about the debtor. Moreover, as discussed above, there may be a large number of competing individual and institutional interests in access to and security for that database. Consequently, it seems clear that some combination of the models discussed above, as well as other new approaches tailored to the needs of the bankruptcy process, will be needed in balancing individual privacy interests and rights of access to information in the bankruptcy context.

6. CONCLUSIONS

This chapter details a series of findings and recommendations regarding the privacy-access balance for the bankruptcy process.

(a) Findings

6(a)(i) Access to Information is Necessary for Case Administration

The rights of parties in interest and the fair and efficient administration of cases require that certain personal information be available to the courts, parties in interest, and governmental entities. Creditors, trustees, creditors' and debtors' attorneys, other parties in interest, and governmental entities often need detailed financial information about debtors in order to efficiently carry out their respective functions.

6(a)(ii) Access to Information is Necessary to Ensure Accountability

Ensuring public accountability and preventing abuses of the bankruptcy system require that some personal information filed in bankruptcy cases be available to the general public. In the bankruptcy context, accountability includes the public's policing of debtors' use of the system, as well as evaluating how the system is working overall. As with the administration of justice more generally, public access to some personal information is necessary so that the press, oversight organizations, and others can assure accountability.

6(a)(iii) Debtors Have A Privacy Interest in Certain Highly Sensitive Information

Certain personal information collected in bankruptcy proceedings is highly sensitive and is protected from access by the general public in other contexts by financial privacy laws. Individual debtors have a privacy interest in such information that is not expressly recognized in the current bankruptcy system. The increasing ease of electronic access to this information is heightening debtors' interests in ensuring that this information is protected.

6(a)(iv) Storage of Personal Information in Government Electronic Systems Poses New Privacy Concerns

Information held by government, including the judicial branch, increasingly is being collected, stored, and transmitted electronically. While the use of electronic systems by the government provides better service to users, more efficient processing of transactions, and a host of other benefits for the American people, there is a corresponding need to safeguard the privacy of personal information that is electronically compiled and transmitted to private entities. Because electronic systems create the capability to release greater amounts of personal information to more remote and anonymous users, the shift to electronic systems will sometimes require additional protections in order to avoid a large increase in the actual level of disclosure of personal information.

6(b) Recommendations[73]

6(b)(i) Balance Interests in Efficiency, Government Accountability, and Privacy

The Study Agencies recommend that the goal of protecting personal financial information be given increased emphasis in the bankruptcy system. Bankruptcy information policy should better balance society's interests in fair and efficient case administration, bankruptcy system integrity, government accountability, and the debtor's privacy. As electronic tools for accessing case information develop and improve, there is an increased need for analysis of access issues to ensure the integrity and proper administration of the system.

Upon filing for bankruptcy, a debtor gets the immediate relief of the automatic stay that precludes virtually all collection actions against him or her, and the prospect of a discharge of any further obligation to repay his or her debts. In order to obtain such relief, however, the debtor must make detailed disclosures of his or her personal financial information at the commencement of the case, or soon thereafter. The bankruptcy system currently treats the debtor's personal financial information as "open record" information that is generally available to the public. While this approach well serves the important functions of fair and efficient case administration and accountability in government, it may not provide adequate protection of personal financial information.

The growing use of computer technology and electronic communications will have an impact on debtors' privacy interests in the personal information they provide in the bankruptcy process. Prior to recent technological advances, information provided by individuals in bankruptcy was accessible only by requesting a copy of the debtor's schedules from the court, or by reviewing the bankruptcy file at the court. However, the proliferation of electronic technology now allows, or will soon allow, myriad private entities or individuals to obtain unmediated and widespread access to an individual's most sensitive information. With the widespread use of the Internet, almost anyone can anonymously obtain the most personal details of an individual's life without limitation on how the information is used.

The Study Agencies believe that debtors should not be required to forego reasonable personal privacy protections and expose themselves unnecessarily to risk in order to obtain the protections of bankruptcy. Rather, there should be a balance between debtors' interests and other needs of the bankruptcy system.

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[73] The following recommendations are proposed to address issues of access and re-use of personal financial information in bankruptcy cases by private entities. They are not to be read to apply to access and use by governmental entities, including law enforcement or regulatory agencies, or the communication of this information by or to these governmental entities. Governmental use and access is outside the scope of this Study.

