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The “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,” S. 256, in the 109th Congress

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Summary

On February 1, 2005, Senator Grassley introduced S. 256, the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005” (BAPCA), in the 109th Congress, 1st Session. The bill is similar to that passed by the House in the 108th Congress. S. 256 addresses many areas of bankruptcy practice, including consumer filings, small business bankruptcy, tax bankruptcy, ancillary and cross-border cases, financial contract provisions, amendments to chapter 12 governing family farmer reorganization, and health care and employee benefits. This report surveys selected provisions that have been of interest to past Congresses that have considered comparable legislation.

Contents

Introduction	1
Survey of Selected Provisions	1

The “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,” S. 256, in the 109th Congress

Introduction. On February 1, 2005, Senator Grassley introduced S. 256, the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005” (BAPCA), in the 109th Congress, 1st Session.¹ The bill is similar to that passed by the House in the 108th Congress.² Like the House-passed bill from the 108th Congress, S. 256 omits the provision making nondischargeable liability for violation of protective orders and violent protests against providers of “lawful services,” including reproductive health services.

The U.S. Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, is divided into eight chapters — chapters 1, 3, 5, 7, 9, 11, 12, and 13. Chapters 1, 3, and 5 govern general procedures involving management and administration of the bankruptcy estate which are applicable, as specified, to the operative chapters. Chapters 7 through 13, the operative chapters, address the different forms of bankruptcy relief. Chapter 7 governs liquidation; chapter 11 governs business reorganization; chapter 12, family farmer reorganization; and, chapter 13, consumer reorganization.

Also codified under Title 11 of the United States Code are the Rules of Bankruptcy Court and officially authorized bankruptcy forms.

Survey of Selected Provisions. S. 256 addresses many areas of bankruptcy practice, including consumer filings, small business bankruptcy, tax bankruptcy, ancillary and cross-border cases, financial contract provisions, amendments to chapter 12 governing family farmer reorganization, and health care and employee benefits.

The chart below surveys selected provisions that have been of interest to past Congresses that have considered comparable legislation.

¹ 151 CONG. REC. S768 (daily ed. Feb. 1, 2005).

² H.R. 975, 108th Cong., 1st Sess. 2003. *See* H.R. Rept. 108-40, 108th Cong., 1st Sess. (2003).

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
Means test, 11 U.S.C. § § 704, 707:	
<i>Implementation</i>	Would amend 11 U.S.C. § 707 to permit creditors, the trustee, or any party in interest to challenge a debtor's eligibility to file under chapter 7. If indicated, the U.S. trustee must file a statement that the debtor's case is a presumed abuse of chapter 7. § 102.
<i>Definition of "current monthly income"</i>	Excludes Social Security benefits; payments to victims of war crimes or crimes against humanity; and payments to victims of international terrorism . § 102.
<i>Presumed abuse</i>	<p>Debtor presumed to be abusing chapter 7 if current monthly income, excluding allowed deductions, secured debt payments, and priority unsecured debt payments, multiplied by 60, would permit a debtor to pay not less than the lesser of (a) 25% of nonpriority unsecured debt or \$6,000 (or \$100 a month), whichever is greater, or (b) \$10,000.</p> <p>In addition to the means test, the court may find that the debtor's filing was in bad faith or that the totality of the circumstances demonstrates abuse. § 102.</p>

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109 th Congress, 1 st Session.
<p><i>Calculation of permissible monthly living expenses</i></p>	<p>Expenses to be calculated as specified under the National Standards and Local Standards, and the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides. A debtor may also subtract, if reasonably necessary, an allowance of up to 5% of the IRS food and clothing categories.</p> <p>Individualized expenses may include debts incurred to protect the debtor’s family from domestic violence; actual expenses for the care and support of nondependent, elderly, ill or disabled household or family members; private or public school tuition of up to \$1,500 per year; administrative expenses for chapter 13 candidates; average monthly expenses for secured and priority debts; actual expenses for housing and utilities, if reasonably necessary; and, charitable contributions of up to 15% of gross income.³</p> <p>Dollar amounts will be adjusted at three-year intervals in accordance with the Consumer Price Index. § 102.</p>
<p><i>To rebut the presumption of abuse</i></p>	<p>A debtor must demonstrate and justify “special circumstances” in order to adjust current monthly income determination. § 102.</p>

³ Charitable contributions are permissible under current law, 11 U.S.C. § 707(b), and would not be altered by the bill.

