title before that date, see section 12 of Pub. L. 100–597, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 944. Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and any creditor, whether or not—

(1) a proof of such creditor's claim is filed or deemed filed under section 501 of this title;

(2) such claim is allowed under section 502 of this title; or

(3) such creditor has accepted the plan.

(b) Except as provided in subsection (c) of this section, the debtor is discharged from all debts as of the time when—

(1) the plan is confirmed;

(2) the debtor deposits any consideration to be distributed under the plan with a disbursing agent appointed by the court; and

(3) the court has determined—

(A) that any security so deposited will constitute, after distribution, a valid legal obligation of the debtor; and

(B) that any provision made to pay or secure payment of such obligation is valid.

(c) The debtor is not discharged under subsection (b) of this section from any debt—

(1) excepted from discharge by the plan or order confirming the plan; or

(2) owed to an entity that, before confirmation of the plan, had neither notice nor actual knowledge of the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2624.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

[Section 947] Subsection (a) [enacted as section 944(a)] makes the provisions of a confirmed plan binding on the debtor and creditors. It is derived from section 95(a) of chapter 9 [section 415(a) of former title 11].

Subsections (b) and (c) [enacted as section 944(b) and (c)] provide for the discharge of a municipality. The discharge is essentially the same as that granted under section 95(b) of the Bankruptcy Act [section 415(b) of former title 11].

§ 945. Continuing jurisdiction and closing of the case

(a) The court may retain jurisdiction over the case for such period of time as is necessary for the successful implementation of the plan.

(b) Except as provided in subsection (a) of this section, the court shall close the case when administration of the case has been completed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2625; Pub. L. 98–353, title III, § 498, July 10, 1984, 98 Stat. 384.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 948 [enacted as section 945] permits the court to retain jurisdiction over the case to ensure successful execution of the plan. The provision is the same as that found in section 96(e) of Chapter 9 of the present Act [section 416(e) of former title 11].

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 substituted ''implementation'' for ''execution''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 946. Effect of exchange of securities before the date of the filing of the petition

The exchange of a new security under the plan for a claim covered by the plan, whether such exchange occurred before or after the date of the filing of the petition, does not limit or impair the effectiveness of the plan or of any provision of this chapter. The amount and number specified in section 1126(c) of this title include the amount and number of claims formerly held by a creditor that has participated in any such exchange.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2625.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment deletes section 950 of the Senate amendment as unnecessary. The constitutionality of chapter 9 of the House amendment is beyond doubt.

SENATE REPORT NO. 95–989

[Section 949] This section [enacted as section 946], which follows section 97 of current law [section 417 of former title 11], permits an exchange of a security before the case is filed to constitute an acceptance of the plan if the exchange was under a proposal that later becomes the plan.

CHAPTER 11—REORGANIZATION

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

Sec.
1101. Definitions for this chapter.
1102. Creditors' and equity security holders' committees.
1103. Powers and duties of committees.
1104. Appointment of trustee or examiner.
1105. Termination of trustee's appointment.
1106. Duties of trustee and examiner.
1107. Rights, powers, and duties of debtor in possession.
1108. Authorization to operate business.
1109. Right to be heard.
1110. Aircraft equipment and vessels.
1111. Claims and interests.
1112. Conversion or dismissal.
1113. Rejection of collective bargaining agreements.
1114. Payment of insurance benefits to retired employees.
1115. Property of the estate.
1116. Duties of trustee or debtor in possession in small business cases.

SUBCHAPTER II—THE PLAN

1121. Who may file a plan.
1122. Classification of claims or interests.
1123. Contents of plan.
1124. Impairment of claims or interests.
1125. Postpetition disclosure and solicitation.
1126. Acceptance of plan.
1127. Modification of plan.
1128. Confirmation hearing.
1129. Confirmation of plan.

SUBCHAPTER III—POSTCONFIRMATION MATTERS

1141. Effect of confirmation.
1142. Implementation of plan.

Sec.
1143. Distribution.
1144. Revocation of an order of confirmation.
1145. Exemption from securities laws.
1146. Special tax provisions.

SUBCHAPTER IV—RAILROAD REORGANIZATION

1161. Inapplicability of other sections.
1162. Definition.
1163. Appointment of trustee.
1164. Right to be heard.
1165. Protection of the public interest.
1166. Effect of subtitle IV of title 49 and of Federal, State, or local regulations.
1167. Collective bargaining agreements.
1168. Rolling stock equipment.
1169. Effect of rejection of lease of railroad line.
1170. Abandonment of railroad line.
1171. Priority claims.
1172. Contents of plan.
1173. Confirmation of plan.
1174. Liquidation.

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Chapter 11 of the House amendment is derived in large part from chapter 11 as contained in the House bill. Unlike chapter 11 of the Senate amendment, chapter 11 of the House amendment does not represent an extension of chapter X of current law [chapter 10 of former title 11] or any other chapter of the Bankruptcy Act [former title 11]. Rather chapter 11 of the House amendment takes a new approach consolidating subjects dealt with under chapters VIII, X, XI, and XII of the Bankruptcy Act [chapters 8, 10, 11, and 12 of former title 11]. The new consolidated chapter 11 contains no special procedure for companies with public debt or equity security holders. Instead, factors such as the standard to be applied to solicitation of acceptances of a plan of reorganization are left to be determined by the court on a case-by-case basis. In order to insure that adequate investigation of the debtor is conducted to determine fraud or wrongdoing on the part of present management, an examiner is required to be appointed in all cases in which the debtor's fixed, liquidated, and unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5 million. This should adequately represent the needs of public security holders in most cases. However, in addition, section 1109 of the House amendment enables both the Securities and Exchange Commission and any party in interest who is creditor, equity security holder, indenture trustee, or any committee representing creditors or equity security holders to raise and appear and be heard on any issue in a case under chapter 11. This will enable the bankruptcy court to evaluate all sides of a position and to determine the public interest. This approach is sharply contrasted to that under chapter X of present law in which the public interest is often determined only in terms of the interest of public security holders. The advisory role of the Securities and Exchange Commission will enable the court to balance the needs of public security holders against equally important public needs relating to the economy, such as employment and production, and other factors such as the public health and safety of the people or protection of the national interest. In this context, the new chapter 11 deletes archaic rules contained in certain chapters of present law such as the requirement of an approval hearing and the prohibition of prepetition solicitation. Such requirements were written in an age before the enactment of the Trust Indenture Act [15 U.S.C. 77aaa et seq.] and the development of securities laws had occurred. The benefits of these provisions have long been outlived but the detriment of the provisions served to frustrate and delay effective reorganization in those chapters of the Bankruptcy Act in which such provisions applied. Chapter 11 thus represents a much needed revision of reorganization laws. A brief discussion of the history of this important achievement is useful to an appreciation of the monumental reform embraced in chapter 11.

Under the existing Bankruptcy Act [former title 11] debtors seeking reorganization may choose among three reorganization chapters, chapter X, chapter XI, and chapter XII [chapters 10, 11, and 12 of former title 11]. Individuals and partnerships may file under chapter XI or, if they own property encumbered by mortgage liens, they may file under chapter XII. A corporation may file under either chapter X or chapter XI, but is ineligible to file under chapter XII. Chapter X was designed to facilitate the pervasive reorganization of corporations whose creditors include holders of publicly issued debt securities. Chapter XI, on the other hand, was designed to permit smaller enterprises to negotiate composition or extension plans with their unsecured creditors. The essential differences between chapters X and XI are as follows. Chapter X mandates that, first, an independent trustee be appointed and assume management control from the officers and directors of the debtor corporation; second, the Securities and Exchange Commission must be afforded an opportunity to participate both as an adviser to the court and as a representative of the interests of public security holders; third, the court must approve any proposed plan of reorganization, and prior to such approval, acceptances of creditors and shareholders may not be solicited; fourth, the court must apply the absolute priority rule; and fifth, the court has the power to affect, and grant the debtor a discharge in respect of, all types of claims, whether secured or unsecured and whether arising by reason of fraud or breach of contract.

The Senate amendment consolidates chapters X, XI, and XII [chapters 10, 11, and 12 of former title 11], but establishes a separate and distinct reorganization procedure for ''public companies.'' The special provisions applicable to ''public companies'' are tantamount to the codification of chapter X of the existing Bankruptcy Act and thus result in the creation of a ''two-track system.'' The narrow definition of the term ''public company'' would require many businesses which could have been rehabilitated under chapter XI to instead use the more cumbersome procedures of chapter X, whether needed or not.

The special provisions of the Senate amendment applicable to a ''public company'' are as follows:

(a) Section 1101(3) defines a ''public company'' as a debtor who, within 12 months prior to the filing of the petition, had outstanding $5 million or more in debt and had not less than 1000 security holders;

(b) Section 1104(a) requires the appointment of a disinterested trustee irrespective of whether creditors support such appointment and whether there is cause for such appointment;

(c) Section 1125(f) prohibits the solicitation of acceptances of a plan of reorganization prior to court approval of such plan even though the solicitation complies with all applicable securities laws;

(d) Section 1128(a) requires the court to conduct a hearing on any plan of reorganization proposed by the trustee or any other party;

(e) Section 1128(b) requires the court to refer any plans ''worthy of consideration'' to the Securities and Exchange Commission for their examination and report, prior to court approval of a plan; and

(f) Section 1128(c) and section 1130(a)(7) requires the court to approve a plan or plans which are ''fair and equitable'' and comply with the other provisions of chapter 11.

The record of the Senate hearings on S. 2266 and the House hearings on H.R. 8200 is replete with evidence of the failure of the reorganization provisions of the existing Bankruptcy Act [former title 11] to meet the needs of insolvent corporations in today's business environment. Chapter X [chapter 10 of former title 11] was designed to impose rigid and formalized procedures upon the reorganization of corporations and, although designed to protect public creditors, has often worked to the detriment of such creditors. As the House report has noted:

The negative results under chapter X [chapter 10 of former title 11] have resulted from the stilted procedures, under which management is always ousted and replaced by an independent trustee, the courts and the Securities and Exchange Commission examine the plan of reorganization in great detail, no matter how long that takes, and the court values the business, a time consuming and inherently uncertain procedure.

The House amendment deletes the ''public company'' exception, because it would codify the well recognized infirmities of chapter X [chapter 10 of former title 11], because it would extend the chapter X approach to a large number of new cases without regard to whether the rigid and formalized procedures of chapter X are needed, and because it is predicated upon the myth that provisions similar to those contained in chapter X are necessary for the protection of public investors. Bankruptcy practice in large reorganization cases has also changed substantially in the 40 years since the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] was enacted. This change is, in large part, attributable to the pervasive effect of the Federal securities laws and the extraordinary success of the Securities and Exchange Commission in sensitizing both management and members of the bar to the need for full disclosure and fair dealing in transactions involving publicly held securities.

It is important to note that Congress passed the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] prior to enactment of the Trust Indenture Act of 1939 [15 U.S.C. section 77aaa et seq.] and prior to the definition and enforcement of the disclosure requirements of the Securities Act of 1933 [15 U.S.C. 77a et seq.] and the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.]. The judgments made by the 75th Congress in enacting the Chandler Act are not equally applicable to the financial markets of 1978. First of all, most public debenture holders are neither weak nor unsophisticated investors. In most cases, a significant portion of the holders of publicly issued debentures are sophisticated institutions, acting for their own account or as trustees for investment funds, pension funds, or private trusts. In addition, debenture holders, sophisticated, and unsophisticated alike, are represented by indenture trustees, qualified under section 77ggg of the Trust Indenture Act [probably should be ''section 307'' which is 15 U.S.C. 77ggg]. Given the high standard of care to which indenture trustees are bound, they are invariably active and sophisticated participants in efforts to rehabilitate corporate debtors in distress.

It is also important to note that in 1938 when the Chandler Act [June 22, 1938, ch. 575, 52 Stat. 883, amending former title 11] was enacted, public investors commonly held senior, not subordinated, debentures and corporations were very often privately owned. In this environment, the absolute priority rule protected debenture holders from an erosion of their position in favor of equity holders. Today, however, if there are public security holders in a case, they are likely to be holders of subordinated debentures and equity and thus the application of the absolute priority rule under chapter X [chapter 10 of former title 11] leads to the exclusion, rather than the protection, of the public.

The primary problem posed by chapter X [chapter 10 of former title 11] is delay. The modern corporation is a complex and multifaceted entity. Most corporations do not have a significant market share of the lines of business in which they compete. The success, and even the survival, of a corporation in contemporary markets depends on three elements: First, the ability to attract and hold skilled management; second, the ability to obtain credit; and third, the corporation's ability to project to the public an image of vitality. Over and over again, it is demonstrated that corporations which must avail themselves of the provisions of the Bankruptcy Act [former title 11] suffer appreciable deterioration if they are caught in a chapter X proceeding for any substantial period of time.

There are exceptions to this rule. For example, King Resources filed a chapter X [chapter 10 of former title 11] petition in the District of Colorado and it emerged from such proceeding as a solvent corporation. The debtor's new found solvency was not, however, so much attributable to a brilliant rehabilitation program conceived by a trustee, but rather to a substantial appreciation in the value of the debtor's oil and uranium properties during the pendency of the proceedings.

Likewise, Equity Funding is always cited as an example of a successful chapter X [chapter 10 of former title 11] case. But it should be noted that in Equity Funding there was no question about retaining existing management. Rather, Equity Funding involved fraud on a grand scale. Under the House amendment with the deletion of the mandatory appointment of a trustee in cases involving ''public companies,'' a bankruptcy judge, in a case like Equity Funding, would presumably have little difficulty in concluding that a trustee should be appointed under section 1104(6).

While I will not undertake to list the chapter X [chapter 10 of former title 11] failures, it is important to note a number of cases involving corporations which would be ''public companies'' under the Senate amendment which have successfully skirted the shoals of chapter X and confirmed plans of arrangement in chapter XI [chapter 11 of former title 11]. Among these are Daylin, Inc. (''Daylin'') and Colwell Mortgage Investors (''Colwell'').

Daylin filed a chapter XI [chapter 11 of former title 11] petition on February 26, 1975, and confirmed its plan of arrangement on October 20, 1976. The success of its turnaround is best evidenced by the fact that it had consolidated net income of $6,473,000 for the first three quarters of the 1978 fiscal year.

Perhaps the best example of the contrast between chapter XI and chapter X [chapters 11 and 10 of former title 11] is the recent case of *In re Colwell Mortgage Investors*. Colwell negotiated a recapitalization plan with its institutional creditors, filed a proxy statement with the Securities and Exchange Commission, and solicited consents of its creditors and shareholders prior to filing its chapter XI petition. Thereafter, Colwell confirmed its plan of arrangement 41 days after filing its chapter XI petition. This result would have been impossible under the Senate amendment since Colwell would have been a ''public company.''

There are a number of other corporations with publicly held debt which have successfully reorganized under chapter XI [chapter 11 of former title 11]. Among these are National Mortgage Fund (NMF), which filed a chapter XI petition in the northern district of Ohio on June 30, 1976. Prior to commencement of the chapter XI proceeding, NMF filed a proxy statement with the Securities and Exchange Commission and solicited acceptances to a proposed plan of arrangement. The NMF plan was subsequently confirmed on December 14, 1976. The Securities and Exchange Commission did not file a motion under section 328 of the Bankruptcy Act [section 728 of former title 11] to transfer the case to chapter X [chapter 10 of former title 11] and a transfer motion which was filed by private parties was denied by the court.

While there are other examples of large publicly held companies which have successfully reorganized in chapter XI [chapter 11 of former title 11], including Esgrow, Inc. (C.D.Cal. 73–02510), Sherwood Diversified Services Inc. (S.D.N.Y. 73–B–213), and United Merchants and Manufacturers, Inc. (S.D.N.Y. 77–B–1513), the numerous successful chapter XI cases demonstrate two points: first, the complicated and time-consuming provisions of chapter X [chapter 10 of former title 11] are not always necessary for the successful reorganization of a company with publicly held debt, and second, the more flexible provisions in chapter XI permit a debtor to obtain relief under the Bankruptcy Act [former title 11] in significantly less time than is required to confirm a plan of reorganization under chapter X of the Bankruptcy Act.

One cannot overemphasize the advantages of speed and simplicity to both creditors and debtors. Chapter XI [chapter 11 of former title 11] allows a debtor to ne-

gotiate a plan outside of court and, having reached a settlement with a majority in number and amount of each class of creditors, permits the debtor to bind all unsecured creditors to the terms of the arrangement. From the perspective of creditors, early confirmation of a plan of arrangement: first, generally reduces administrative expenses which have priority over the claims of unsecured creditors; second, permits creditors to receive prompt distributions on their claims with respect to which interest does not accrue after the filing date; and third, increases the ultimate recovery on creditor claims by minimizing the adverse effect on the business which often accompanies efforts to operate an enterprise under the protection of the Bankruptcy Act [former title 11].