The recommendation for balancing of interests in the bankruptcy process is supported by the following public comments:

- Mary Jo Obee, Chief Deputy Clerk of the U.S. Bankruptcy Court of the Western District of Oklahoma, commented that unlimited access to bankruptcy information: (1) harms privacy rights by providing greater access than necessary to achieve the public benefit; (2) limits the fresh start by placing a stigma on debtors; (3) contributes unnecessarily to threats of physical harm to parties; (4) contributes unnecessarily to identity theft, credit fraud and lender redlining; and (5) under new technology, may hinder individuals from seeking redress under the bankruptcy laws.

- The Federal Trade Commission commented that concern regarding the availability of sensitive information is heightened with the increasing availability on the Internet of courts' public record data.

- The Privacy Rights Clearing House commented that with the widespread use of the Internet, almost anyone can anonymously obtain access to the most personal details of an individual's life without limitation on how the information is used.

- The Center for Democracy and Technology commented that if computerized systems are designed without an eye towards protecting privacy, they can enlarge existing privacy loopholes and present unique challenges to protecting privacy.

- The New Jersey League - Community and Savings Bankers commented that it supports efforts that properly balance the legitimate information sharing needs of a creditor with the obligations to protect consumer privacy.

6(b)(ii) The General Public Should Have Access to Core Information

The Study Agencies recommend that the general public continue to have access to some general information so that the public can hold the bankruptcy system accountable. This information includes the fact that an individual has filed for bankruptcy, the type of bankruptcy proceeding, the identities of parties in interest, and other core information.

At the same time, the Study Agencies recommend that the general public not have access to certain highly sensitive information that poses substantial privacy risks to the debtor. This information may include, among other items: Social Security numbers, credit card numbers, loan accounts, dates of birth, and bank account numbers. Similarly, the Study Agencies recommend that schedules that show detailed profiles of personal spending habits and debtors' medical information be removed from the public record.

Finally, the Study Agencies recommend that special attention be given to protecting information regarding entities or individuals who are not parties to the bankruptcy proceeding. This includes detailed personal and financial information regarding non-filing spouses, relatives, or business partners.

Bankruptcy cases are different from other civil litigation.[74] For example, the schedules that are required to be filed early in a bankruptcy case include information that far surpasses the notice standard of traditional civil litigation. Bankruptcy cases try to anticipate all financial information that a creditor would need to evaluate its rights against the debtor, and requires the debtor to provide that information.

Certain general information in the bankruptcy system should remain available to the general public in order to allow members of the press, oversight organizations, and others to monitor the functioning of the executive branch (e.g., United States Trustee Program), private trustees, and the courts in bankruptcy cases. General information that falls into this category includes, among other data items: the fact that an individual has filed for bankruptcy; the type of bankruptcy proceeding; the identities of parties in interest; and other core information necessary to serve the accountability function.

The Study Agencies believe that an appropriate balance can be achieved if the process provides general public access to the core information while limiting access and use of sensitive information to parties in interest and for governmental purposes. The Study Agencies believe in promoting public accountability, but are concerned that unlimited general public access to

bankruptcy information may harm debtor privacy rights by providing greater access to private entities than necessary to achieve a public benefit while contributing unnecessarily to identity theft, threats of physical harm, credit fraud, and lender redlining and individual profiling. That concern is heightened with the increasing availability on the Internet of Social Security numbers, credit card numbers, bank account numbers, loan account numbers, dates of birth, and other sensitive personal information.

The risk of identity theft and predatory lending practices may be increased by the disclosure of schedules that show the profiles of personal spending habits, medical information, Social Security numbers, credit card numbers, loan account numbers, dates of birth, and bank account numbers. The FTC identified common forms of identity theft as: taking over an existing credit card account; taking out loans in another person's name; writing fraudulent checks using another person's name and/or account number; and opening a telephone or wireless service account in another person's name. In extreme cases, an identity thief may completely take over a victim's identity, including being arrested in the victim's name.

Several credit card companies commented that such personal identifiers must continue to be publicly available so that all entities can determine whether a particular bankruptcy relates to a

[74] 11 U.S.C. § 301; H. R. Rep. 95-595, 95th Cong., 1st Sess. 321 (1977); S. Rep. 95-989, 95th Cong., 2nd Sess. 31 (1978).

specific individual. However, the bulk of the public comments supported restricting access by the general public to highly sensitive information. The needs of the credit card industry and other parties in interest are accommodated in Recommendation 6(b)(iii) below. The following public comments supported these recommendations:

- Mary Jo Obee, Chief Deputy Clerk of the U.S. Bankruptcy Court of the Western District of Oklahoma, and others commented that §107 of the Bankruptcy Code may need to be revisited, and that consideration should be given to defining public data and non- public data clearly. Only limited general case information should remain public, although access for parties in interest would remain unchanged.