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109 th Congress, 1 st Session.
<p><i>Safe harbor exemption from the means test</i></p>	<p>Only the judge, U.S. trustee or bankruptcy administrator may bring a substantial abuse motion if the debtor’s current monthly income is less than the highest national or the applicable State median family income.</p> <p>No party may make a motion to convert the debtor to chapter 13 if the debtor (and spouse combined) have a monthly income equal to or less than the state median household income reported by the Bureau of the Census.</p> <p>The U.S. trustee may also decline to file a motion to convert if the debtor’s monthly income is between 100% and 150% of the national or applicable State median income, and would permit a debtor to pay the lesser of (a) 25% of nonpriority unsecured debt or \$6,000, whichever is greater, or (b) \$10,000. § 102.</p>
<p><i>IRS Living Standards applicable to chapter 13 reorganization plan</i></p>	<p>A chapter 13 debtor’s “disposable income” which may be directed to the repayment plan will be calculated in accordance with IRS Living Standards if the debtor meets the applicable means test for state median family income.</p> <p>A chapter 13 debtor may deduct from plan payments the costs of health insurance; domestic support obligations; charitable contributions of up to 15% of gross income; and expenses necessary to operate a business.</p> <p>§ 102.</p>

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
<i>Attorney sanctions for improper motion</i>	<p>If a panel trustee brings a successful motion for dismissal or conversion, counsel for the debtor may be liable to reimburse the trustee for costs, attorneys' fees, and payment of a civil penalty if the court finds a violation of Bankruptcy Rule 9011.</p> <p>An attorney's signature on the bankruptcy petition certifies that the attorney has performed an investigation into the circumstances that gave rise to the petition; that the attorney has determined that the petition is well grounded in fact and is warranted by existing law; and that the attorney has no knowledge after an inquiry that the information in accompanying schedules is incorrect. § 102.</p>
<i>Creditor sanctions for an improper motion</i>	<p>The court may award the debtor costs for contesting an unsuccessful motion to convert if the court finds that the motion violated Rule 9011, or was intended to coerce the debtor into waiving rights under the Bankruptcy Code. A small business creditor whose claim is less than \$1000 is not liable for sanctions. § 102.</p>
<i>Dismissal of filings by persons convicted of violent crimes or drug trafficking</i>	<p>A crime victim or party in interest may request dismissal of the voluntary bankruptcy case of the convicted debtor. The court must grant the dismissal unless the filing is necessary to satisfy a domestic support obligation. § 102.</p>
Selected consumer provisions	
<i>Mandatory credit counseling</i>	<p>Debtor must undergo credit counseling within 180 days of filing, and may not obtain a discharge until completion of a personal financial management instructional course.</p> <p>The jurisdictional filing requirement may be waived for 30 to 45 days if the debtor certifies exigent circumstances or was denied service from an approved counseling agency.</p> <p>The U.S. trustee or bankruptcy administrator for the judicial district is directed to oversee and approve nonprofit budget and credit counseling agencies. § 106.</p>