Although chapter XI [chapter 11 of former title 11] offers the corporate debtor flexibility and continuity of management, successful rehabilitation under chapter XI is often impossible for a number of reasons. First, chapter XI does not permit a debtor to ''affect'' secured creditors or shareholders, in the absence of their consent. Second, whereas a debtor corporation in chapter X [chapter 10 of former title 11], upon the consummation of the plan or reorganization, is discharged from all its debts and liabilities, a corporation in chapter XI may not be able to get a discharge in respect of certain kinds of claims including fraud claims, even in cases where the debtor is being operated under new management. The language of chapter 11 in the House amendment solves these problems and thus increases the utility and flexibility of the new chapter 11, as compared to chapter XI of the existing Bankruptcy Act [chapter 11 of former title 11].

Those who would urge the adoption of a two-track system have two major obstacles to meet. First, the practical experience of those involved in business rehabilitation cases, practitioners, debtors, and bankruptcy judges, has been that the more simple and expeditious procedures of chapter XI [chapter 11 of former title 11] are appropriate in the great majority of cases. While attempts have been made to convince the courts that a chapter X [chapter 10 of former title 11] proceeding is required in every case where public debt is present, the courts have categorically rejected such arguments. Second, chapter X has been far from a success. Of the 991 chapter X cases filed during the period of January 1, 1967, through December 31, 1977, only 664 have been terminated. Of those cases recorded as ''terminated,'' only 140 resulted in consummated plans. This 21 percent success rate suggests one of the reasons for the unpopularity of chapter X.

In summary, it has been the experience of the great majority of those who have testified before the Senate and House subcommittees that a consolidated approach to business rehabilitation is warranted. Such approach is adopted in the House amendment.

Having discussed the general reasons why chapter 11 of the House amendment is sorely needed, a brief discussion of the differences between the House bill, Senate amendment, and the House amendment, is in order. Since chapter 11 of the House amendment rejects the concept of separate treatment for a public company, sections 1101(3), 1104(a), 1125(f), 1128, and 1130(a)(7) of the Senate amendment have been deleted.

AMENDMENTS

2005—Pub. L. 109–8, title III, § 321(a)(2), title IV, § 436(b), Apr. 20, 2005, 119 Stat. 95, 113, added items 1115 and 1116.

1988—Pub. L. 100–334, § 2(c), June 16, 1988, 102 Stat. 613, added item 1114.

1984—Pub. L. 98–353, title III, §§ 514(b), 541(b), July 10, 1984, 98 Stat. 387, 391, added item 1113 and substituted ''Implementation'' for ''Execution'' in item 1142.

1983—Pub. L. 97–449, § 5(a)(1), Jan. 12, 1983, 96 Stat. 2442, substituted ''subtitle IV of title 49'' for ''Interstate Commerce Act'' in item 1166.

SUBCHAPTER I—OFFICERS AND ADMINISTRATION

§ 1101. Definitions for this chapter

In this chapter—

(1) ''debtor in possession'' means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case;

(2) ''substantial consummation'' means—

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2626.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section contains definitions of three terms that are used in chapter 11. Paragraph (1) defines debtor in possession to mean the debtor, except when a trustee who has qualified in serving in the case.

Paragraph (2), derived from section 229a of current law [section 629(a) of former title 11], defines substantial consummation. Substantial consummation of a plan occurs when transfer of all or substantially all of the property proposed by the plan to be transferred is actually transferred; when the debtor (or its successor) has assumed the business of the debtor or the management of all or substantially all of the property dealt with by the plan; and when distribution under the plan has commenced.

Paragraph (3) defines for purposes of Chapter 11 a public company to mean ''a debtor who, within 12 months prior to the filing of a petition for relief under this chapter, had outstanding liabilities of $5 million or more, exclusive of liabilities for goods, services, or taxes and not less than 1,000 security holders.'' There are, as noted, special safeguards for public investors related to the reorganization of a public company, as so defined.

Both requirements must be met: liabilities, excluding tax obligations and trade liabilities, must be $5 million or more; and (2) the number of holders of securities, debt or equity, or both, must be not less than 1,000. The amount and number are to be determined as of any time within 12 months prior to the filing of the petition for reorganization.

§ 1102. Creditors' and equity security holders' committees

(a)(1) Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

(2) On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders. The United States trustee shall appoint any such committee.

(3) On request of a party in interest in a case in which the debtor is a small business debtor

and for cause, the court may order that a committee of creditors not be appointed.

(4) On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of a committee appointed under this subsection, if the court determines that the change is necessary to ensure adequate representation of creditors or equity security holders. The court may order the United States trustee to increase the number of members of a committee to include a creditor that is a small business concern (as described in section 3(a)(1) of the Small Business Act), if the court determines that the creditor holds claims (of the kind represented by the committee) the aggregate amount of which, in comparison to the annual gross revenue of that creditor, is disproportionately large.

(b)(1) A committee of creditors appointed under subsection (a) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee, or of the members of a committee organized by creditors before the commencement of the case under this chapter, if such committee was fairly chosen and is representative of the different kinds of claims to be represented.

(2) A committee of equity security holders appointed under subsection (a)(2) of this section shall ordinarily consist of the persons, willing to serve, that hold the seven largest amounts of equity securities of the debtor of the kinds represented on such committee.

(3) A committee appointed under subsection (a) shall—

(A) provide access to information for creditors who—

(i) hold claims of the kind represented by that committee; and

(ii) are not appointed to the committee;

(B) solicit and receive comments from the creditors described in subparagraph (A); and

(C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2626; Pub. L. 98–353, title III, § 499, July 10, 1984, 98 Stat. 384; Pub. L. 99–554, title II, § 221, Oct. 27, 1986, 100 Stat. 3101; Pub. L. 103–394, title II, § 217(b), Oct. 22, 1994, 108 Stat. 4127; Pub. L. 109–8, title IV, §§ 405, 432(b), Apr. 20, 2005, 119 Stat. 105, 110.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1102(a) of the House amendment adopts a compromise between the House bill and Senate amendment requiring appointment of a committee of creditors holding unsecured claims by the court; the alternative of creditor committee election is rejected.

Section 1102(b) of the House amendment represents a compromise between the House bill and the Senate amendment by preventing the appointment of creditors who are unwilling to serve on a creditors committee.

SENATE REPORT NO. 95–989

This section provides for the election and appointment of committees. Subsection (c) provides that this section does not apply in case of a public company, as to which a trustee, appointed under section 1104(a) will have responsibility to administer the estate and to formulate a plan as provided in section 1106(a).

There is no need for the election or appointment of committees for which the appointment of a trustee is mandatory. In the case of a public company there are likely to be several committees, each representing a different class of security holders and seeking authority to retain accountants, lawyers, and other experts, who will expect to be paid. If in the case of a public company creditors or stockholders wish to organize committees, they may do so, as authorized under section 1109(a). Compensation and reimbursement will be allowed for contributions to the reorganization pursuant to section 503(b) (3) and (4).

HOUSE REPORT NO. 95–595

This section provides for the appointment of creditors' and equity security holders' committees, which will be the primary negotiating bodies for the formulation of the plan of reorganization. They will represent the various classes of creditors and equity security holders from which they are selected. They will also provide supervision of the debtor in possession and of the trustee, and will protect their constituents' interests.

Subsection (a) requires the court to appoint at least one committee. That committee is to be composed of creditors holding unsecured claims. The court is authorized to appoint such additional committees as are necessary to assure adequate representation of creditors and equity security holders. The provision will be relied upon in cases in which the debtor proposes to affect several classes of debt or equity holders under the plan, and in which they need representation.

Subsection (b) contains precatory language directing the court to appoint the persons holding the seven largest claims against the debtor of the kinds represented on a creditors' committee, or the members of a prepetition committee organized by creditors before the order for relief under chapter 11. The court may continue prepetition committee members only if the committee was fairly chosen and is representative of the different kinds of claims to be represented. The court is restricted to the appointment of persons in order to exclude governmental holders of claims or interests.

Paragraph (2) of subsection (b) requires similar treatment for equity security holders' committees. The seven largest holders are normally to be appointed, but the language is only precatory.

Subsection (c) authorizes the court, on request of a party in interest, to change the size or the membership of a creditors' or equity security holders' committee if the membership of the committee is not representative of the different kinds of claims or interests to be represented. This subsection is intended, along with the nonbinding nature of subsection (b), to afford the court latitude in appointing a committee that is manageable and representative in light of the circumstances of the case.

REFERENCES IN TEXT

Section 3(a)(1) of the Small Business Act, referred to in subsec. (a)(4), is classified to section 632(a)(1) of Title 15, Commerce and Trade.

AMENDMENTS

2005—Subsec. (a)(3). Pub. L. 109–8, § 432(b), inserted ''debtor'' after ''small business''.

Subsec. (a)(4). Pub. L. 109–8, § 405(a), added par. (4).

Subsec. (b)(3). Pub. L. 109–8, § 405(b), added par. (3).

1994—Subsec. (a). Pub. L. 103–394 substituted ''Except as provided in paragraph (3), as'' for ''As'' in par. (1) and added par. (3).

1986—Subsec. (a). Pub. L. 99–554, § 221(1), amended subsec. (a) generally, substituting ''chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate'' for ''this chapter, the court shall appoint a committee of creditors holding unsecured claims'' in

par. (1) and ''United States trustee'' for ''court'' in par. (2).

Subsec. (c). Pub. L. 99–554, § 221(2), struck out subsec. (c) which read as follows: ''On request of a party in interest and after notice and a hearing, the court may change the membership or the size of a committee appointed under subsection (a) of this section if the membership of such committee is not representative of the different kinds of claims or interests to be represented.''

1984—Subsec. (b)(1). Pub. L. 98–353 substituted ''commencement of the case'' for ''order for relief''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1103. Powers and duties of committees

(a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

(b) An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

(c) A committee appointed under section 1102 of this title may—

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

(d) As soon as practicable after the appointment of a committee under section 1102 of this title, the trustee shall meet with such committee to transact such business as may be necessary and proper.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2627; Pub. L. 98–353, title III, §§ 324, 500, July 10, 1984, 98 Stat. 358, 384.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section defines the powers and duties of a committee elected or appointed under section 1102.

Under subsection (a) the committee may, if authorized by the court, employ one or more attorneys, accountants, or other agents to represent or perform services for the committee. Normally one attorney should suffice; more than one may be authorized for good cause. The same considerations apply to the services of others, if the need for any at all is demonstrated.

Under subsections (c) and (d) the committee, like any party in interest, may confer with the trustee or debtor regarding the administration of the estate; may advise the court on the need for a trustee under section 1104(b). The committee may investigate matters specified in paragraph (2) of subsection (c), but only if authorized by the court and if no trustee or examiner is appointed.

HOUSE REPORT NO. 95–595

Subsection (a) of this section authorizes a committee appointed under section 1102 to select and authorize the employment of counsel, accountants, or other agents, to represent or perform services for the committee. The committee's selection and authorization is subject to the court's approval, and may only be done at a meeting of the committee at which a majority of its members are present. The subsection provides for the employment of more than one attorney. However, this will be the exception, and not the rule; cause must be shown to depart from the normal standard.

Subsection (b) requires a committee's counsel to cease representation of any other entity in connection with the case after he begins to represent the committee. This will prevent the potential of severe conflicts of interest.

Subsection (c) lists a committee's functions in a chapter 11 case. The committee may consult with the trustee or debtor in possession concerning the administration of the case, may investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business, and the desirability of the continuance of the business, and any other matter relevant to the case or to the formulation of a plan. The committee may participate in the formulation of a plan, advise those it represents of the committee's recommendation with respect to any plan formulated, and collect and file acceptances. These will be its most important functions. The committee may also determine the need for the appointment of a trustee, if one has not previously been appointed, and perform such other services as are in the interest of those represented.

Subsection (d) requires the trustee and each committee to meet as soon as practicable after their appointments to transact such business as may be necessary and proper.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353, §§ 324, 500(a), substituted ''An attorney or accountant'' for ''A person'',

substituted ''entity having an adverse interest'' for ''entity'', and inserted provision that representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

Subsec. (c)(3). Pub. L. 98–353, § 500(b)(1), substituted ''determinations'' for ''recommendations'', and ''acceptances or rejections'' for ''acceptances''.

Subsec. (c)(4). Pub. L. 98–353, § 500(b)(2), struck out ''if a trustee or examiner, as the case may be, has not previously been appointed under this chapter in the case'' after ''section 1104 of this title''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1104. Appointment of trustee or examiner

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor;

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(3) if grounds exist to convert or dismiss the case under section 1112, but the court determines that the appointment of a trustee or an examiner is in the best interests of creditors and the estate.

(b)(1) Except as provided in section 1163 of this title, on the request of a party in interest made not later than 30 days after the court orders the appointment of a trustee under subsection (a), the United States trustee shall convene a meeting of creditors for the purpose of electing one disinterested person to serve as trustee in the case. The election of a trustee shall be conducted in the manner provided in subsections (a), (b), and (c) of section 702 of this title.

(2)(A) If an eligible, disinterested trustee is elected at a meeting of creditors under paragraph (1), the United States trustee shall file a report certifying that election.

(B) Upon the filing of a report under subparagraph (A)—

(i) the trustee elected under paragraph (1) shall be considered to have been selected and appointed for purposes of this section; and

(ii) the service of any trustee appointed under subsection (d) shall terminate.

(C) The court shall resolve any dispute arising out of an election described in subparagraph (A).

(c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if—

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

(d) If the court orders the appointment of a trustee or an examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the United States trustee, after consultation with parties in interest, shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve as trustee or examiner, as the case may be, in the case.

(e) The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2627; Pub. L. 99–554, title II, § 222, Oct. 27, 1986, 100 Stat. 3102; Pub. L. 103–394, title II, § 211(a), title V, § 501(d)(30), Oct. 22, 1994, 108 Stat. 4125, 4146; Pub. L. 109–8, title IV, §§ 416, 442(b), title XIV, § 1405, Apr. 20, 2005, 119 Stat. 107, 116, 215.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1104 of the House amendment represents a compromise between the House bill and the Senate amendment concerning the appointment of a trustee or examiner. The method of appointment rather than election, is derived from the House bill; the two alternative standards of appointment are derived with modifications from the Senate amendment, instead of the standard stated in the House bill. For example, if the current management of the debtor gambled away rental income before the filing of the petition, a trustee should be appointed after the petition, whether or not postpetition mismanagement can be shown. However, under no circumstances will cause include the number of security holders of the debtor or the amount of assets or liabilities of the debtor. The standard also applies to the appointment of an examiner in those circumstances in which mandatory appointment, as previously detailed, is not required.

SENATE REPORT NO. 95–989

Subsection (a) provides for the mandatory appointment of a disinterested trustee in the case of a public company, as defined in section 1101(3), within 10 days of the order for relief, or of a successor, in the event of a vacancy, as soon as practicable.

Section 156 of chapter X ([former] 11 U.S.C. 516 [556]) requires the appointment of a disinterested trustee if

the debtor's liabilities are $250,000 or over. Section 1104(a) marks a substantial change. The appointment of a trustee is mandatory only for a public company, which under section 1101(3), has $5 million in liabilities, excluding tax and trade obligations, and 1,000 security holders. In view of past experience, cases involving public companies will under normal circumstances probably be relatively few in number but of vast importance in terms of public investor interest.

In case of a nonpublic company, the appointment or election of a trustee is discretionary if the interests of the estate and its security holders would be served thereby. A test based on probable costs and benefits of a trusteeship is not practical. The appointment may be made at any time prior to confirmation of the plan.

In case of a nonpublic company, if no trustee is appointed, the court may under subsection (c) appoint an examiner, if the appointment would serve the interests of the estate and security holders. The purpose of his appointment is specified in section 1106(b).

HOUSE REPORT NO. 95–595

Subsection (a) of this section governs the appointment of trustees in reorganization cases. The court is permitted to order the appointment of one trustee at any time after the commencement of the case if a party in interest so requests. The court may order appointment only if the protection afforded by a trustee is needed and the costs and expenses of a trustee would not be disproportionately higher than the value of the protection afforded.

The protection afforded by a trustee would be needed, for example, in cases where the current management of the debtor has been fraudulent or dishonest, or has grossly mismanaged the company, or where the debtor's management has abandoned the business. A trustee would not necessarily be needed to investigate misconduct of former management of the debtor, because an examiner appointed under this section might well be able to serve that function adequately without displacing the current management. Generally, a trustee would not be needed in any case where the protection afforded by a trustee could equally be afforded by an examiner. Though the device of examiner appears in current chapter X [chapter 10 of former title 11], it is rarely used because of the nearly absolute presumption in favor of the appointment of a trustee. Its use here will give the courts, debtors, creditors, and equity security holders greater flexibility in handling the affairs of an insolvent debtor, permitting the court to tailor the remedy to the case.

The second test, relating to the costs and expenses of a trustee, is not intended to be a strict cost/benefit analysis. It is included to require the court to have due regard for any additional costs or expenses that the appointment of a trustee would impose on the estate.