- The Center for Democracy and Technology commented that an effective information policy should protect the rights of the individuals who participate in the bankruptcy system by limiting the use and disclosure of their personal information to that necessary to support the bankruptcy process. General information about the debtor may need to be available to the public to ensure that all those with a stake in the outcome may participate. However, detailed information, currently considered public records under § 107 of the Bankruptcy Code, such as bank account numbers, credit card account numbers, Social Security numbers, and bank balances are not necessary to ensure that parties with an interest are notified of a debtor's filing. Also, public disclosure of such information breaches personal privacy and places individuals at risk of additional financial harm.

- The Federal Trade Commission, an agency mandated to establish the federal government's centralized depository for identity theft complaints, commented that disclosure of non-public data, as with public data, may facilitate identity theft and other illegal conduct. The FTC also commented that finance-related fraud constitutes 80 percent of the identity theft crimes reported to it.

- The Privacy Rights Clearinghouse commented that if bankruptcy and trustee files are available online to the general public, they should be available in the form of a "digest" of the key data elements. Personal identifiers, such as Social Security numbers, represent a gold mine to dishonest individuals as well as to the rising number of organized criminal enterprises that specialize in systematic identity theft. Such scams not only victimize the debtor, but the bankruptcy courts as well by clogging the system with fraudulent filings.

- The National Association of Consumer Bankruptcy Attorneys commented that given the broad dissemination of public record information, debtors are entitled to have their information protected from unnecessary disclosure.

- Several financial associations and information service providers commented that certain personal information should be available in bankruptcy cases to protect the rights of parties in interest and debtors, but that the information made available to the public should be limited to general information that promotes public accountability.

- The New Jersey Credit Union League commented that making sensitive information available on the Internet would expose debtors, who are already in precarious financial positions, to an enhanced risk of identity theft, and that this unintended result outweighs any possible benefits.

6(b)(iii) Parties in Interest Should Continue to Have Access to a Broad Range of Non-Public Information, Subject to Re-use and Re-disclosure Limitations.

The Study Agencies recommend that parties in interest and potential parties in interest have access to a broad range of information collected in bankruptcy proceedings in order to exercise their rights and responsibilities.

However, when private entities have such access, they should generally be prohibited from reusing or re-disclosing the information for purposes unrelated to administering bankruptcy cases. These re-use and re-disclosure limitations should not be construed as restricting private entities from sharing information with governmental entities.

The Study Agencies also recommend that the detailed information that appears in a bankruptcy filing should be available to researchers in a manner that would not identify individuals.

The report's recommendations are not intended to address the access or use of bankruptcy information by governmental entities in connection with their important public responsibilities, or the communication of personal financial information by or to governmental entities for functions they serve.

Creditors, parties in interest and their agents, law enforcement, or other governmental entities – but not the general public – should continue to have access to the full range of information necessary to administer cases, subject to re-use and re-disclosure limitations. It is essential for parties in interest to have broad access to comprehensive debtor information in order to: (a) determine whether entities are entitled to recovery before their contractual rights are forever terminated; (b) participate effectively in the bankruptcy process; (c) ascertain the accuracy of debtors' claims; and (d) communicate efficiently with trustees about bankruptcy cases. When private entities have such access, however, the Study Agencies propose that they generally be prohibited from reusing or re-disclosing the information for purposes unrelated to administering bankruptcy cases. However, these prohibitions do not include re-disclosing information to law enforcement or for other governmental purposes.

Court officials, including private trustees, who have responsibility for administering bankruptcy cases, need full access to comprehensive debtor information for all cases coming under their purview, subject to appropriate re-use and re-disclosure restrictions.

As for the creditor community, an entity that believes that it is a party in interest in a bankruptcy case should, perhaps upon adequate showing, have access to information sufficient to

determine whether it has an interest in the case. However, under the Study Agencies' recommended use and disclosure limitations, if the private party determined not to file a claim in that case, it would be prohibited from using or disclosing the data for any purpose, with exceptions for disclosure to law enforcement or other governmental entities.