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
<i>Promotion of alternative dispute resolution</i>	A creditor's allowable claim may be reduced by 20% if a court finds that the creditor "unreasonably refused to negotiate a reasonable alternative repayment schedule proposed by an approved credit counseling agency that provides repayment of at least 60% of the debt, and the debtor can prove by "clear and convincing" evidence that a creditor unreasonably refused to consider the offer." § 201.
<i>Reaffirmation agreements</i>	Imposes enhanced requirements for approval of a reaffirmation agreement when the debtor is not represented by counsel but exempts credit unions from creditor disclosure requirements; requires U.S. Attorney and FBI to investigate abusive reaffirmation practices. § 203.
<i>Preserving defenses against predatory lenders</i>	Amends 11 U.S.C. § 363 to add a new subsection preserving defenses that a party to a consumer credit transaction may have if the contract is sold by a debtor in bankruptcy. § 204.
<i>GAO reaffirmation study</i>	Requires a study of reaffirmation practices and a report to Congress. § 205.
<i>Domestic support owed to individuals and government units made first priority</i>	<p>Would move domestic support obligations to first priority, which is currently allocated to administrative expenses of the bankruptcy estate. Administrative expenses would become second priority.</p> <p>However, if a trustee is appointed under chapter 7, 11, 12, or 13, the trustee's expenses may be paid before domestic support. § 212.</p>
<i>Trustee notification of child support claim holders</i>	Would direct the trustee to notify a priority child support recipient of the existence of a state child support enforcement agency, and, upon discharge, the existence of nondischargeable and reaffirmed debt. § 219.
<i>Priority assigned to claims for liability incurred by the debtor DUI</i>	A new § 507 tenth priority is created for unsecured claims for liability incurred by a debtor from operating a vessel while under the influence of alcohol or drugs. Claims of this nature are also nondischargeable. § 223.

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
<i>Retirement savings exemption broadened</i>	Would clarify and expand the law to provide that retirement accounts that are tax exempt under the Internal Revenue Code are exempted from the debtor's estate up to a \$1,000,000 cap, which may be increased if "the interests of justice so require." § 224.
<i>Exemption for saving for postsecondary education</i>	Subject to certain IRS requirements, excludes funds up to \$5000 per specified beneficiary made within a year of filing in an education individual retirement account and/or any funds used to purchase a tuition credit or certificate under a qualified state tuition program. §225.
<i>Protection of nonpublic personal information and consumer privacy ombudsman</i>	Prohibits the transfer by the debtor of personal customer information unless approved by the court. Provides for the appointment of a consumer privacy ombudsman if a debtor wishes to sell or lease such information. §§ 231,232.
<i>Prohibition on disclosure of identify of minor children</i>	Debtor may not be required to disclose the name of a minor child in public records. U.S. trustee or auditor may have access to nonpublic records maintained by the court. § 233.
<i>Lien stripping on security interests in consumer goods (cramdown)</i>	Chapter 13 debtors would not be permitted to bifurcate security interests in an automobile purchased within 910 days (2½ years) before the filing; or in other consumer goods purchased within 1 year of the filing. § 306.

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
<i>Homestead exemption</i>	<p>Definition of “debtor’s residence” includes mobile homes or trailers. § 306.</p> <p>Imposes lengthened residency requirements to qualify for state exemption. § 307.</p> <p>Reduces the value of the exemption if the value is attributable to property that the debtor disposed of within 10 years of bankruptcy with the intent to hinder, delay or defraud a creditor. § 308.</p> <p>Debtors’ electing a state homestead exemption may not exempt any interest acquired within 1215 days (3.3 years) of filing which exceeds in the aggregate \$125,000, unless the value in excess of that amount occurs from a transfer of residences within the same state. Exempts family farmers from the limit. Limitations may not apply to amounts reasonably necessary to support the debtor and any dependents.</p> <p>Imposes a firm \$125,000 cap on an individual who is convicted of specified felonies (including violations of federal securities laws) or who commits criminal acts, intentional torts, or willful or reckless misconduct that caused serious physical injury or death within 5 years preceding the bankruptcy filing. § 322.</p>
<i>Residential lease excepted from the automatic stay</i>	<p>Adds new provisions permitting a landlord/lessor to bypass the automatic stay to continue with a residential eviction of a tenant/lessee. § 311.</p>
<i>Restrictions on chapter 7 and chapter 13 filings.</i>	<p>Extends time within which a debtor who has received a chapter 7 discharge may not receive another from 6 to 8 years.</p> <p>Amends chapter 13 to disallow discharge if the debtor filed under chapters 7, 11, or 12 within 4 years prior to the 13 filing, or under chapter 13, within 2 years of the subsequent filing. § 312.</p>