Subsection (b) permits the court, at any time after the commencement of the case and on request of a party in interest, to order the appointment of an examiner, if the court has not ordered the appointment of a trustee. The examiner would be appointed to conduct such an investigation of the debtor as is appropriate under the particular circumstances of the case, including an investigation of any allegations of fraud, dishonesty, or gross mismanagement of the debtor of or by current or former management of the debtor. The standards for the appointment of an examiner are the same as those for the appointment of a trustee: the protection must be needed, and the costs and expenses must not be disproportionately high.

By virtue of proposed 11 U.S.C. 1109, an indenture trustee and the Securities and Exchange Commission will be parties in interest for the purpose of requesting the appointment of a trustee or examiner.

Subsection (c) directs that the United States trustee actually select and appoint the trustee or examiner ordered appointed under this section. The United States trustee is required to consult with various parties in interest before selecting and appointing a trustee. He is not bound to select one of the members of the panel of private trustees established under proposed 28 U.S.C. 586(a)(1) which exists only for the purpose of providing trustees for chapter 7 cases. Neither is he precluded from selecting a panel member if the member is qualified to serve as chapter 11 trustee. Appointment by the United States trustee will remove the court from the often criticized practice of appointing an officer that will appear in litigation before the court against an adverse party.

AMENDMENTS

2005—Subsec. (a)(3). Pub. L. 109–8, § 442(b), added par. (3).

Subsec. (b). Pub. L. 109–8, § 416, designated existing provisions as par. (1) and added par. (2).

Subsec. (e). Pub. L. 109–8, § 1405, added subsec. (e).

1994—Subsec. (b). Pub. L. 103–394, § 211(a)(2), added subsec. (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 103–394, § 211(a)(1), redesignated subsec. (b) as (c). Former subsec. (c) redesignated (d).

Subsec. (d). Pub. L. 103–394, §§ 211(a)(1), 501(d)(30), redesignated subsec. (c) as (d) and inserted comma after ''interest''.

1986—Subsecs. (a), (b). Pub. L. 99–554, § 222(1), (2), inserted ''or the United States trustee'' after ''party in interest''.

Subsec. (c). Pub. L. 99–554, § 222(3), substituted ''the United States trustee, after consultation with parties in interest shall appoint, subject to the court's approval, one disinterested person other than the United States trustee to serve'' for ''the court shall appoint one disinterested person to serve''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1405 of Pub. L. 109–8 effective Apr. 20, 2005, and applicable only with respect to cases commenced under this title on or after Apr. 20, 2005, see section 1406 of Pub. L. 109–8, set out as a note under section 507 of this title.

Amendment by sections 416 and 442(b) of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

§ 1105. Termination of trustee's appointment

At any time before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court may terminate the trustee's appointment and restore the debtor to possession and management of the property of the estate and of the operation of the debtor's business.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2628; Pub. L. 98–353, title III, § 501, July 10, 1984, 98 Stat. 384; Pub. L. 99–554, title II, § 223, Oct. 27, 1986, 100 Stat. 3102.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section authorizes the court to terminate the trustee's appointment and to restore the debtor to pos-

session and management of the property of the estate and to operation of the debtor's business. Section 1104(a) provides that this section does not apply in the case of a public company, for which the appointment of a trustee is mandatory.

HOUSE REPORT NO. 95–595

This section authorizes the court to terminate the trustee's appointment and to restore the debtor to possession and management of the property of the estate, and to operation of the debtor's business. This section would permit the court to reverse its decision to order the appointment of a trustee in light of new evidence.

AMENDMENTS

1986—Pub. L. 99–554 inserted ''or the United States trustee'' after ''party in interest''.

1984—Pub. L. 98–353 substituted ''estate and of the'' for ''estate, and''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1106. Duties of trustee and examiner

(a) A trustee shall—

(1) perform the duties of the trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704;

(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;

(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(4) as soon as practicable—

(A) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate; and

(B) transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;

(5) as soon as practicable, file a plan under section 1121 of this title, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12, or 13 of this title or dismissal of the case;

(6) for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information;

(7) after confirmation of a plan, file such reports as are necessary or as the court orders; and

(8) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c).

(b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform.

(c)(1) In a case described in subsection (a)(8) to which subsection (a)(8) applies, the trustee shall—

(A)(i) provide written notice to the holder of the claim described in subsection (a)(8) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title; and

(ii) include in the notice required by clause (i) the address and telephone number of such State child support enforcement agency;

(B)(i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice required by clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 1141, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2)(A) The holder of a claim described in subsection (a)(8) or the State child enforcement support agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2628; Pub. L. 98–353, title III, §§ 311(b)(1), 502, July 10, 1984, 98 Stat. 355, 384; Pub. L. 99–554, title II, § 257(c), Oct. 27, 1986, 100 Stat. 3114; Pub. L. 103–394, title II, § 211(b), Oct. 22, 1994, 108 Stat. 4125; Pub. L. 109–8, title II, § 219(b), title IV, § 446(c), title XI, § 1105(b), Apr. 20, 2005, 119 Stat. 56, 118, 192.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) of this section prescribes the trustee's duties. He is required to perform the duties of a trustee in a liquidation case specified in section 704 (2), (4), (6), (7), (8), and (9). These include reporting and informational duties, and accountability for all property received. Paragraph (2) of this subsection requires the trustee to file with the court, if the debtor has not done so, the list of creditors, schedule of assets and liabilities, and statement of affairs required under section 521(1).

Paragraph (3) of S. 1106 requires the trustee to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business, and the desirability of the continuance of the business, and any other matter relevant to the case or to the formulation of a plan. Paragraph (4) requires the trustee to report the results of his investigation to the court and to creditors' committees, equity security holders' committees, indenture trustees and any other entity the court designates.

Paragraph (5) requires the trustee to file a plan or to report why a plan cannot be formulated, or to recommend conversion to liquidation or to an individual repayment plan case, or dismissal. It is anticipated that the trustee will consult with creditors and other parties in interest in the formulation of a plan, just as the debtor in possession would.

Paragraph (6) [enacted as (7)] requires final reports by the trustee, as the court orders.

Subsection (b) gives the trustee's investigative duties to an examiner, if one is appointed. The court is authorized to give the examiner additional duties as the circumstances warrant.

Paragraphs (3), (4), and (5) of subsection (a) are derived from sections 165 and 169 of chapter X [sections 565 and 569 of former title 11].

REFERENCES IN TEXT

Sections 464 and 466 of the Social Security Act, referred to in subsec. (c)(1)(A)(i), are classified to sections 664 and 666, respectively, of Title 42, The Public Health and Welfare.

AMENDMENTS

2005—Subsec. (a)(1). Pub. L. 109–8, §1105(b), substituted ''(11), and (12)'' for ''and (11)''.

Pub. L. 109–8, §446(c), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''perform the duties of a trustee specified in sections 704(2), 704(5), 704(7), 704(8), and 704(9) of this title;''.

Subsec. (a)(8). Pub. L. 109–8, §219(b)(1), added par. (8).

Subsec. (c). Pub. L. 109–8, §219(b)(2), added subsec. (c).

1994—Subsec. (b). Pub. L. 103–394 substituted ''1104(d)'' for ''1104(c)''.

1986—Subsec. (a)(5). Pub. L. 99–554 inserted reference to chapter 12.

1984—Subsec. (a)(1). Pub. L. 98–353, §311(b)(1), substituted ''704(5), 704(7), 704(8), and 704(9)'' for ''704(4), 704(6), 704(7) and 704(8)''.

Subsec. (b). Pub. L. 98–353, §502, inserted '', except to the extent that the court orders otherwise,''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

PAYMENT OF CERTAIN BENEFITS TO RETIRED FORMER EMPLOYEES

Pub. L. 99–500, §101(b) [title VI, §608], Oct. 18, 1986, 100 Stat. 1783–39, 1783–74, and Pub. L. 99–591, §101(b) [title VI, §608], Oct. 30, 1986, 100 Stat. 3341–39, 3341–74, as amended by Pub. L. 100–41, May 15, 1987, 101 Stat. 309; Pub. L. 100–99, Aug. 18, 1987, 101 Stat. 716; Pub. L. 100–334, §3(a), June 16, 1988, 102 Stat. 613, provided that:

''(a)(1) Subject to paragraphs (2), (3), (4), and (5), and notwithstanding title 11 of the United States Code, the trustee shall pay benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition (through the purchase of insurance or otherwise) for the purpose of providing medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death.

''(2) The level of benefits required to be paid by this subsection may be modified prior to confirmation of a plan under section 1129 of such title if—

''(A) the trustee and an authorized representative of the former employees with respect to whom such benefits are payable agree to the modification of such benefit payments; or

''(B) the court finds that a modification proposed by the trustee meets the standards of section 1113(b)(1)(A) of such title and the balance of the equities clearly favors the modification.

If such benefits are covered by a collective bargaining agreement, the authorized representative shall be the labor organization that is signatory to such collective bargaining agreement unless there is a conflict of interest.

''(3) The trustee shall pay benefits in accordance with this subsection until—

''(A) the dismissal of the case involved; or

''(B) the effective date of a plan confirmed under section 1129 of such title which provides for the continued payment after confirmation of the plan of all such benefits at the level established under paragraph (2) of this subsection, at any time prior to the confirmation of the plan, for the duration of the period the debtor (as defined in such title) has obligated itself to provide such benefits.

''(4) No such benefits paid between the filing of a petition in a case covered by this section and the time a plan confirmed under section 1129 of such title with respect to such case becomes effective shall be deducted or offset from the amount allowed as claims for any benefits which remain unpaid, or from the amount to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future benefits or from any benefit not paid as a result of modifications allowed pursuant to this section.

''(5) No claim for benefits covered by this section shall be limited by section 502(b)(7) of such title.

''(b)(1) Notwithstanding any provision of title 11 of the United States Code, the trustee shall pay an allowable claim of any person for a benefit paid—

''(A) before the filing of the petition under title 11 of the United States Code; and

''(B) directly or indirectly to a retired former employee under a plan, fund, or program described in subsection (a)(1);

if, as determined by the court, such person is entitled to recover from such employee, or any provider of health care to such employee, directly or indirectly, the amount of such benefit for which such person receives no payment from the debtor.

''(2) For purposes of paragraph (1), the term 'provider of health care' means a person who—

''(A) is the direct provider of health care (including a physician, dentist, nurse, podiatrist, optometrist, physician assistant, or ancillary personnel employed under the supervision of a physician); or

''(B) administers a facility or institution (including a hospital, alcohol and drug abuse treatment facility, outpatient facility, or health maintenance organization) in which health care is provided.

''(c) This section is effective with respect to cases commenced under chapter 11, of title 11, United States Code, in which a plan for reorganization has not been confirmed by the court and in which any such benefit is still being paid on October 2, 1986, and in cases that become subject to chapter 11, title 11, United States Code, after October 2, 1986 and before the date of the enactment of the Retiree Benefits Bankruptcy Protection Act of 1988 [June 16, 1988].

''(d) This section shall not apply during any period in which a case is subject to chapter 7, title 11, United States Code.''

Similar provisions were contained in Pub. L. 99–656, § 2, Nov. 14, 1986, 100 Stat. 3668, as amended by Pub. L. 100–41, May 15, 1987, 101 Stat. 309; Pub. L. 100–99, Aug. 18, 1987, 101 Stat. 716, and were repealed by Pub. L. 100–334, § 3(b), June 16, 1988, 102 Stat. 614.

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2628; Pub. L. 98–353, title III, § 503, July 10, 1984, 98 Stat. 384.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts section 1107(b) of the Senate amendment which clarifies a point not covered by the House bill.

SENATE REPORT NO. 95–989

This section places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee, and to such other limitations and conditions as the court prescribes cf. *Wolf v. Weinstein*, 372 U.S. 633, 649–650 (1963).

AMENDMENTS

1984—Subsec. (a). Pub. L. 98–353 substituted ''on a trustee serving in a case'' for ''on a trustee''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1108. Authorization to operate business

Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2629; Pub. L. 98–353, title III, § 504, July 10, 1984, 98 Stat. 384.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

The House amendment adopts section 1108 of the House bill in preference to the style of an identical substantive provision contained in the Senate amendment. Throughout title 11 references to a ''trustee'' is read to include other parties under various sections of the bill. For example, section 1107 applies to give the debtor in possession all the rights and powers of a trustee in a case under chapter 11; this includes the power of the trustee to operate the debtor's business under section 1108.

SENATE REPORT NO. 95–989

This section permits the debtor's business to continue to be operated, unless the court orders otherwise. Thus, in a reorganization case, operation of the business will be the rule, and it will not be necessary to go to the court to obtain an order authorizing operation.

HOUSE REPORT NO. 95–595

This section does not presume that a trustee will be appointed to operate the business of the debtor. Rather, the power granted to trustee under this section is one of the powers that a debtor in possession acquires by virtue of proposed 11 U.S.C. 1107.

AMENDMENTS

1984—Pub. L. 98–353 inserted '', on request of a party in interest and after notice and a hearing,''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1109. Right to be heard

(a) The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.

(b) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2629.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1109 of the House amendment represents a compromise between comparable provisions in the House bill and Senate amendment. As previously discussed the section gives the Securities and Exchange Commission the right to appear and be heard and to raise any issue in a case under chapter 11; however, the Securities and Exchange Commission is not a party in interest and the Commission may not appeal from any judgment, order, or decree entered in the case. Under section 1109(b) a party in interest, including the debtor,

the trustee, creditors committee, equity securities holders committee, a creditor, an equity security holder, or an indentured trustee, may raise and may appear and be heard on any issue in a case under chapter 11. Section 1109(c) of the Senate amendment has been moved to subchapter IV pertaining to Railroad Reorganizations.

SENATE REPORT NO. 95–989

Subsection (a) provides, in unqualified terms, that any creditor, equity security holder, or an indenture trustee shall have the right to be heard as a party in interest under this chapter in person, by an attorney, or by a committee. It is derived from section 206 of chapter X ([former] 11 U.S.C. 606).

Subsection (b) provides that the Securities and Exchange Commission may appear by filing an appearance in a case of a public company and may appear in other cases if authorized or requested by the court. As a party in interest in either case, the Commission may raise and be heard on any issue. The Commission may not appeal from a judgment, order, or decree in a case, but may participate in any appeal by any other party in interest. This is the present law under section 208 of chapter X ([former] 11 U.S.C. 608).

HOUSE REPORT NO. 95–595

Section 1109 authorizes the Securities and Exchange Commission and any indenture trustee to intervene in the case at any time on any issue. They may raise an issue or may appear and be heard on an issue that is raised by someone else. The section, following current law, denies the right of appeal to the Securities and Exchange Commission. It does not, however, prevent the Commission from joining or participating in an appeal taken by a true party in interest. The Commission is merely prevented from initiating the appeal in any capacity.

§ 1110. Aircraft equipment and vessels

(a)(1) Except as provided in paragraph (2) and subject to subsection (b), the right of a secured party with a security interest in equipment described in paragraph (3), or of a lessor or conditional vendor of such equipment, to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract, and to enforce any of its other rights or remedies, under such security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment, is not limited or otherwise affected by any other provision of this title or by any power of the court.

(2) The right to take possession and to enforce the other rights and remedies described in paragraph (1) shall be subject to section 362 if—

(A) before the date that is 60 days after the date of the order for relief under this chapter, the trustee, subject to the approval of the court, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract; and

(B) any default, other than a default of a kind specified in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

(i) that occurs before the date of the order is cured before the expiration of such 60-day period;

(ii) that occurs after the date of the order and before the expiration of such 60-day period is cured before the later of—

(I) the date that is 30 days after the date of the default; or

(II) the expiration of such 60-day period; and

(iii) that occurs on or after the expiration of such 60-day period is cured in compliance with the terms of such security agreement, lease, or conditional sale contract, if a cure is permitted under that agreement, lease, or contract.

(3) The equipment described in this paragraph—

(A) is—

(i) an aircraft, aircraft engine, propeller, appliance, or spare part (as defined in section 40102 of title 49) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that, at the time such transaction is entered into, holds an air carrier operating certificate issued pursuant to chapter 447 of title 49 for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo; or

(ii) a vessel documented under chapter 121 of title 46 that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a water carrier that, at the time such transaction is entered into, holds a certificate of public convenience and necessity or permit issued by the Department of Transportation; and

(B) includes all records and documents relating to such equipment that are required, under the terms of the security agreement, lease, or conditional sale contract, to be surrendered or returned by the debtor in connection with the surrender or return of such equipment.

(4) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the approval of the court, to extend the 60-day period specified in subsection (a)(1).

(c)(1) In any case under this chapter, the trustee shall immediately surrender and return to a secured party, lessor, or conditional vendor, described in subsection (a)(1), equipment described in subsection (a)(3), if at any time after the date of the order for relief under this chapter such secured party, lessor, or conditional vendor is entitled pursuant to subsection (a)(1) to take possession of such equipment and makes a written demand for such possession to the trustee.