Agents of parties in interest necessarily will need to collect and make available in an efficient manner a wide range of information from many cases. It is important that these activities also be subject to re-use and re-disclosure restrictions that protect debtors' privacy interests. As noted, one of the recognized "fair information practices" provides that data only be used and disclosed to advance the purpose for which it was collected. As described above, several existing systems outside of bankruptcy adopt this principle and impose re-use and re-disclosure limitations.

Limitations on re-disclosure of bankruptcy information by private entities will supplement existing statutes governing financial privacy, such as the FCRA, which may not reach all entities involved in the collection and redistribution of this information. The protections of the FCRA are limited to "consumer reporting agencies" and those of GLBA are limited to "financial institutions." However, entities may become involved in the collection and dissemination of financial information without falling within either of these categories. The recommended limitations on re-disclosure of sensitive bankruptcy information by private entities will help close any statutory gap.

The Study Agencies separately recommend that detailed information that appears in a bankruptcy filing be available to researchers on a de-identified basis. This approach protects the debtor's privacy while assisting public and private entities in understanding various aspects of the bankruptcy system and in making or considering policy decisions about the bankruptcy system. Notably, the lack of such information was pointed out during the recent debate on bankruptcy reform in the 106th Congress.

An additional recommendation concerns the special needs of law enforcement. Law enforcement officials throughout the country often use public record information – including bankruptcy information – to assist in their investigations. Public records can help to locate individuals, identify assets, verify personal relationships, and otherwise further enforcement efforts. The Study Agencies recommend that as decision makers craft information policy on non-public information, they do so in a way that does not infringe upon the current ability of governmental entities to gain access and use of this information.

Although a few public commenters supported allowing bankruptcy data to be collected and distributed by third parties, most of the comments were opposed to the commercial use and/or non-bankruptcy related use of private debtor information. The following public comments supported these recommendations:

- The FTC suggested that commercial use of highly personal and sensitive data should be prohibited for several reasons. First, such disclosure may facilitate identity theft or other illegal conduct. Second, trustees receive sensitive private information as a result of

governmental action, and the use of non-public information for commercial purposes appears to be outside the scope of their responsibilities. Third, the commercial use of debtor information conflicts with the trustees' fiduciary duties and responsibilities, and the Department of Justice's policy prohibiting trustee's from using estate funds for their personal benefit. Finally, the commercial sale of debtor information may implicate concerns under the FCRA.

- The National Association of Attorneys General commented that due to the protections afforded in bankruptcy, it is important that information be widely available to parties in interest. However, measures should be established regarding the appropriate uses of bankruptcy information, and there should be restrictions on the release of data that is particularly susceptible to abuse, with penalties for any misuse of information.

- The National Association of Consumer Bankruptcy Attorneys commented that debtors should not be required to forego any expectation of privacy, except to the extent that their information is necessary to the administration of the bankruptcy process. All possible precautions and protections should be implemented to preclude any unwarranted disclosure of personal information.

- The Ohio Credit Union League commented that bankruptcy information should be categorized as public or non-public and as to who may have access. There should be restrictions on and penalties for the use and disclosure of non-public information.

- The Center for Democracy and Technology commented that there may be legitimate public interest considerations for providing aggregate reports, stripped of information that may identify specific individuals, on debtors' interactions with the bankruptcy system and creditors.

6(b)(iv) Incorporate Fair Information Principles.

The Study Agencies recommend that the bankruptcy system incorporate fair information principles of notice, consent, access, security and accountability.

***Notice*: The Study Agencies recommend that debtors who file for bankruptcy be informed in writing that certain information that they disclose in their petitions and schedules may be disclosed to the general public and that, consistent with current law, all information may be disclosed to parties in interest, law enforcement and other governmental entities.**

Current bankruptcy laws and rules do not make explicit provision for a debtor to receive notice of the potential use and distribution of the personal information he must submit to the court in the course of a bankruptcy case. The Study Agencies believe that many individuals may not be aware that their personal information will be made widely available to the general public.

Debtors could be provided with adequate notice regarding the collection and dissemination of their information by several methods. For example, notice could be provided directly on the petition and schedules that a debtor must file. Notice also could be provided through counseling with a debtor's attorney.