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
<i>Definition of “household goods”</i>	Defines household goods to include clothing, furniture, appliances, 1 radio, 1 television, 1 VCR, other electronic entertainment equipment with a market value of under \$500, linens, china, crockery, kitchenware, educational materials used by minor dependent children, medical equipment and supplies, furniture used exclusively by minors and disabled or elderly dependents, personal effects, 1 personal computer and antiques and jewelry with a value less than \$500. § 313.
<i>Debtor’s duty to disclose tax filings.</i>	Modifies debtor filing requirements under 11 U.S.C. § 521 to include federal tax returns. § 315.
<i>Plan duration</i>	Chapter 13 plans to have 5 year duration for families whose monthly income is not less than the highest state median family income. Families below the highest state median income would have 3 year plans. § 318.
<i>Wages withheld by an employer for contributions to employee benefit plans</i>	Withheld wages for contributions to employee benefit plans would be excluded from the debtor (employer’s) estate. § 323.
<i>Valuation of collateral</i>	A secured creditor’s allowable claim would be the retail cost to replace the item without deduction for costs of sale or marketing. Personal property’s replacement value would be the price a retail merchant would charge for like items. § 327.
<i>Wages and benefits awarded as back pay</i>	Makes specified prepetition and postpetition wages and benefits awarded as back pay in a judicial proceeding a high-priority administrative expense. § 329.
<i>Audits</i>	The Attorney General is directed to establish a procedure to ensure random audits of no less than 1 out of every 250 individual filings; the U.S. trustee is authorized to enter into contracts with auditors, and to take action when misstatements in the debtor’s petition and schedules are identified. § 603.

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
Nondischargeable consumer debts	
<i>Debts to government units for domestic support</i>	Defines “domestic support obligation” to include debts owed to or recoverable by a governmental unit. §§ 211, 215.
<i>Expanded definition of student loan</i>	Adds qualified educational loans as defined under § 221 of the IRC to those educational loans that are currently nondischargeable. § 220.
<i>Loan repayments to debtor’s retirement savings or thrift plan</i>	Makes nondischargeable, i.e., allows an employer to continue to withhold, loan repayments to debtor’s savings/retirement plan from debtor’s wages. § 224(c).
<i>Consumer debts presumed fraudulent</i>	Consumer debts owed to a single creditor for more than \$550 for “luxury goods” incurred within 90 days of filing; and cash advances for more than \$750 under an open end credit plan within 70 days of filing are presumed to be nondischargeable. § 310.
<i>Debts incurred to pay nondischargeable debts are nondischargeable</i>	Debts incurred to a third party to pay a tax to a state or local government unit become nondischargeable. § 314.
<i>Expanded definition of nondischargeable condominium and homeowners association fees</i>	Expands the types of post-petition condo and homeowners association fees that are nondischargeable by omitting requirement that in order to be nondischargeable the debtor must reside in the residence postpetition. § 412.
<i>FEC penalties nondischargeable</i>	Fines and penalties under federal election law are made nondischargeable. § 1235.

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
Consumer credit disclosure	
<i>Amendments to the Truth in Lending Act (TILA)</i>	TILA amended to require enhanced minimum payment disclosures under an open end credit plan; enhanced disclosures regarding the tax deductibility of credit extensions which exceed the fair market value of a dwelling for credit transactions secured by the consumer's dwelling; disclosures related to introductory "teaser" rates; disclosures related to Internet-based open end credit solicitations; and disclosures related to late payment deadlines and penalties. TILA would be amended to prohibit termination of a credit account because the consumer has not incurred finance charges. §§ 1301-1306.
<i>Study of bankruptcy impact of credit extended to dependent students</i>	The Board of Governors of the Federal Reserve is directed to study bankruptcy impact of credit extensions to students in postsecondary school. § 1308.
<i>Consumer credit studies</i>	The Board of Governors of the Federal Reserve is directed to study existing protections for consumers for unauthorized use of a dual use debit card. § 1307.
Business bankruptcy	
<i>Increased employee wage and benefit priority</i>	Increases the high-priority categories for employee wages and benefits from \$4925 earned within 90 days of filing to \$10,000 earned within 180 days of filing. § 1401.
<i>Trustee to appoint retiree committees</i>	Amends 11 U.S.C. § 1114 to provide that in the event that a retiree committee is appointed, the appointment of members will be made by the U.S. Trustee, not the court. § 447.
<i>Retiree insurance benefits</i>	Amends 11 U.S.C. § 1114 to allow the court to reinstate retiree benefits that are modified by a debtor within 180 days <i>prior</i> to the bankruptcy filing unless the court finds that the balance of equities supports such modifications. § 1404.
<i>Avoidable preferences</i>	Amends 11 U.S.C. § 547 to liberalize the rules for defending against an avoidable transfer in the ordinary course of business; creates a new preference exception to aggregate transfers of less than \$5,000. § 409.