(2) At such time as the trustee is required under paragraph (1) to surrender and return equipment described in subsection (a)(3), any lease of such equipment, and any security agreement or conditional sale contract relating to such equipment, if such security agreement or conditional sale contract is an executory contract, shall be deemed rejected.

(d) With respect to equipment first placed in service on or before October 22, 1994, for purposes of this section—

(1) the term ''lease'' includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the

agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

(2) the term ''security interest'' means a purchase-money equipment security interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2629; Pub. L. 103–272, § 5(c), July 5, 1994, 108 Stat. 1373; Pub. L. 103–394, title II, § 201(a), Oct. 22, 1994, 108 Stat. 4119; Pub. L. 106–181, title VII, § 744(b), Apr. 5, 2000, 114 Stat. 177; Pub. L. 109–304, § 17(b)(2), Oct. 6, 2006, 120 Stat. 1707.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1110 of the House amendment adopts an identical provision contained in the House bill without modifications contained in the Senate amendment. This section protects a limited class of financiers of aircraft and vessels and is intended to be narrowly construed to prevent secured parties or lessors from gaining the protection of the section unless the interest of such lessor or secured party is explicitly enumerated therein. It should be emphasized that under section 1110(a) a debtor in possession or trustee is given 60 days after the order for relief in a case under chapter 11, to have an opportunity to comply with the provisions of section 1110(a).

During this time the automatic stay will apply and may not be lifted prior to the expiration of the 60-day period. Under section 1110(b), the debtor and secured party or lessor are given an opportunity to extend the 60-day period, but no right to reduce the period is intended. It should additionally be noted that under section 1110(a) the trustee or debtor in possession is not required to assume the executory contract or unexpired lease under section 1110; rather, if the trustee or debtor in possession complies with the requirements of section 1110(a), the trustee or debtor in possession is entitled to retain the aircraft or vessels subject to the normal requirements of section 365. The discussion regarding aircraft and vessels likewise applies with respect to railroad rolling stock in a railroad reorganization under section 1168.

SENATE REPORT NO. 95–989

This section, to a large degree, preserves the protection given lessors and conditional vendors of aircraft to a certificated air carrier or of vessels to a certificated water carrier under section 116(5) and 116(6) of present Chapter X [section 516(5) and (6) of former title 11]. It is modified to conform with the consolidation of Chapters X and XI [chapters 10 and 11 of former title 11] and with the new chapter 11 generally. It is also modified to give the trustee in a reorganization case an opportunity to continue in possession of the equipment in question by curing defaults and by making the required lease or purchase payments. This removes the absolute veto power over a reorganization that lessors and conditional vendors have under present law, while entitling them to protection of their investment.

The section overrides the automatic stay or any power of the court to enjoin taking of possession of certain leased, conditionally sold, or liened equipment, unless, the trustee agrees to perform the debtor's obligations and cures all prior defaults (other than defaults under ipso facto or bankruptcy clauses) within 60 days after the order for relief. The trustee and the equipment financer are permitted to extend the 60-day period by agreement. During the first 60 days, the automatic stay will apply to prevent foreclosure unless the creditor gets relief from the stay.

The effect of this section will be the same if the debtor has granted the security interest to the financer or if the debtor is leasing equipment from a financer that has leveraged the lease and leased the equipment subject to a security interest of a third party.

AMENDMENTS

2006—Subsec. (a)(3)(A)(ii). Pub. L. 109–304 substituted ''vessel documented under chapter 121 of title 46'' for ''documented vessel (as defined in section 30101(1) of title 46)''.

2000—Pub. L. 106–181 amended section catchline and text generally, substituting present provisions consisting of subsecs. (a) to (d) for former subsecs. (a) to (c) which contained somewhat similar provisions.

1994—Pub. L. 103–394 amended section generally. Prior to amendment, section read as follows:

''(a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, or vessels of the United States, as defined in section 30101 of title 46, that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier operating under a certificate of convenience and necessity issued by the Secretary of Transportation, or a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, as the case may be, to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless—

''(1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and

''(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—

''(A) that occurred before such date is cured before the expiration of such 60-day period; and

''(B) that occurs after such date is cured before the later of—

''(i) 30 days after the date of such default; and

''(ii) the expiration of such 60-day period.

''(b) The trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.''

Subsec. (a). Pub. L. 103–272 substituted ''section 40102(a) of title 49'' for ''section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301)'', ''section 30101 of title 46'' for ''subsection B(4) of the Ship Mortgage Act, 1920 (46 U.S.C. 911(4))'', and ''Secretary of Transportation'' for ''Civil Aeronautics Board''.

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106–181 applicable only to fiscal years beginning after Sept. 30, 1999, see section 3 of Pub. L. 106–181, set out as a note under section 106 of Title 49, Transportation.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, with this section, as amended by section 201 of Pub. L. 103–394, applicable with respect to any lease, as defined by subsec. (c) of this section, entered into in connection with a settlement of any proceeding in any case pending under this title on Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

ABOLITION OF INTERSTATE COMMERCE COMMISSION AND TRANSFER OF FUNCTIONS

Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise

provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of Title 49, Transportation, and section 101 of Pub. L. 104–88, set out as a note under section 701 of Title 49. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of Title 49.

AIRCRAFT EQUIPMENT SETTLEMENT LEASES

Pub. L. 103–7, Mar. 17, 1993, 107 Stat. 36, provided that:

''SECTION 1. SHORT TITLE.

''This Act may be cited as the 'Aircraft Equipment Settlement Leases Act of 1993'.

''SEC. 2. TREATMENT OF AIRCRAFT EQUIPMENT SETTLEMENT LEASES WITH THE PENSION BENEFIT GUARANTY CORPORATION.

''In the case of any settlement of liability under title IV of the Employee Retirement Income Security Act of 1974 [29 U.S.C. 1301 et seq.] entered into by the Pension Benefit Guaranty Corporation and one or more other parties, if—

''(1) such settlement was entered into before, on, or after the date of the enactment of this Act [Mar. 17, 1993],

''(2) at least one party to such settlement was a debtor under title 11 of the United States Code, and

''(3) an agreement that is entered into as part of such settlement provides that such agreement is to be treated as a lease,

then such agreement shall be treated as a lease for purposes of section 1110 of such title 11.''

§ 1111. Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2630.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

A discussion of section 1111(b) of the House amendment is best considered in the context of confirmation and will therefore, be discussed in connection with section 1129.

SENATE REPORT NO. 95–989

This section dispenses with the need for every creditor and equity security holder to file a proof of claim or interest in a reorganization case. Usually the debtor's schedules are accurate enough that they will suffice to determine the claims or interests allowable in the case. Thus, the section specifies that any claim or interest included on the debtor's schedules is deemed filed under section 501. This does not apply to claims or interests that are scheduled as disputed, contingent, or unliquidated.

§ 1112. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—

(1) the debtor is not a debtor in possession;

(2) the case originally was commenced as an involuntary case under this chapter; or

(3) the case was converted to a case under this chapter other than on the debtor's request.

(b)(1) Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104(a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

(2) The relief provided in paragraph (1) shall not be granted absent unusual circumstances specifically identified by the court that establish that such relief is not in the best interests of creditors and the estate, if the debtor or another party in interest objects and establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for granting such relief include an act or omission of the debtor other than under paragraph (4)(A)—

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

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term ''cause'' includes—

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28;

(L) revocation of an order of confirmation under section 1144;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan;

(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

(P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—

(1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

(e) Except as provided in subsections (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521, including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2630; Pub. L. 98–353, title III, § 505, July 10, 1984, 98 Stat. 384; Pub. L. 99–554, title II, §§ 224, 256, Oct. 27, 1986, 100 Stat. 3102, 3114; Pub. L. 103–394, title II, § 217(c), Oct. 22, 1994, 108 Stat. 4127; Pub. L. 109–8, title IV, § 442(a), Apr. 20, 2005, 119 Stat. 115.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1112 of the House amendment represents a compromise between the House bill and Senate amendment with respect to the factors constituting cause for conversion of a case to chapter 7 or dismissal. The House amendment combines two separate factors contained in section 1112(b)(1) and section 1112(b)(2) of the Senate amendment. Section 1112(b)(1) of the House amendment permits the court to convert a case to a case under chapter 7 or to dismiss the case if there is both a continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; requiring both factors to be present simultaneously represents a compromise from the House bill which eliminated both factors from the list of causes enumerated.

Sections 1112(c) and 1112(d) of the House amendment is derived from the House bill which differs from the Senate amendment only as a matter of style.

SENATE REPORT NO. 95–989

This section brings together all of the conversion and dismissal rules for chapter 11 cases. Subsection (a) gives the debtor an absolute right to convert a voluntarily commenced chapter 11 case in which the debtor remains in possession to a liquidation case.

Subsection (b) gives wide discretion to the court to make an appropriate disposition of the case sua sponte or upon motion of a party in interest, or the court is permitted to convert a reorganization case to a liquidation case or to dismiss the case, whichever is in the best interest of creditors and the estate, but only for cause. Cause may include the continuing loss to or dimunition [sic] of the estate of an insolvent debtor, the absence of a reasonable likelihood of rehabilitation, the inability to effectuate a plan, unreasonable delay by the debtor that is prejudicial to creditors, failure to file a plan within the appropriate time limits, denial of confirmation and any opportunity to modify or propose a new plan, revocation of confirmation and denial of confirmation of a modified plan, inability to effectuate substantial consummation of a confirmed plan, material default by the debtor under the plan, and termination of the plan by reason of the occurrence of a condition specified in the plan. This list is not exhaustive. The court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases. The power of the court to act sua sponte should be used sparingly and only in emergency situations.

Subsection (c) prohibits the court from converting a case concerning a farmer or an eleemosynary institution to a liquidation case unless the debtor consents.

Subsection (d) prohibits conversion of a reorganization case to a chapter 13 case unless the debtor requests conversion and his discharge has not been granted or has been revoked.

Subsection (e) reinforces section 109 by prohibiting conversion of a chapter 11 case to a case under another chapter proceedings under which the debtor is not permitted to proceed.

REFERENCES IN TEXT

The Federal Rules of Bankruptcy Procedure, referred to in subsec. (b)(4)(G), are set out in the Appendix to this title.

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–8 added subsec. (b) and struck out former subsec. (b) which consisted of introductory provisions and pars. (1) to (10) relating to conversion of cases under this chapter to chapter 7 cases or dismissal for cause in the best interest of creditors and the estate.

1994—Subsec. (b). Pub. L. 103–394 inserted ''or bankruptcy administrator'' after ''United States trustee''.

1986—Subsec. (b). Pub. L. 99–554, § 224(1)(A), inserted ''or the United States trustee'' after ''party in interest''.

Subsec. (b)(10). Pub. L. 99–554, § 224(1)(B)–(D), added par. (10).

Subsec. (d). Pub. L. 99–554, § 256, inserted reference to chapter 12 and added par. (3).

Subsecs. (e), (f). Pub. L. 99–554, § 224(2), (3), added subsec. (e) and redesignated former subsec. (e) as (f).

1984—Subsec. (a)(2). Pub. L. 98–353, § 505(a)(1), substituted ''originally was commenced as an involuntary case'' for ''is an involuntary case originally commenced''.

Subsec. (a)(3). Pub. L. 98–353, § 505(a)(2), substituted ''other than on'' for ''on other than''.

Subsec. (b)(5). Pub. L. 98–353, § 505(b)(1), inserted ''a request made for'' before ''additional''.

Subsec. (b)(8). Pub. L. 98–353, § 505(b)(2), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 224 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 256 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section ''trustee'' shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if es-

sential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

(Added Pub. L. 98–353, title III, § 541(a), July 10, 1984, 98 Stat. 390.)

REFERENCES IN TEXT

The Railway Labor Act, referred to in subsec. (a), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended. Title I of the Railway Labor Act is classified principally to subchapter I (§ 151 et seq.) of chapter 8 of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

EFFECTIVE DATE

Section 541(c) of Pub. L. 98–353 provided that: "The amendments made by this section [enacting this section] shall become effective upon the date of enactment of this Act [July 10, 1984]; provided that this section shall not apply to cases filed under title 11 of the United States Code which were commenced prior to the date of enactment of this section."

§ 1114. Payment of insurance benefits to retired employees

(a) For purposes of this section, the term "retiree benefits" means payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death under any plan, fund, or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title.

(b)(1) For purposes of this section, the term "authorized representative" means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.

(2) Committees of retired employees appointed by the court pursuant to this section shall have the same rights, powers, and duties as committees appointed under sections 1102 and 1103 of this title for the purpose of carrying out the purposes of sections 1114 and 1129(a)(13) and, as permitted by the court, shall have the power to enforce the rights of persons under this title as they relate to retiree benefits.

(c)(1) A labor organization shall be, for purposes of this section, the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, unless (A) such labor organization elects not to serve as the authorized representative of such persons, or (B) the court, upon a motion by any party in interest, after notice and hearing, determines that different representation of such persons is appropriate.

(2) In cases where the labor organization referred to in paragraph (1) elects not to serve as the authorized representative of those persons receiving any retiree benefits covered by any collective bargaining agreement to which that labor organization is signatory, or in cases where the court, pursuant to paragraph (1) finds different representation of such persons appropriate, the court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, from among such persons, to serve as the authorized representative of such persons under this section.

(d) The court, upon a motion by any party in interest, and after notice and a hearing, shall order the appointment of a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement. The United States trustee shall appoint any such committee.

(e)(1) Notwithstanding any other provision of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that—

(A) the court, on motion of the trustee or authorized representative, and after notice and a hearing, may order modification of such payments, pursuant to the provisions of subsections (g) and (h) of this section, or

(B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments,

after which such benefits as modified shall continue to be paid by the trustee.

(2) Any payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title.

(f)(1) Subsequent to filing a petition and prior to filing an application seeking modification of the retiree benefits, the trustee shall—

(A) make a proposal to the authorized representative of the retirees, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (k)(3), the representative of the retirees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1), and ending on the date of the hearing provided for in subsection (k)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such retiree benefits.

(g) The court shall enter an order providing for modification in the payment of retiree benefits if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (f);

(2) the authorized representative of the retirees has refused to accept such proposal without good cause; and

(3) such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably, and is clearly favored by the balance of the equities;

except that in no case shall the court enter an order providing for such modification which provides for a modification to a level lower than that proposed by the trustee in the proposal found by the court to have complied with the requirements of this subsection and subsection (f): *Provided, however*, That at any time after an order is entered providing for modification in the payment of retiree benefits, or at any time after an agreement modifying such benefits is made between the trustee and the authorized representative of the recipients of such benefits, the authorized representative may apply to the court for an order increasing those benefits which order shall be granted if the increase in retiree benefits sought is consistent with the standard set forth in paragraph (3): *Provided further*, That neither the trustee nor the authorized representative is precluded from making more than one motion for a modification order governed by this subsection.

(h)(1) Prior to a court issuing a final order under subsection (g) of this section, if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim modifications in retiree benefits.

(2) Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee.

(3) The implementation of such interim changes does not render the motion for modification moot.

(i) No retiree benefits paid between the filing of the petition and the time a plan confirmed under section 1129 of this title becomes effective shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid, or from the amounts to be paid under the plan with respect to such claims for unpaid benefits, whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section.

(j) No claim for retiree benefits shall be limited by section 502(b)(7) of this title.

(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.

(2) The court shall rule on such application for modification within ninety days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the authorized representative may agree to. If the court does not rule on such application within ninety days after the date of the commencement of the hearing, or within such additional time as the trustee and the authorized representative may agree to, the trustee may implement the proposed modifications pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the retirees to evaluate the trustee's proposal and the application for modification, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(*l*) If the debtor, during the 180-day period ending on the date of the filing of the petition—

(1) modified retiree benefits; and

(2) was insolvent on the date such benefits were modified;

the court, on motion of a party in interest, and after notice and a hearing, shall issue an order reinstating as of the date the modification was made, such benefits as in effect immediately before such date unless the court finds that the balance of the equities clearly favors such modification.

(m) This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds $250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition under this title.

(Added Pub. L. 100–334, § 2(a), June 16, 1988, 102 Stat. 610; amended Pub. L. 109–8, title IV, § 447, title XIV, § 1403, Apr. 20, 2005, 119 Stat. 118, 215.)

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–8, § 447, substituted ''order the appointment of'' for ''appoint'' and inserted ''The United States trustee shall appoint any such committee.'' at end.

Subsecs. (*l*), (m). Pub. L. 109–8, § 1403, added subsec. (*l*) and redesignated former subsec. (*l*) as (m).

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1403 of Pub. L. 109–8 effective Apr. 20, 2005, and applicable only with respect to cases commenced under this title on or after Apr. 20, 2005, see section 1406 of Pub. L. 109–8, set out as a note under section 507 of this title.

Amendment by section 447 of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE

Section 4 of Pub. L. 100–334 provided that:

''(a) GENERAL EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act [enacting this section, amending section 1129 of this title, enacting provisions set out as a note under section 101 of this title, and amending and repealing provisions set out as notes under section 1106 of this title] shall take effect on the date of the enactment of this Act [June 16, 1988].