Several public commenters stated that debtors should relinquish their right to privacy in exchange for the protections afforded by the bankruptcy process. However, most of the comments supported the concept that bankruptcy incorporate fair information principles, including providing debtors with adequate notification. The following public comments supported these recommendations:

- Many of the public comments noted that debtors are generally fearful of and unfamiliar with the bankruptcy process, and do not envision that their files may be available for review by any member of the public.

- Mary Jo Obee, Chief Deputy Clerk of the U.S. Bankruptcy Court of the Western District of Oklahoma, commented that generally individuals have no idea that anyone other than those listed on their schedules, the trustee, and the courts will ever see their information.

- The FTC commented that because certain information necessarily must be put on the public record during a bankruptcy case, consideration should be given to ensuring that debtors are given notification as soon as possible in the bankruptcy process as to how their information will be used and whether and how it will be disclosed. Individuals cannot fully understand the consequences of pursuing relief from their debts unless they are informed of the consequences and the extent and means by which their personal and financial information will be divulged to parties in interest and the general public.

- Several commenters suggested that debtors' attorneys should be required to explain the potential loss of privacy when advising their clients as to whether bankruptcy is an appropriate course of action.

> ***Consent*: The Study Agencies recommend that debtors' affirmative voluntary consent be required in order for creditors, trustees, other parties in interest, and their agents to re-use or re-disclose information reported in the bankruptcy process for purposes unrelated to administering a particular case, except for re-use and re-disclosure of information to law enforcement or other governmental entities.**

This recommendation is based on the assumption that consent is implied for uses of data by private entities related to the bankruptcy process and that explicit consent is required for unrelated uses by private entities. The voluntariness of consent is quite important – individuals should not be coerced into providing their consent for such transfers. This recommendation was supported by most of the public commenters.

Several federal laws provide relevant frameworks for consent requirements for the re-use and re-disclosure of non-public information by private entities. For example, the GLBA provides for certain allowable uses and disclosures of financial information. Beyond those uses, consumers must be provided an opportunity to object to the disclosure of their personal information to non-affiliated entities. The FCRA also allows disclosure for certain "permissible purposes." Beyond those, disclosure may occur only with the consent of the consumer. These re-use and re-disclosure limitations, however, should not restrict private entities from sharing information with governmental entities.

***Access*: The Study Agencies recommend that individual debtors have the right to reasonable access of their file, and the right to challenge the accuracy of information it contains.**

Fair information principles provide that individuals should have reasonable access to the information about them maintained by private entities. Further, in instances where their information is used to facilitate decisions about them, individuals should have the right to request correction of that information.

In a related context, the FCRA assures the accuracy of personal information by providing consumers with the ability to discover whether adverse information is in their files, inspect that information, and demand that all inaccuracies be corrected in a timely manner.

***Security*: The Study Agencies recommend that adequate security standards be in place for private entity access to all information flows in the bankruptcy system.**

The Study Agencies believe that there should be mechanisms to minimize the risk that unauthorized entities gain access to information that could compromise the personal financial information of the debtor, or the integrity of the data. Accordingly, measures should be established and implemented to ensure that only authorized users have access to non-public information and that re-disclosure limitations are followed. The development and implementation of security standards are particularly important in the new networked environment. Therefore, if a new privacy protection structure is established, special emphasis should be placed on limiting access by private entities, through proper security standards, to certain sensitive data, such as Social Security numbers and other personal identifiers.

This recommendation was supported by several public comments, including:

- The Center for Democracy and Technology recommends that the entity collecting the data be required to secure the information it maintains. Not only does the emergence of advanced information systems promote access to government records, but also highlights the weaknesses in the handling of personal information contained in bankruptcy records.

- The Credit Union National Association commented that if bankruptcy information is made available electronically, it may be acceptable to secure the information by use of passwords.

***Accountability*: The Study Agencies recommend the development of mechanisms to ensure that private entities engaging in improper use or re-use of a debtor's personal financial information are held accountable for their actions.**

Fair information principles provide that there should be an enforcement or other mechanism to ensure that private entities are held accountable for noncompliance with the standards regarding notification, use and disclosure, consent, access, and security of information. The accountability mechanism for bankruptcy records should be designed to ensure that private entities that violate the fair information principles are held accountable by legal remedies, disciplinary action, or other effective mechanisms.

The principle of accountability was supported by most of the public commenters, including:

- The Ohio Credit Union League commented that there should be disclosure restrictions on, and penalties for the misuse of, information deemed to be non-public information in the bankruptcy process.