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
<i>Fraudulent transfers</i>	Amends 11 U.S.C. § 548 to increase the time period for setting aside certain fraudulent transactions from one year to two and expressly includes certain transfers made pursuant to an employment contract. § 1402.
<i>Small business bankruptcy</i>	<p>Subtitle B of Title IV has provisions defining a “small business” for chapter 11 purposes as one with debts under \$2,000,000. The debtor’s period of exclusivity to file a reorganization plan is 180 days. A plan and disclosure statement must be filed within 300 days of the initial filing.</p> <p>A plan must be confirmed within 45 days of filing in bankruptcy. § 438.</p> <p>Provisions require establishment of uniform accounting and reporting standards for small businesses. Grounds for appointment of a trustee and the trustee’s general supervisory duties are expanded, as are grounds for dismissal or conversion of the case. §§ 431-442.</p>
<i>Health care business bankruptcy</i>	<p>Defines a broad variety of service-providing health care business, including skilled nursing facilities, assisted-living facilities and homes for the aged.</p> <p>Provides for the disposition and disposal of patient records and for the costs of closing the facility, including the transfer of patients. Permits the court to appoint a patient care ombudsman to monitor patient care and represent the interest of patients. Excludes participation in medicare from the automatic stay. §§ 1101- 1106.</p>
<i>Trustee to appoint retiree committees</i>	Amends 11 U.S.C. § 1114 to provide that in the event that a retiree committee is appointed, the appointment of members will be made by the U.S. Trustee, not the court. § 447.

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
<i>Chapter 11 corporate nondischargeability</i>	Confirmation of a plan under chapter 11 would not discharge a corporate debtor from debts under 11 U.S.C. § 523(a)(2) that are owed to a domestic governmental unit for property obtained by false pretenses or representations; or owed to an individual under subchapter III of chapter 37 of Title 31, U.S.C.; or any debt for taxes for which the debtor willfully attempted to evade or made a fraudulent return. § 708.
<i>Title X dealing with chapter 12 family farmers</i>	<p>Makes chapter 12 permanent. Measure to be effective upon enactment; includes jurisdictional debt limit in amount subject to readjustment in accordance with CPI; subordinates certain high priority unsecured claims owed to the government to nonpriority claims. Measure to take effect upon enactment, but will not apply to pending cases. §§ 1001-1003.</p> <p>Raises jurisdictional debt limit of family farmers to \$3,237,000 and lowers percentage requirement of income derived from farming and expands the time frame for measuring farm income from one to three years. §§ 1004, 1005.</p> <p>Prohibits retroactive assessment of disposable income. § 1006</p> <p>Amends chapter 12 to include “family fishermen.” § 1007.</p>

Selected Provisions	S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 109th Congress, 1st Session.
General provisions	
<i>In forma pauperis filings</i>	Directs the Judicial Conference to prescribe procedures for waiving bankruptcy fees for an individual debtor under chapter 7 whose income is less than 150% of the official poverty line and who is unable to pay the fee in installments. § 418.
<i>Bankruptcy judgeships</i>	Creates new temporary bankruptcy judgeships for designated districts. § 1223.
<i>Procedure to certify appeals from a bankruptcy court to a court of appeals</i>	Establishes procedures to permit direct appeals from a bankruptcy court to a court of appeals if the decision involves a substantial question of law for which there is no controlling decision; a question requiring resolution of conflicting decisions; or, a matter of public importance. §1233.
<i>Involuntary Bankruptcy</i>	Makes technical corrections made to 11 U.S.C. § 303 dealing with involuntary bankruptcy. Measure applies upon enactment, but not to pending cases. § 1234.
<i>General effective date</i>	Subject to express provisions otherwise in specified titles, the new law will take effect 180 days after enactment and will not apply to cases commenced before the effective date. § 1501.