''(b) APPLICATION OF AMENDMENTS.—The amendments made by section 2 [enacting this section and amending section 1129 of this title] shall not apply with respect to cases commenced under title 11 of the United States Code before the date of the enactment of this Act [June 16, 1988].''

PAYMENT OF CERTAIN BENEFITS TO RETIRED FORMER EMPLOYEES

For payment of benefits by bankruptcy trustee to retired employees in enumerated circumstances with respect to cases commenced under this chapter in which a plan for reorganization had not been confirmed by the court and in which any such benefit was still being paid on October 2, 1986, and in cases that became subject to this chapter after October 2, 1986, and before June 16, 1988, see section 101(b) [title VI, § 608] of Pub. L. 99–500, and Pub. L. 99–591, as amended, set out as a note under section 1106 of this title.

§ 1115. Property of the estate

(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541—

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

(b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

(Added Pub. L. 109–8, title III, § 321(a)(1), Apr. 20, 2005, 119 Stat. 94.)

EFFECTIVE DATE

Section effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as an Effective Date of 2005 Amendment note under section 101 of this title.

§ 1116. Duties of trustee or debtor in possession in small business cases

In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall—

(1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief—

(A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or

(B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;

(2) attend, through its senior management personnel and counsel, meetings scheduled by the court or the United States trustee, including initial debtor interviews, scheduling conferences, and meetings of creditors convened under section 341 unless the court, after notice and a hearing, waives that requirement upon a finding of extraordinary and compelling circumstances;

(3) timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances;

(4) file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;

(5) subject to section 363(c)(2), maintain insurance customary and appropriate to the industry;

(6)(A) timely file tax returns and other required government filings; and

(B) subject to section 363(c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted; and

(7) allow the United States trustee, or a designated representative of the United States trustee, to inspect the debtor's business premises, books, and records at reasonable times, after reasonable prior written notice, unless notice is waived by the debtor.

(Added Pub. L. 109–8, title IV, § 436(a), Apr. 20, 2005, 119 Stat. 112.)

REFERENCES IN TEXT

The Federal Rules of Bankruptcy Procedure, referred to in par. (4), are set out in the Appendix to this title.

EFFECTIVE DATE

Section effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as an Effective Date of 2005 Amendment note under section 101 of this title.

SUBCHAPTER II—THE PLAN

§ 1121. Who may file a plan

(a) The debtor may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case.

(b) Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.

(c) Any party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may file a plan if and only if—

(1) a trustee has been appointed under this chapter;

(2) the debtor has not filed a plan before 120 days after the date of the order for relief under this chapter; or

(3) the debtor has not filed a plan that has been accepted, before 180 days after the date of the order for relief under this chapter, by each class of claims or interests that is impaired under the plan.

(d)(1) Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period or the 180-day period referred to in this section.

(2)(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

(B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

(e) In a small business case—

(1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is—

(A) extended as provided by this subsection, after notice and a hearing; or

(B) the court, for cause, orders otherwise;

(2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and

(3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if—

(A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;

(B) a new deadline is imposed at the time the extension is granted; and

(C) the order extending time is signed before the existing deadline has expired.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2631; Pub. L. 98–353, title III, § 506, July 10, 1984, 98 Stat. 385; Pub. L. 99–554, title II, § 283(u), Oct. 27, 1986, 100 Stat. 3118; Pub. L. 103–394, title II, § 217(d), Oct. 22, 1994, 108 Stat. 4127; Pub. L. 109–8, title IV, §§ 411, 437, Apr. 20, 2005, 119 Stat. 106, 113.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1121 of the House amendment is derived from section 1121 of the House bill; section 1121(c)(1) will be satisfied automatically in a case under subchapter IV of title 11.

SENATE REPORT NO. 95–989

Subsection (a) permits the debtor to file a reorganization plan with a petition commencing a voluntary case or at any time during a voluntary or involuntary case.

Subsection (b) gives the debtor the exclusive right to file a plan during the first 120 days of the case. There are exceptions, however, enumerated in subsection (c). If a trustee has been appointed, if the debtor does not meet the 120-day deadline, or if the debtor fails to obtain the required consent within 180 days after the filing of the petition, any party in interest may propose a plan. This includes the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, and an indenture trustee. The list is not exhaustive. In the case of a public company, a trustee is appointed within 10 days of the petition. In such a case, for all practical purposes, any party in interest may file a plan.

Subsection (d) permits the court, for cause, to increase or reduce the 120-day and 180-day periods specified. Since, the debtor has an exclusive privilege for 6 months during which others may not file a plan, the granted extension should be based on a showing of some promise of probable success. An extension should not be employed as a tactical device to put pressure on parties in interest to yield to a plan they consider unsatisfactory.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–8, § 411, designated existing provisions as par. (1), substituted ''Subject to paragraph (2), on'' for ''On'', and added par. (2).

Subsec. (e). Pub. L. 109–8, § 437, added subsec. (e) and struck out former subsec. (e) which read as follows: ''In a case in which the debtor is a small business and elects to be considered a small business—

''(1) only the debtor may file a plan until after 100 days after the date of the order for relief under this chapter;

''(2) all plans shall be filed within 160 days after the date of the order for relief; and

''(3) on request of a party in interest made within the respective periods specified in paragraphs (1) and (2) and after notice and a hearing, the court may—

''(A) reduce the 100-day period or the 160-day period specified in paragraph (1) or (2) for cause; and

''(B) increase the 100-day period specified in paragraph (1) if the debtor shows that the need for an increase is caused by circumstances for which the debtor should not be held accountable.''

1994—Subsec. (e). Pub. L. 103–394 added subsec. (e).

1986—Subsec. (d). Pub. L. 99–554 inserted reference to subsection (b) of this section.

1984—Subsec. (c)(3). Pub. L. 98–353, § 506(a), substituted ''of claims or interests that is'' for ''the claims or interests of which are''.

Subsec. (d). Pub. L. 98–353, § 506(b), inserted ''made within the respective periods specified in subsection (c) of this section''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of

Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1122. Classification of claims or interests

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2631.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section codifies current case law surrounding the classification of claims and equity securities. It requires classification based on the nature of the claims or interests classified, and permits inclusion of claims or interests in a particular class only if the claim or interest being included is substantially similar to the other claims or interests of the class.

Subsection (b), also a codification of existing practice, contains an exception. The plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(2), 507(a)(3), or 507(a)(8) of this title, and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee; and

(8) in a case in which the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case or other future income of the debtor as is necessary for the execution of the plan.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a

security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(d) Notwithstanding subsection (a) of this section and sections 506(b), 1129(a)(7), and 1129(b) of this title, if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2631; Pub. L. 98–353, title III, § 507, July 10, 1984, 98 Stat. 385; Pub. L. 103–394, title II, § 206, title III, §§ 304(h)(6), 305(a), title V, § 501(d)(31), Oct. 22, 1994, 108 Stat. 4123, 4134, 4146; Pub. L. 109–8, title III, § 321(b), title XV, § 1502(a)(7), Apr. 20, 2005, 119 Stat. 95, 216.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1123 of the House amendment represents a compromise between similar provisions in the House bill and Senate amendment. The section has been clarified to clearly indicate that both secured and unsecured claims, or either of them, may be impaired in a case under title 11. In addition assumption or rejection of an executory contract under a plan must comply with section 365 of title 11. Moreover, section 1123(a)(1) has been substantively modified to permit classification of certain kinds of priority claims. This is important for purposes of confirmation under section 1129(a)(9).

Section 1123(a)(5) of the House amendment is derived from a similar provision in the House bill and Senate amendment but deletes the language pertaining to ''fair upset price'' as an unnecessary restriction. Section 1123 is also intended to indicate that a plan may provide for any action specified in section 1123 in the case of a corporation without a resolution of the board of directors. If the plan is confirmed, then any action proposed in the plan may be taken notwithstanding any otherwise applicable nonbankruptcy law in accordance with section 1142(a) of title 11.

SENATE REPORT NO. 95–989

Subsection (a) specifies what a plan of reorganization must contain. The plan must designate classes of claims and interests, and specify, by class, the claims or interests that are unimpaired under the plan. Priority claims are not required to be classified because they may not have arisen when the plan is filed. The plan must provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a different, but not better, treatment of his claim or interest.

Paragraph (3) applies to claims, not creditors. Thus, if a creditor is undersecured, and thus has a secured claim and an unsecured claim, this paragraph will be applied independently to each of his claims.

Paragraph (4) of subsection (a) is derived from section 216 of chapter X [section 616 of former title 11] with some modifications. It requires the plan to provide adequate means for the plans execution. These means may include retention by the debtor of all or any part of the property of the estate, transfer of all or any part of the property of the estate to one or more entities, whether organized pre- or postconfirmation, merger or consolidation of the debtor with one or more persons, sale and distribution of all or any part of the property of the estate, satisfaction or modification of any lien, cancellation or modification of any indenture or similar instrument, curing or waiving of any default, extension of maturity dates or change in interest rates of securities, amendment of the debtor's charter, and issuance of securities.

Subparagraph (C), as it applies in railroad cases, has the effect of overruling *St. Joe Paper Co. v. Atlantic Coast Line R. R.*, 347 U.S. 298 (1954). It will allow the trustee or creditors to propose a plan of merger with another railroad without the consent of the debtor, and the debtor will be bound under proposed 11 U.S.C. 1141(a). See Hearings, pt. 3, at 1616. ''Similar instrument'' referred to in subparagraph (F) might include a deposit with an agent for distribution, other than an indenture trustee, such as an agent under an agreement in a railroad conditional sale or lease financing agreement.

Paragraphs (5) and (6) and subsection (b) are derived substantially from Section 216 of Chapter X ([former] 11 U.S.C. 616). Paragraph (5) requires the plan to prohibit the issuance of nonvoting equity securities, and to provide for an appropriate distribution of voting power among the various classes of equity securities. Paragraph (6) requires that the plan contain only provisions that are consistent with the interests of creditors and equity security holders, and with public policy with respect to the selection of officers, directors, and trustees, and their successors.

Subsection (b) specifies the matters that the plan may propose. The plan may impair or leave unimpaired any claim or interest. The plan may provide for the assumption or rejection of executory contracts or unexpired leases not previously rejected under section 365. The plan may also provide for the treatment of claims by the debtor against other entities that are not settled before the confirmation of the plan. The plan may propose settlement or adjustment of any claim or equity security belonging to the estate, or may propose retention and enforcement of such claim or interest by the debtor or by an agent appointed for that purpose.

The plan may also propose the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of the sale among creditors and equity security holders. This would be a liquidating plan. The subsection permits the plan to include any other appropriate provision not inconsistent with the applicable provisions of the bankruptcy code.

Subsection (c) protects an individual debtor's exempt property by prohibiting its use, sale, or lease under a plan proposed by someone other than the debtor, unless the debtor consents.

AMENDMENTS

2005—Subsec. (a)(1). Pub. L. 109–8, § 1502(a)(7), substituted ''507(a)(2), 507(a)(3)'' for ''507(a)(1), 507(a)(2)''.

Subsec. (a)(8). Pub. L. 109–8, § 321(b), added par. (8).

1994—Subsec. (a)(1). Pub. L. 103–394, §§ 304(h)(6), 501(d)(31), substituted ''507(a)(8) of this title,'' for ''507(a)(7) of this title''.

Subsec. (b)(5), (6). Pub. L. 103–394, § 206, added par. (5) and redesignated former par. (5) as (6).

Subsec. (d). Pub. L. 103–394, § 305(a), added subsec. (d).

1984—Subsec. (a). Pub. L. 98–353, § 507(a)(1), in provisions preceding par. (1) substituted ''Notwithstanding any otherwise applicable nonbankruptcy law, a'' for ''A''.

Subsec. (a)(1). Pub. L. 98–353, § 507(a)(2), inserted a comma after ''classes of claims'' and substituted ''507(a)(7) of this title,'' for ''507(a)(6) of this title''.

Subsec. (a)(3). Pub. L. 98–353, § 507(a)(3), struck out ''shall'' before ''specify the treatment''.

Subsec. (a)(5). Pub. L. 98–353, § 507(a)(4), substituted ''implementation'' for ''execution''.

Subsec. (a)(5)(G). Pub. L. 98–353, § 507(a)(5), inserted ''of'' after ''waiving''.

Subsec. (b)(2). Pub. L. 98–353, § 507(b), substituted ''rejection, or assignment'' for ''or rejection'', and ''under such section'' for ''under section 365 of this title''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by sections 206, 304(h)(6), and 501(d)(31) of Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, and amendment by section 305(a) of Pub. L. 103–394 effective Oct. 22, 1994, and applicable only to agreements entered into after Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1124. Impairment of claims or interests

Except as provided in section 1123(a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—

(1) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;

(B) reinstates the maturity of such claim or interest as such maturity existed before such default;

(C) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law;

(D) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and

(E) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2633; Pub. L. 98–353, title III, § 508, July 10, 1984, 98 Stat. 385; Pub. L. 103–394, title II, § 213(d), Oct. 22, 1994, 108 Stat. 4126; Pub. L. 109–8, title III, § 328(b), Apr. 20, 2005, 119 Stat. 100.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1124 of the House amendment is derived from a similar provision in the House bill and Senate amendment. The section defines the new concept of ''impairment'' of claims or interests; the concept differs significantly from the concept of ''materially and adversely affected'' under the Bankruptcy Act [former title 11]. Section 1124(3) of the House amendment provides that a holder of a claim or interest is not impaired, if the plan provides that the holder will receive the allowed amount of the holder's claim, or in the case of an interest with a fixed liquidation preference or redemption price, the greater of such price. This adopts the position contained in the House bill and rejects the contrary standard contained in the Senate amendment.

Section 1124(3) of the House amendment rejects a provision contained in section 1124(3)(B)(iii) of the House bill which would have considered a class of interest not to be impaired by virtue of the fact that the plan provided cash or property for the value of the holder's interest in the debtor.

The effect of the House amendment is to permit an interest not to be impaired only if the interest has a fixed liquidation preference or redemption price. Therefore, a class of interests such as common stock, must either accept a plan under section 1129(a)(8), or the plan must satisfy the requirements of section 1129(b)(2)(C) in order for a plan to be confirmed.

A compromise reflected in section 1124(2)(C) of the House amendment indicates that a class of claims is not impaired under the circumstances of section 1124(2) if damages are paid to rectify reasonable reliance engaged in by the holder of a claim or interest arising from the prepetition breach of a contractual provision, such as an ipso facto or bankruptcy clause, or law. Where the rights of third parties are concerned, such as in the case of lease premises which have been rerented to a third party, it is not intended that there will be adequate damages to compensate the third party.

SENATE REPORT NO. 95–989

The basic concept underlying this section is not new. It rests essentially on Section 107 of Chapter X ([former] 11 U.S.C. 507), which states that creditors or stockholders or any class thereof ''shall be deemed to be 'affected' by a plan only if their or its interest shall be materially and adversely affected thereby.''

This section is designated to indicate when contractual rights of creditors or interest holders are not materially affected. It specifies three ways in which the plan may leave a claim or interest unimpaired.

First, the plan may propose not to alter the legal, equitable, or contractual rights to which the claim or interest entitled its holder.

Second, a claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain. Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

Third, a claim or interest is unimpaired if the plan provides for their payment in cash. In the case of a debt liability, the cash payment is for the allowed amount of the claim, which does not include a redemption premium. If it is an equity security with a fixed liquidation preference, such as a preferred stock, the allowed amount is such liquidation preference, with no redemption premium. With respect to any other equity security, such as a common stock, cash payment must be equal to the ''value of such holder's interest in the debtor.''

Section 1124 does not include payment ''in property'' other than cash. Except for a rare case, claims or interests are not by their terms payable in property, but a plan may so provide and those affected thereby may accept or reject the proposed plan. They may not be forced to accept a plan declaring the holders' claims or interests to be ''unimpaired.''

HOUSE REPORT NO. 95–595

This section is new. It is designed to indicate when contractual rights of creditors or interest holders are not materially affected. The section specifies three ways in which the plan may leave a claim or interest unimpaired.

First, the plan may propose not to alter the legal, equitable, or contractual rights to which the claim or interest entitled its holder.

Second, the plan is permitted to reinstate a claim or interest and thus leave it unimpaired. Reinstatement consists of curing any default (other than a default under an ipso facto or bankruptcy clause) and reinstatement of the maturity of the claim or interest. Further, the plan may not otherwise alter any legal, equitable, or contractual right to which the claim or interest entitles its holder.

Third, the plan may leave a claim or interest unimpaired by paying its amount in full other than in securities of the debtor, an affiliate of the debtor participating in a joint plan, or a successor to the debtor. These securities are excluded because determination of their value would require a valuation of the business being reorganized. Use of them to pay a creditor or equity security holder without his consent may be done only under section 1129(b) and only after a valuation of the debtor. Under this paragraph, the plan must pay the allowed amount of the claim in full, in cash or other property, or, in the case of an equity security, must pay the greatest of any fixed liquidation preference to which the terms of the equity security entitle its holder, any fixed price at which the debtor, under the terms of the equity security may redeem such equity security, and the value, as of the effective date of the plan, of the holder's interest in the debtor. The value of the holder's interest need not be determined precisely by valuing the debtor's business if such value is clearly below redemption or liquidation preference values. If such value would require a full-scale valuation of the business, then such interest should be treated as impaired. But, if the debtor corporation is clearly insolvent, then the value of the common stock holder's interest in the debtor is zero, and offering them nothing under the plan of reorganization will not impair their rights.

''Value, as of the effective date of the plan,'' as used in paragraph (3) and in proposed 11 U.S.C. 1179(a)(7)(B), 1129(a)(9), 1129(b), 1172(2), 1325(a)(4), 1325(a)(5)(B), and 1328(b), indicates that the promised payment under the plan must be discounted to present value as of the effective date of the plan. The discounting should be based only on the unpaid balance of the amount due under the plan, until that amount, including interest, is paid in full.

AMENDMENTS

2005—Par. (2)(A). Pub. L. 109–8, § 328(b)(1), inserted ''or of a kind that section 365(b)(2) expressly does not require to be cured'' before semicolon at end.

Par. (2)(D), (E). Pub. L. 109–8, § 328(b)(2)–(4), added subpar. (D) and redesignated former subpar. (D) as (E).

1994—Par. (3). Pub. L. 103–394 struck out par. (3) which read as follows: ''provides that, on the effective date of the plan, the holder of such claim or interest receives, on account of such claim or interest, cash equal to—

''(A) with respect to a claim, the allowed amount of such claim; or

''(B) with respect to an interest, if applicable, the greater of—

''(i) any fixed liquidation preference to which the terms of any security representing such interest entitle the holder of such interest; or

''(ii) any fixed price at which the debtor, under the terms of such security, may redeem such security from such holder.''

1984—Par. (2)(A). Pub. L. 98–353, § 508(1), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''cures any such default, other than a default of a kind specified in section 365(b)(2) of this title, that occurred before or after the commencement of the case under this title;''.

Par. (3)(B)(i). Pub. L. 98–353, § 508(2), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1125. Postpetition disclosure and solicitation

(a) In this section—

(1) ''adequate information'' means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information; and

(2) ''investor typical of holders of claims or interests of the relevant class'' means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or

a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

(c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

(d) Whether a disclosure statement required under subsection (b) of this section contains adequate information is not governed by any otherwise applicable nonbankruptcy law, rule, or regulation, but an agency or official whose duty is to administer or enforce such a law, rule, or regulation may be heard on the issue of whether a disclosure statement contains adequate information. Such an agency or official may not appeal from, or otherwise seek review of, an order approving a disclosure statement.

(e) A person that solicits acceptance or rejection of a plan, in good faith and in compliance with the applicable provisions of this title, or that participates, in good faith and in compliance with the applicable provisions of this title, in the offer, issuance, sale, or purchase of a security, offered or sold under the plan, of the debtor, of an affiliate participating in a joint plan with the debtor, or of a newly organized successor to the debtor under the plan, is not liable, on account of such solicitation or participation, for violation of any applicable law, rule, or regulation governing solicitation of acceptance or rejection of a plan or the offer, issuance, sale, or purchase of securities.

(f) Notwithstanding subsection (b), in a small business case—

(1) the court may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary;

(2) the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28; and

(3)(A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

(B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the date of the hearing on confirmation of the plan; and

(C) the hearing on the disclosure statement may be combined with the hearing on confirmation of a plan.

(g) Notwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if such holder was solicited before the commencement of the case in a manner complying with applicable nonbankruptcy law.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2633; Pub. L. 98–353, title III, § 509, July 10, 1984, 98 Stat. 385; Pub. L. 103–394, title II, § 217(e), Oct. 22, 1994, 108 Stat. 4127; Pub. L. 109–8, title IV, §§ 408, 431, title VII, § 717, Apr. 20, 2005, 119 Stat. 106, 109, 131.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1125 of the House amendment is derived from section 1125 of the House bill and Senate amendment except with respect to section 1125(f) of the Senate amendment. It will not be necessary for the court to consider the report of the examiner prior to approval of a disclosure statement. The investigation of the examiner is to proceed on an independent basis from the procedure of the reorganization under chapter 11. In order to ensure that the examiner's report will be expeditious and fair, the examiner is precluded from serving as a trustee in the case or from representing a trustee if a trustee is appointed, whether the case remains in chapter 11 or is converted to chapter 7 or 13.

SENATE REPORT NO. 95–989

This section extends disclosure requirements in connection with solicitations to all cases under chapter 11. Heretofore this subject was dealt with by the Bankruptcy Act [former title 11] mainly in the special contexts of railroad reorganizations and chapter X [chapter 10 of former title 11] cases.

Subsection (a) defines (1) the subject matter of disclosure as ''adequate information'' and relates the standard of adequacy to an (2) ''investor typical of holders or claims or interests of the relevant class.'' ''Investor'' is used broadly here, for it will almost always include a trade creditor or other creditors who originally had no investment intent or interest. It refers to the investment-type decision by those called upon to accept a plan to modify their claims or interests, which typically will involve acceptance of new securities or of a cash payment in lieu thereof.

Both the kind and form of information are left essentially to the judicial discretion of the court, guided by the specification in subparagraph (a)(1) that it be of a kind and in sufficient detail that a reasonable and typical investor can make an informed judgment about the plan. The information required will necessarily be governed by the circumstances of the case.

Reporting and audit standards devised for solvent and continuing businesses do not necessarily fit a debtor in reorganization. Subsection (a)(1) expressly incorporates consideration of the nature and history of the debtor and the condition of its books and records into the determination of what is reasonably practicable to supply. These factors are particularly pertinent to historical data and to discontinued operations of no future relevance.

A plan is necessarily predicated on knowledge of the assets and liabilities being dealt with and on factually supported expectations as to the future course of the business sufficient to meet the feasibility standard in section 1130(a)(11) of this title. It may thus be necessary to provide estimates or judgments for that purpose. Yet it remains practicable to describe, in such detail as may be relevant and needed, the basis for the plan and the data on which supporters of the plan rely.

Subsection (b) establishes the jurisdiction of the court over this subject by prohibiting solicitation of acceptance or rejection of a plan after the commencement of the case, unless the person solicited receives, before or at the time of the solicitation, a written disclosure statement approved by the court, after notice and hearing, as containing adequate information. As under present law, determinations of value, by appraisal or otherwise, are not required if not needed to accomplish the purpose specified in subsection (a)(1).

Subsection (c) requires that the same disclosure statement be transmitted to each member of a class. It recognizes that the information needed for an informed

judgment about the plan may differ among classes. A class whose rights under the plan center on a particular fund or asset would have no use for an extensive description of other matters that could not affect them.

Subsection (d) relieves the court of the need to follow any otherwise applicable Federal or state law in determining the adequacy of the information contained in the disclosure statement submitted for its approval. It authorizes an agency or official, Federal or state, charged with administering cognate laws so preempted to advise the court on the adequacy of proposed disclosure statement. But they are not authorized to appeal the court's decision.

Solicitations with respect to a plan do not involve just mere requests for opinions. Acceptance of the plan vitally affects creditors and shareholders, and most frequently the solicitation involves an offering of securities in exchange for claims or interests. The present bankruptcy statute [former title 11] has exempted such offerings under each of its chapters from the registration and disclosure requirements of the Securities Act of 1933 [15 U.S.C. 77a et seq.], an exemption also continued by section 1145(a)(2) of this title. The extension of the disclosure requirements to all chapter 11 cases justifies the coordinate extension of these exemptions. By the same token, no valid purpose is served not to exempt from the requirements of similar state laws in a matter under the exclusive jurisdiction of the Federal bankruptcy laws.

Subsection (e) exonerates any person who, in good faith and in compliance with this title, solicits or participates in the offer, issuance, sale or purchase, under the plan, of a security from any liability, on account of such solicitation or participation, for violation of any law, rule, or regulation governing the offer, issuance, sale, or purchase of securities. This exoneration is coordinate with the exemption from Federal or State registration or licensing requirements provided by section 1145 of this title.

In the nonpublic case, the court, when approving the disclosure statement, has before it the texts of the plan, a proposed disclosure document, and such other information the plan proponents and other interested parties may present at the hearing. In the final analysis the exoneration which subsection (e) grants must depend on the good faith of the plan proponents and of those who participate in the preparation of the disclosure statement and in the solicitation. Subsection (e) does not affect civil or criminal liability for defects and inadequacies that are beyond the limits of the exoneration that good faith provides.

Section 1125 applies to public companies as well, subject to the qualifications of subsection (f). In case of a public company no solicitations of acceptance is permitted unless authorized by the court upon or after approval of the plan pursuant to section 1128(c). In addition to the documents specified in subsection (b), subsection (f) requires transmission of the opinion and order of the court approving the plan and, if filed, the advisory report of the Securities and Exchange Commission or a summary thereof prepared by the Commission.

HOUSE REPORT NO. 95–595

This section is new. It is the heart of the consolidation of the various reorganization chapters found in current law. It requires disclosure before solicitation of acceptances of a plan or reorganization.

Subsection (a) contains two definitions. First, ''adequate information'' is defined to mean information of a kind, and insufficient detail, as far as is reasonably practical in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. Second, ''investor typical of holders of claims or interests of the relevant class'' is defined to mean an investor having a claim or interest of the relevant class, having such a relationship with the debtor as the holders of other claims or interests of the relevant class have, and having such ability to obtain information from sources other than the disclosure statement as holders of claims or interests of the relevant class have, and having such ability to obtain information from sources other than the disclosure statement as holders of claims or interests of the relevant class have. That is, the hypothetical investor against which the disclosure is measured must not be an insider if other members of the class are not insiders, and so on. In other words, the adequacy of disclosure is measured against the typical investor, not an extraordinary one.

The Supreme Court's rulemaking power will not extend to rulemaking that will prescribe what constitutes adequate information. That standard is a substantive standard. Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case, such as the cost of preparation of the statements, the need for relative speed in solicitation and confirmation, and, of course, the need for investor protection. There will be a balancing of interests in each case. In reorganization cases, there is frequently great uncertainty. Therefore the need for flexibility is greatest.

Subsection (b) is the operative subsection. It prohibits solicitation of acceptances or rejections of a plan after the commencement of the case unless, at the time of the solicitation or before, there is transmitted to the solicitee the plan or a summary of the plan, and a written disclosure statement approved by the court as containing adequate information. The subsection permits approval of the statement without the necessity of a valuation of the debtor or an appraisal of the debtor's assets. However, in some cases, a valuation or appraisal will be necessary to develop adequate information. The court will be able to determine what is necessary in light of the facts and circumstances of each particular case.

Subsection (c) requires that the same disclosure statement go to all members of a particular class, but permits different disclosure to different classes.

Subsection (d) excepts the disclosure statements from the requirements of the securities laws (such as section 14 of the 1934 Act [15 U.S.C. 78n] and section 5 of the 1933 Act [15 U.S.C. 77e]), and from similar State securities laws (blue sky laws, for example). The subsection permits an agency or official whose duty is to administer or enforce such laws (such as the Securities and Exchange Commission or State Corporation Commissioners) to appear and be heard on the issue of whether a disclosure statement contains adequate information, but the agencies and officials are not granted the right of appeal from an adverse determination in any capacity. They may join in an appeal by a true party in interest, however.

Subsection (e) is a safe harbor provision, and is necessary to make the exemption provided by subsection (d) effective. Without it, a creditor that solicited an acceptance or rejection in reliance on the court's approval of a disclosure statement would be potentially liable under antifraud sections designed to enforce the very sections of the securities laws from which subsection (d) excuses compliance. The subsection protects only persons that solicit in good faith and in compliance with the applicable provisions of the reorganization chapter. It provides protection from legal liability as well as from equitable liability based on an injunctive action by the SEC or other agency or official.

AMENDMENTS

2005—Subsec. (a)(1). Pub. L. 109–8, §717, inserted ''including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case,'' after ''records,'' and substituted ''such a hypothetical investor'' for ''a hypothetical reasonable investor typical of holders of claims or interests''.

Pub. L. 109–8, § 431(1), inserted before semicolon ''and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information''.

Subsec. (f). Pub. L. 109–8, § 431(2), added subsec. (f) and struck out former subsec. (f) which read as follows: ''Notwithstanding subsection (b), in a case in which the debtor has elected under section 1121(e) to be considered a small business—

''(1) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

''(2) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement as long as the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed at least 10 days prior to the date of the hearing on confirmation of the plan; and

''(3) a hearing on the disclosure statement may be combined with a hearing on confirmation of a plan.''

Subsec. (g). Pub. L. 109–8, § 408, added subsec. (g).

1994—Subsec. (f). Pub. L. 103–394 added subsec. (f).

1984—Subsec. (a)(1). Pub. L. 98–353, § 509(a)(1), inserted '', but adequate information need not include such information about any other possible or proposed plan''.

Subsec. (a)(2)(B). Pub. L. 98–353, § 509(a)(2), inserted ''the'' after ''with''.

Subsec. (a)(2)(C). Pub. L. 98–353, § 509(a)(3), inserted ''of'' after ''holders''.

Subsec. (d). Pub. L. 98–353, § 509(b), inserted ''required under subsection (b) of this section'' and '', or otherwise seek review of,''.

Subsec. (e). Pub. L. 98–353, § 509(c), inserted ''acceptance or rejection of a plan'' after ''solicits'', and ''solicitation of acceptance or rejection of a plan or'' after ''governing''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1126. Acceptance of plan

(a) The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan. If the United States is a creditor or equity security holder, the Secretary of the Treasury may accept or reject the plan on behalf of the United States.

(b) For the purposes of subsections (c) and (d) of this section, a holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—

(1) the solicitation of such acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation; or

(2) if there is not any such law, rule, or regulation, such acceptance or rejection was solicited after disclosure to such holder of adequate information, as defined in section 1125(a) of this title.

(c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(d) A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

(e) On request of a party in interest, and after notice and a hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith, or was not solicited or procured in good faith or in accordance with the provisions of this title.

(f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.

(g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2634; Pub. L. 98–353, title III, § 510, July 10, 1984, 98 Stat. 386.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1126 of the House amendment deletes section 1126(e) as contained in the House bill. Section 105 of the bill constitutes sufficient power in the court to designate exclusion of a creditor's claim on the basis of a conflict of interest. Section 1126(f) of the House amendment adopts a provision contained in section 1127(f) of the Senate bill indicating that a class that is not impaired under a plan is deemed to have accepted a plan and solicitation of acceptances from such class is not required.

SENATE REPORT NO. 95–989

Subsection (a) of this section permits the holder of a claim or interest allowed under section 502 to accept or reject a proposed plan of reorganization. The subsection also incorporates a provision now found in section 199 of chapter X [section 599 of former title 11] that authorizes the Secretary of the Treasury to accept or reject a plan on behalf of the United States when the United States is a creditor or equity security holder.

Subsection (b) governs acceptances and rejections of plans obtained before commencement of a reorganiza-

tion for a nonpublic company. Paragraph (3) expressly states that subsection (b) does not apply to a public company.

Prepetition solicitation is a common practice under chapter XI [chapter 11 of former title 11] today, and chapter IX [chapter 9 of former title 11] current makes explicit provision for it. Section 1126(b) counts a prepetition acceptance or rejection toward the required amounts and number of acceptances only if the solicitation of the acceptance or rejection was in compliance with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation. If there is not any such applicable law, rule, or regulation, then the acceptance or rejection is counted only if it was solicited after disclosure of adequate information, to the holder, as defined in section 1125(a)(1). This permits the court to ensure that the requirements of section 1125 are not avoided by prepetition solicitation.

Subsection (c) specifies the required amount and number of acceptances for a class of creditors. A class of creditors has accepted a plan if at least two-thirds in amount and more than one-half in number of the allowed claims of the class that are voted are cast in favor of the plan. The amount and number are computed on the basis of claims actually voted for or against the plan, not as under chapter X [chapter 10 of former title 11] on the basis of the allowed claims in the class. Subsection (f) excludes from all these calculations claims not voted in good faith, and claims procured or solicited not in good faith or not in accordance with the provisions of this title.

Subsection (c) requires that the same disclosure statement be transmitted to each member of a class. It recognizes that the information needed for an informed judgment about the plan may differ among classes. A class whose rights under the plan center on a particular fund or asset would have no use for an extensive description of other matters that could not affect them.

Subsection (d) relieves the court of the need to follow any otherwise applicable Federal or state law in determining the adequacy of the information contained in the disclosure statement submitted for its approval. It authorizes an agency or official, Federal or state, charged with administering cognate laws so pre-empted to advise the court on the adequacy of proposed disclosure statement. But they are not authorized to appeal the court's decision.

Solicitations with respect to a plan do not involve just mere requests for opinions. Acceptance of the plan vitally affects creditors and shareholders, and most frequently the solicitation involves an offering of securities in exchange for claims or interests. The present Bankruptcy Act [former title 11] has exempted such offerings under each of its chapters from the registration and disclosure requirements of the Securities Act of 1933 [15 U.S.C. 77a et seq.], an exemption also continued by section 1145 of this title. The extension of the disclosure requirements to all chapter 11 cases is justified by the integration of the separate chapters into the single chapter 11. By the same token, no valid purpose is served by failing to provide exemption from the requirements of similar state laws in a matter under the exclusive jurisdiction of the Federal bankruptcy laws.

Under subsection (d), with respect to a class of equity securities, it is sufficient for acceptance of the plan if the amount of securities voting for the plan is at least two-thirds of the total actually voted.

Subsection (e) provides that no acceptances are required from any class whose claims or interests are unimpaired under the plan or in the order confirming the plan.

Subsection (g) provides that any class denied participation under the plan is conclusively deemed to have rejected the plan. There is obviously no need to submit a plan for a vote by a class that is to receive nothing. But under subsection (g) the excluded class is like a class that has not accepted, and is a dissenting class for purposes of confirmation under section 1130.

AMENDMENTS

1984—Subsec. (b)(2). Pub. L. 98–353, § 510(a), substituted ''1125(a)'' for ''1125(a)(1)''.

Subsec. (d). Pub. L. 98–353, § 510(b), inserted a comma after ''such interests''.

Subsec. (f). Pub. L. 98–353, § 510(c), substituted '', and each holder of a claim or interest of such class, are conclusively presumed'' for ''is deemed'', ''solicitation'' for ''solicititation'', and ''interests'' for ''interest''.

Subsec. (g). Pub. L. 98–353, § 510(d), substituted ''receive or retain any property'' for ''any payment or compensation''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1127. Modification of plan

(a) The proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

(d) Any holder of a claim or interest that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

(e) If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time period for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.

(f)(1) Sections 1121 through 1128 and the requirements of section 1129 apply to any modification under subsection (a).

(2) The plan, as modified, shall become the plan only after there has been disclosure under section 1125 as the court may direct, notice and a hearing, and such modification is approved.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2635; Pub. L. 98–353, title III, § 511, July 10, 1984, 98 Stat. 386;

Pub. L. 109–8, title III, § 321(e), Apr. 20, 2005, 119 Stat. 96.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1127(a) of the House amendment adopts a provision contained in the House bill permitting only the proponent of a plan to modify the plan and rejecting the alternative of open modification contained in the Senate amendment.

SENATE REPORT NO. 95–989

Under subsection (a) the proponent may file a proposal to modify a plan prior to confirmation. In the case of a public company the modifying proposal may be filed prior to approval.

Subsection (b) provides that a party in interest eligible to file a plan may file instead of a plan a proposal to modify a plan filed by another. Under subsection (c) a party in interest objecting to some feature of a plan may submit a proposal to modify the plan to meet the objection.

After a plan has been confirmed, but before its substantial consummation, a plan may be modified by leave of court, which subsection (d) provides shall be granted for good cause. Subsection (e) provides that a proposal to modify a plan is subject to the disclosure requirements of section 1125 and as provided in subsection (f). It provides that a creditor or stockholder who voted for or against a plan is deemed to have accepted or rejected the modifying proposal. But if the modification materially and adversely affects any of their interests, they must be afforded an opportunity to change their vote in accordance with the disclosure and solicitation requirements of section 1125.

Under subsection (g) a plan, if modified prior to confirmation, shall be confirmed if it meets the requirements of section 1130.

HOUSE REPORT NO. 95–595

Subsection (a) permits the proponent of a plan to modify it at any time before confirmation, subject, of course, to the requirements of sections 1122 and 1123, governing classification and contents of a plan. After the proponent of a plan files a modification with the court, the plan as modified becomes the plan, and is to be treated the same as an original plan.

Subsection (b) permits modification of a plan after confirmation under certain circumstances. The modification must be proposed before substantial consummation of the plan. The requirements of sections 1122 and 1123 continue to apply. The plan as modified under this subsection becomes the plan only if the court confirms the plan as modified under section 1129 and the circumstances warrant the modification.

Subsection (c) requires the proponent of a modification to comply with the disclosure provisions of section 1125. Of course, if the modification were sufficiently minor, the court might determine that additional disclosure was not required under the circumstances.

Subsection (d) simplifies modification procedure by deeming any creditor or equity security holder that has already accepted or rejected the plan to have accepted or rejected the modification, unless, within the time fixed by the court, the creditor or equity security holder changes this previous acceptance or rejection.

AMENDMENTS

2005—Subsecs. (e), (f). Pub. L. 109–8 added subsecs. (e) and (f).

1984—Subsec. (a). Pub. L. 98–353, § 511(a), inserted ''of a plan'' after ''After the proponent'', and ''of such plan'' after ''modification''.

Subsec. (b). Pub. L. 98–353, § 511(b), substituted ''circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title'' for ''the court, after notice and a hearing, confirms such plan, as modified, under section 1129 of this title, and circumstances warrant such modification''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1128. Confirmation hearing

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) A party in interest may object to confirmation of a plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2635.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

[Section 1129 (enacted as section 1128)] Subsection (a) requires that there be a hearing in every case on the confirmation of the plan. Notice is required.

Subsection (b) permits any party in interest to object to the confirmation of the plan. The Securities and Exchange Commission and indenture trustees, as parties in interest under section 1109, may object to confirmation of the plan.

§ 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the

plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2635; Pub. L. 98–353, title III, § 512, July 10, 1984, 98 Stat. 386; Pub. L. 99–554, title II, §§ 225, 283(v), Oct. 27, 1986, 100 Stat. 3102, 3118; Pub. L. 100–334, § 2(b), June 16, 1988, 102 Stat. 613; Pub. L. 103–394, title III, § 304(h)(7), title V, § 501(d)(32), Oct. 22, 1994, 108 Stat. 4134, 4146; Pub. L. 109–8, title II, § 213(1), title III, § 321(c), title IV, § 438, title VII, § 710, title XII, § 1221(b), title XV, § 1502(a)(8), Apr. 20, 2005, 119 Stat. 52, 95, 113, 127, 196, 216.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1129 of the House amendment relates to confirmation of a plan in a case under chapter 11. Section 1129(a)(3) of the House amendment adopts the position taken in the Senate amendment and section 1129(a)(5) takes the position adopted in the House bill. Section 1129(a)(7) adopts the position taken in the House bill in order to insure that the dissenting members of an accepting class will receive at least what they would otherwise receive under the best interest of creditors test; it also requires that even the members of a class that has rejected the plan be protected by the best interest of creditors test for those rare cramdown cases where a class of creditors would receive more on liquidation than under reorganization of the debtor. Section 1129(a)(7)(C) is discussed in connection with section 1129(b) and section 1111(b). Section 1129(a)(8) of the House amendment adopts the provision taken in the House bill which permits confirmation of a plan as to a particular class without resort to the fair and equitable test if the class has accepted a plan or is unimpaired under the plan.

Section 1129(a)(9) represents a compromise between a similar provision contained in the House bill and the Senate amendment. Under subparagraph (A) claims entitled to priority under section 507(a)(1) or (2) are entitled to receive cash on the effective date of the plan equal to the amount of the claim. Under subparagraph (B) claims entitled to priority under section 507(a)(3), (4), or (5), are entitled to receive deferred cash payments of a present value as of the effective date of the plan equal to the amount of the claims if the class has accepted the plan or cash payments on the effective date of the plan otherwise. Tax claims entitled to priority under section 507(a)(6) of different governmental units may not be contained in one class although all claims of one such unit may be combined and such unit may be required to take deferred cash payments over a period not to exceed 6 years after the date of assessment of the tax with the present value equal to the amount of the claim.

Section 1129(a)(10) is derived from section 1130(a)(12) of the Senate amendment.

Section 1129(b) is new. Together with section 1111(b) and section 1129(a)(7)(C), this section provides when a plan may be confirmed, notwithstanding the failure of an impaired class to accept the plan under section 1129(a)(8). Before discussing section 1129(b) an understanding of section 1111(b) is necessary. Section

1111(b)(1), the general rule that a secured claim is to be treated as a recourse claim in chapter 11 whether or not the claim is nonrecourse by agreement or applicable law. This preferred status for a nonrecourse loan terminates if the property securing the loan is sold under section 363 or is to be sold under the plan.

The preferred status also terminates if the class of which the secured claim is a part elects application of section 1111(b)(2). Section 1111(b)(2) provides that an allowed claim is a secured claim to the full extent the claim is allowed rather than to the extent of the collateral as under section 506(a). A class may elect application of paragraph (2) only if the security is not of inconsequential value and, if the creditor is a recourse creditor, the collateral is not sold under section 363 or to be sold under the plan. Sale of property under section 363 or under the plan is excluded from treatment under section 1111(b) because of the secured party's right to bid in the full amount of his allowed claim at any sale of collateral under section 363(k) of the House amendment.

As previously noted, section 1129(b) sets forth a standard by which a plan may be confirmed notwithstanding the failure of an impaired class to accept the plan.

Paragraph (1) makes clear that this alternative confirmation standard, referred to as ''cram down,'' will be called into play only on the request of the proponent of the plan. Under this cramdown test, the court must confirm the plan if the plan does not discriminate unfairly, and is ''fair and equitable,'' with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. The requirement of the House bill that a plan not ''discriminate unfairly'' with respect to a class is included for clarity; the language in the House report interpreting that requirement, in the context of subordinated debentures, applies equally under the requirements of section 1129(b)(1) of the House amendment.

Although many of the factors interpreting ''fair and equitable'' are specified in paragraph (2), others, which were explicated in the description of section 1129(b) in the House report, were omitted from the House amendment to avoid statutory complexity and because they would undoubtedly be found by a court to be fundamental to ''fair and equitable'' treatment of a dissenting class. For example, a dissenting class should be assured that no senior class receives more than 100 percent of the amount of its claims. While that requirement was explicitly included in the House bill, the deletion is intended to be one of style and not one of substance.

Paragraph (2) provides guidelines for a court to determine whether a plan is fair and equitable with respect to a dissenting class. It must be emphasized that the fair and equitable requirement applies only with respect to dissenting classes. Therefore, unlike the fair and equitable rule contained in chapter X [chapter 10 of former title 11] and section 77 of the Bankruptcy Act [section 205 of former title 11] under section 1129(b)(2), senior accepting classes are permitted to give up value to junior classes as long as no dissenting intervening class receives less than the amount of its claims in full. If there is no dissenting intervening class and the only dissent is from a class junior to the class to which value have been given up, then the plan may still be fair and equitable with respect to the dissenting class, as long as no class senior to the dissenting class has received more than 100 percent of the amount of its claims.

Paragraph (2) contains three subparagraphs, each of which applies to a particular kind of class of claims or interests that is impaired and has not accepted the plan. Subparagraph (A) applies when a class of secured claims is impaired and has not accepted the plan. The provision applies whether or not section 1111(b) applies. The plan may be crammed down notwithstanding the dissent of a secured class only if the plan complies with clause (i), (ii), or (iii).

Clause (i) permits cramdown if the dissenting class of secured claims will retain its lien on the property whether the property is retained by the debtor or transferred. It should be noted that the lien secures the allowed secured claim held by such holder. The meaning of ''allowed secured claim'' will vary depending on whether section 1111(b)(2) applies to such class.

If section 1111(b)(2) applies then the ''electing'' class is entitled to have the entire allowed amount of the debt related to such property secured by a lien even if the value of the collateral is less than the amount of the debt. In addition, the plan must provide for the holder to receive, on account of the allowed secured claims, payments, either present or deferred, of a principal face amount equal to the amount of the debt and of a present value equal to the value of the collateral.

For example, if a creditor loaned $15,000,000 to a debtor secured by real property worth $18,000,000 and the value of the real property had dropped to $12,000,000 by the date when the debtor commenced a proceeding under chapter 11, the plan could be confirmed notwithstanding the dissent of the creditor as long as the lien remains on the collateral to secure a $15,000,000 debt, the face amount of present or extended payments to be made to the creditor under the plan is at least $15,000,000, and the present value of the present or deferred payments is not less than $12,000,000. The House report accompanying the House bill described what is meant by ''present value''.

Clause (ii) is self explanatory. Clause (iii) requires the court to confirm the plan notwithstanding the dissent of the electing secured class if the plan provides for the realization by the secured class of the indubitable equivalents of the secured claims. The standard of ''indubitable equivalents'' is taken from *In re Murel Holding Corp.*, 75 F.2d 941 (2d Cir. 1935) (Learned Hand, Jr.).

Abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence, as would a lien on similar collateral. However, present cash payments less than the secured claim would not satisfy the standard because the creditor is deprived of an opportunity to gain from a future increase in value of the collateral. Unsecured notes as to the secured claim or equity securities of the debtor would not be the indubitable equivalent. With respect to an oversecured creditor, the secured claim will never exceed the allowed claim.

Although the same language applies, a different result pertains with respect to a class of secured claims to which section 1111(b)(2) does not apply. This will apply to all claims secured by a right of setoff. The court must confirm the plan notwithstanding the dissent of such a class of secured claims if any of three alternative requirements is met. Under clause (i) the plan may be confirmed if the class retains a right of setoff or a lien securing the allowed secured claims of the class and the holders will receive payments of a present value equal to the allowed amount of their secured claims. Contrary to electing classes of secured creditors who retain a lien under subparagraph (A)(i)(I) to the extent of the entire claims secured by such lien, nonelecting creditors retain a lien on collateral only to the extent of their allowed secured claims and not to the extent of any deficiency, and such secured creditors must receive present or deferred payments with a present value equal to the allowed secured claim, which in turn is only the equivalent of the value of the collateral under section 506(a).

Any deficiency claim of a nonelecting class of secured claims is treated as an unsecured claim and is not provided for under subparagraph (A). The plan may be confirmed under clause (ii) if the plan proposes to sell the property free and clear of the secured party's lien as long as the lien will attach to the proceeds and will receive treatment under clause (i) or (iii). Clause (iii) permits confirmation if the plan provides for the realization by the dissenting nonelecting class of secured claims of the indubitable equivalent of the secured claims of such class.

Contrary to an ''electing'' class to which section 1111(b)(2) applies, the nonelecting class need not be protected with respect to any future appreciation in value

of the collateral since the secured claim of such a class is never undersecured by reason of section 506(a). Thus the lien secures only the value of interest of such creditor in the collateral. To the extent deferred payments exceed that amount, they represent interest. In the event of a subsequent default, the portion of the face amount of deferred payments representing unaccrued interest will not be secured by the lien.

Subparagraph (B) applies to a dissenting class of unsecured claims. The court must confirm the plan notwithstanding the dissent of a class of impaired unsecured claims if the plan provides for such claims to receive property with a present value equal to the allowed amount of the claims. Unsecured claims may receive any kind of ''property,'' which is used in its broadest sense, as long as the present value of the property given to the holders of unsecured claims is equal to the allowed amount of the claims. Some kinds of property, such as securities, may require difficult valuations by the court; in such circumstances the court need only determine that there is a reasonable likelihood that the property given the dissenting class of impaired unsecured claims equals the present value of such allowed claims.

Alternatively, under clause (ii), the court must confirm the plan if the plan provides that holders of any claims or interests junior to the interests of the dissenting class of impaired unsecured claims will not receive any property under the plan on account of such junior claims or interests. As long as senior creditors have not been paid more than in full, and classes of equal claims are being treated so that the dissenting class of impaired unsecured claims is not being discriminated against unfairly, the plan may be confirmed if the impaired class of unsecured claims receives less than 100 cents on the dollar (or nothing at all) as long as no class junior to the dissenting class receives anything at all. Such an impaired dissenting class may not prevent confirmation of a plan by objection merely because a senior class has elected to give up value to a junior class that is higher in priority than the impaired dissenting class of unsecured claims as long as the above safeguards are met.

Subparagraph (C) applies to a dissenting class of impaired interests. Such interests may include the interests of general or limited partners in a partnership, the interests of a sole proprietor in a proprietorship, or the interest of common or preferred stockholders in a corporation. If the holders of such interests are entitled to a fixed liquidation preference or fixed redemption price on account of such interests then the plan may be confirmed notwithstanding the dissent of such class of interests as long as it provides the holders property of a present value equal to the greatest of the fixed redemption price, or the value of such interests. In the event there is no fixed liquidation preference or redemption price, then the plan may be confirmed as long as it provides the holders of such interests property of a present value equal to the value of such interests. If the interests are ''under water'' then they will be valueless and the plan may be confirmed notwithstanding the dissent of that class of interests even if the plan provides that the holders of such interests will not receive any property on account of such interests.

Alternatively, under clause (ii), the court must confirm the plan notwithstanding the dissent of a class of interests if the plan provides that holders of any interests junior to the dissenting class of interests will not receive or retain any property on account of such junior interests. Clearly, if there are no junior interests junior to the class of dissenting interests, then the condition of clause (ii) is satisfied. The safeguards that no claim or interest receive more than 100 percent of the allowed amount of such claim or interest and that no class be discriminated against unfairly will insure that the plan is fair and equitable with respect to the dissenting class of interests.

Except to the extent of the treatment of secured claims under subparagraph (A) of this statement, the House report remains an accurate description of confirmation of section 1129(b). Contrary to the example contained in the Senate report, a senior class will not be able to give up value to a junior class over the dissent of an intervening class unless the intervening class receives the full amount, as opposed to value, of its claims or interests.

One last point deserves explanation with respect to the admittedly complex subject of confirmation. Section 1129(a)(7)(C) in effect exempts secured creditors making an election under section 1111(b)(2) from application of the best interest of creditors test. In the absence of an election the amount such creditors receive in a plan of liquidation would be the value of their collateral plus any amount recovered on the deficiency in the case of a recourse loan. However, under section 1111(b)(2), the creditors are given an allowed secured claim to the full extent the claim is allowed and have no unsecured deficiency. Since section 1129(b)(2)(A) makes clear that an electing class need receive payments of a present value only equal to the value of the collateral, it is conceivable that under such a ''cram down'' the electing creditors would receive nothing with respect to their deficiency. The advantage to the electing creditors is that they have a lien securing the full amount of the allowed claim so that if the value of the collateral increases after the case is closed, the deferred payments will be secured claims. Thus it is both reasonable and necessary to exempt such electing class from application of section 1129(a)(7) as a logical consequence of permitting election under section 1111(b)(2).

Section 1131 of the Senate amendment is deleted as unnecessary in light of the protection given a secured creditor under section 1129(b) of the House amendment.

Payment of taxes in reorganizations: Under the provisions of section 1141 as revised by the House amendment, an individual in reorganization under chapter 11 will not be discharged from any debt, including prepetition tax liabilities, which are nondischargeable under section 523. Thus, an individual debtor whose plan of reorganization is confirmed under chapter 11 will remain liable for prepetition priority taxes, as defined in section 507, and for tax liabilities which receive no priority but are nondischargeable under section 523, including no return, late return, and fraud liabilities.

In the case of a partnership or a corporation in reorganization under chapter 11 of title 11, section 1141(d)(1) of the House amendment adopts a provision limiting the taxes that must be provided for in a plan before a plan can be confirmed to taxes which receive priority under section 507. In addition, the House amendment makes dischargeable, in effect, tax liabilities attributable to no return, late return, or fraud situations. The amendment thus does not adopt a shareholder continuity test such as was contained in section 1141(d)(2)(A)(iii) of the Senate amendment. However, the House amendment amends section 1106, relating to duties of the trustee, to require the trustee to furnish, on request of a tax authority and without personal liability, information available to the trustee concerning potential prepetition tax liabilities for unfiled returns of the debtor. Depending on the condition of the debtor's books and records, this information may include schedules and files available to the business. The House amendment also does not prohibit a tax authority from disallowing any tax benefit claimed after the reorganization if the item originated in a deduction, credit, or other item improperly reported before the reorganization occurred. It may also be appropriate for the Congress to consider in the future imposing civil or criminal liability on corporate officers for preparing a false or fraudulent tax return. The House amendment also contemplates that the Internal Revenue Service will monitor the relief from liabilities under this provision and advise the Congress if, and to the extent, any significant tax abuse may be resulting from the provision.

Medium of payment of taxes: Federal, State, and local taxes incurred during the administration period of the estate, and during the ''gap'' period in an involuntary case, are to be paid solely in cash. Taxes relating to third priority wages are to be paid, under the

general rules, in cash on the effective date of the plan, if the class has not accepted the plan, in an amount equal to the allowed amount of the claim. If the class has accepted the plan, the taxes must be paid in cash but the payments must be made at the time the wages are paid which may be paid in deferred periodic installments having a value, on the effective date of the plan, equal to the allowed amount of the tax claims. Prepetition taxes entitled to sixth priority under section 507(a)(6) also must be paid in cash, but the plan may also permit the debtor whether a corporation, partnership, or an individual, to pay the allowed taxes in installments over a period not to exceed 6 years following the date on which the tax authority assesses the tax liability, provided the value of the deferred payments representing principal and interest, as of the effective date of the plan, equals the allowed amount of the tax claim.

The House amendment also modifies the provisions of both bills dealing with the time when tax liabilities of a debtor in reorganization may be assessed by the tax authority. The House amendment follows the Senate amendment in deleting the limitation in present law under which a priority tax assessed after a reorganization plan is confirmed must be assessed within 1 year after the date of the filing of the petition. The House amendment specifies broadly that after the bankruptcy court determines the liability of the estate for a prepetition tax or for an administration period tax, the governmental unit may thereafter assess the tax against the estate, debtor, or successor to the debtor. The party to be assessed will, of course, depend on whether the case is under chapter 7, 11, or 13, whether the debtor is an individual, partnership, or a corporation, and whether the court is determining an individual debtor's personal liability for a nondischargeable tax. Assessment of the tax may only be made, however, within the limits of otherwise applicable law, such as the statute of limitations under the tax law.

Tax avoidance purpose: The House bill provided that no reorganization plan may be approved if the principal purpose of the plan is the avoidance of taxes. The Senate amendment modified the rule so that the bankruptcy court need make a determination of tax avoidance purpose only if it is asked to do so by the appropriate tax authority. Under the Senate amendment, if the tax authority does not request the bankruptcy court to rule on the purpose of the plan, the tax authority would not be barred from later asserting a tax avoidance motive with respect to allowance of a deduction or other tax benefit claimed after the reorganization. The House amendment adopts the substance of the Senate amendment, but does not provide a basis by which a tax authority may collaterally attack confirmation of a plan of reorganization other than under section 1144.

SENATE REPORT NO. 95–989

[Section 1130 (enacted as section 1129)] Subsection (a) enumerates the requirement governing confirmation of a plan. The court is required to confirm a plan if and only if all of the requirements are met.

Paragraph (1) requires that the plan comply with the applicable provisions of chapter 11, such as sections 1122 and 1123, governing classification and contents of plan.

Paragraph (2) requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure.

Paragraph (3) requires that the plan have been proposed in good faith, and not by any means forbidden by law.

Paragraph (4) is derived from section 221 of chapter X [section 621 of former title 11]. It requires that any payment made or promised by the proponent, the debtor, or person issuing securities or acquiring property under the plan, for services or for costs and expenses in, or in connection with the case, or in connection with the plan and incident to the case, be disclosed to the court. In addition, any payment made before confirmation must have been reasonable, and any payment to be fixed after confirmation must be subject to the approval of the court as reasonable.

Paragraph (5) is also derived from section 221 of chapter X [section 621 of former title 11]. It requires the plan to disclose the identity and affiliations of any individual proposed to serve, after confirmation, as a director, officer, or voting trustee of the reorganized debtor. The appointment to or continuance in one of these offices by the individual must be consistent with the interests of creditors and equity security holders and with public policy. The plan must also disclose the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation to be paid to the insider.

Paragraph (6) permits confirmation only if any regulatory commission that will have jurisdiction over the debtor after confirmation of the plan has approved any rate change provided for in the plan. As an alternative, the rate change may be conditioned on such approval.

Paragraph (7) provides that in the case of a public company the court shall confirm the plan if it finds the plan to be fair and equitable and the plan either (1) has been accepted by classes of claims or interests as provided in section 1126, or (2), if not so accepted, satisfies the requirements of subsection (b) of this section.

Paragraphs (8) and (9) apply only in nonpublic cases. Paragraph (8) does not apply the fair and equitable standards in two situations. The first occurs if there is unanimous consent of all affected holders of claims and interests. It is also sufficient for purposes of confirmation if each holder of a claim or interest receives or retains consideration of a value, as of the effective date of the plan, that is not less than each would have or receive if the debtor were liquidated under chapter 7 of this title. This standard adapts the test of ''best interest of creditors'' as interpreted by the courts under chapter XI [chapter 11 of former title 11]. It is given broader application in chapter 11 of this title since a plan under chapter 11 may affect not only unsecured claims but secured claims and stock as well.

Under paragraph (9)(A), if a class of claims or interests has not accepted the plan, the court will confirm the plan if, for the dissenting class and any class of equal rank, the negotiated plan provides in value no less than under a plan that is fair and equitable. Such review and determination are not required for any other classes that accepted the plan.

Paragraph (9)(A) would permit a senior creditor to adjust his participation for the benefit of stockholders. In such a case, junior creditors, who have not been satisfied in full, may not object if, absent the ''give-up'', they are receiving all that a fair and equitable plan would give them. To illustrate, suppose the estate is valued at $1.5 million and claims and stock are:

	Claims and stock (millions)	*Equity (millions)*
(1) Senior debt	$1.2	$1.2
(2) Junior debt	.5	.3
(3) Stock	(1)	–
Total	1.7	1.5

[1] No value.

Under the plan, the senior creditor gives up $100,000 in value for the benefit of stockholders as follows:

	Millions
(1) Senior debt	$1.1
(2) Junior debt	.3
(3) Stock	.1
Total	1.5

If the junior creditors dissent, the court may nevertheless confirm the plan since under the fair and equitable standard they had an equity of only $300,000 and the allocation to equity security holders did not affect them.

Paragraph (9)(A) provides a special alternative with respect to secured claims. A plan may be confirmed

against a dissenting class of secured claims if the plan or order of confirmation provides for the realization of their security (1) by the retention of the property subject to such security; (2) by a sale of the property and transfer of the claim to the proceeds of sale if the secured creditors were permitted to bid at the sale and set off against the purchase price up to the allowed amount of their claims; or (3) by such other method that will assure them the realization of the indubitable equivalent of the allowed amount of their secured claims. The indubitable equivalent language is intended to follow the strict approach taken by Judge Learned Hand in *In Re Murel Holding Corp.* 75, F.2d 941 (2nd Cir. 1935).

Paragraph (9)(B) provides that, if a class of claims or interests is excluded from participation under the plan, the court may nevertheless confirm the plan if it determines that no class on a parity with or junior to such participates under the plan. In the previous illustration, no confirmation would be permitted if the negotiated plan would grant a participation to stockholders but nothing for junior creditors. As noted elsewhere, by reason of section 1126(g), an excluded class is a dissenting class under section 1130.

Paragraph (10) states that, to be confirmed, the plan must provide that each holder of a claim under section 507 will receive property, as therein noted, of a value equal to the allowed amount of the claim. There are two exceptions: (A) The holder thereof may agree to a different settlement in part or in whole; (B) where a debtor's business is reorganized under chapter 11, this provision requires that taxes entitled to priority (including administrative claims or taxes) must be paid in cash not later than 120 days after the plan is confirmed, unless the Secretary of the Treasury agrees to other terms or kinds of payment. The bill, as introduced, required full payment in cash within 60 days after the plan is confirmed.

Paragraph (11) requires a determination regarding feasibility of the plan. It is a slight elaboration of the law that has developed in the application of the word ''feasible'' in Chapter X of the present Act [chapter 10 of former title 11].

Paragraph (12) requires that at least one class must accept the plan, but any claims or interests held by insiders are not to be included for purposes of determining the number and amount of acceptances.

Subsection (b) provides that if, in the case of a public company, the plan meets the requirements of subsection (a) (except paragraphs (8) and (9) which do not apply to such a company), the court is to confirm the plan if the plan or the order of confirmation provides adequate protection for the realization of the value of the claims or interests of each class not accepting the plan. The intent is to incorporate inclusively, as a guide to the meaning of subsection (a) the provisions of section 216(7) ([former] 11 U.S.C. 616(7)) with respect to claims and section 216(8) ([former] 11 U.S.C. 616(8)) with respect to equity security interests.

Under subsection (c) the court may confirm only one plan, unless the order of confirmation has been revoked under section 1144. If the requirements for confirmation are met with respect to more than one plan, the court shall consider the preferences of creditors and stockholders in deciding which plan to confirm.

Subsection (d) provides that the bankruptcy court may not confirm a plan of reorganization if its principal purpose is the avoidance of taxes or the avoidance of section 5 of the Securities Act of 1933 (15 U.S.C. 77e). This rules modifies a similar provision of present law (section 269 of the Bankruptcy Act [section 669 of former title 11]).

HOUSE REPORT NO. 95–595

Paragraph (7) [of subsec. (a)] incorporates the former ''best interest of creditors'' test found in chapter 11, but spells out precisely what is intended. With respect to each class, the holders of the claims or interests of that class must receive or retain under the plan on account of those claims or interest property of a value, as of the effective date of the plan, that is not less than the amount that they would so receive or retain if the debtor were liquidated under chapter 7 on the effective date of the plan.

In order to determine the hypothetical distribution in a liquidation, the court will have to consider the various subordination provisions of proposed 11 U.S.C. 510, 726(a)(3), 726(a)(4), and the postponement provisions of proposed 11 U.S.C. 724. Also applicable in appropriate cases will be the rules governing partnership distributions under proposed 11 U.S.C. 723, and distributions of community property under proposed 11 U.S.C. 726(c). Under subparagraph (A), a particular holder is permitted to accept less than liquidation value, but his acceptance does not bind the class.

Property under subparagraph (B) may include securities of the debtor. Thus, the provision will apply in cases in which the plan is confirmed under proposed 11 U.S.C. 1129(b).

Paragraph (8) is central to the confirmation standards. It requires that each class either have accepted the plan or be unimpaired.

Paragraph (9) augments the requirements of paragraph (8) by requiring payment of each priority claim in full. It permits payments over time and payment other than in cash, but payment in securities is not intended to be permitted without consent of the priority claimant even if the class has consented. It also permits a particular claimant to accept less than full payment.

Subsection (b) permits the court to confirm a plan notwithstanding failure of compliance with paragraph (8) of subsection (a). The plan must comply with all other paragraphs of subsection (a), including paragraph (9). This subsection contains the so-called cramdown. It requires simply that the plan meet certain standards of fairness to dissenting creditors or equity security holders. The general principle of the subsection permits confirmation notwithstanding nonacceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule. The dissenting class must be paid in full before any junior class may share under the plan. If it is paid in full, then junior classes may share. Treatment of classes of secured creditors is slightly different because they do not fall in the priority ladder, but the principle is the same.

Specifically, the court may confirm a plan over the objection of a class of secured claims if the members of that class are unimpaired or if they are to receive under the plan property of a value equal to the allowed amount of their secured claims, as determined under proposed 11 U.S.C. 506(a). The property is to be valued as of the effective date of the plan, thus recognizing the time-value of money. As used throughout this subsection, ''property'' includes both tangible and intangible property, such as a security of the debtor or a successor to the debtor under a reorganization plan.

The court may confirm over the dissent of a class of unsecured claims, including priority claims, only if the members of the class are unimpaired, if they will receive under the plan property of a value equal to the allowed amount of their unsecured claims, or if no class junior will share under the plan. That is, if the class is impaired, then they must be paid in full or, if paid less than in full, then no class junior may receive anything under the plan. This codifies the absolute priority rule from the dissenting class on down.

With respect to classes of equity, the court may confirm over a dissent if the members of the class are unimpaired, if they receive their liquidation preference or redemption rights, if any, or if no class junior shares under the plan. This, too, is a codification of the absolute priority rule with respect to equity. If a partnership agreement subordinates limited partners to general partners to any degree, then the general principles of paragraph (3) of this subsection would apply to prevent the general partners from being squeezed out.

One requirement applies generally to all classes before the court may confirm under this subsection. No class may be paid more than in full.

The partial codification of the absolute priority rule here is not intended to deprive senior creditor of compensation for being required to take securities in the reorganized debtor that are of an equal priority with the securities offered to a junior class. Under current law, seniors are entitled to compensation for their loss of priority, and the increased risk put upon them by being required to give up their priority will be reflected in a lower value of the securities given to them than the value of comparable securities given to juniors that have not lost a priority position.

Finally, the proponent must request use of this subsection. The court may not confirm notwithstanding nonacceptance unless the proponent requests and the court may then confirm only if subsection (b) is complied with. The court may not rewrite the plan.

A more detailed explanation follows:

The test to be applied by the court is set forth in the various paragraphs of section 1129(b). The elements of the test are new[,] departing from both the absolute priority rule and the best interests of creditors tests found under the Bankruptcy Act [former title 11]. The court is not permitted to alter the terms of the plan. It must merely decide whether the plan complies with the requirements of section 1129(b). If so, the plan is confirmed, if not the plan is denied confirmation.

The procedure followed is simple. The court examines each class of claims or interests designated under section 1123(a)(1) to see if the requirements of section 1129(b) are met. If the class is a class of secured claims, then paragraph (1) contains two tests that must be complied with in order for confirmation to occur. First, under subparagraph (A), the court must be able to find that the consideration given under the plan on account of the secured claim does not exceed the allowed amount of the claim. This condition is not prescribed as a matter of law under section 1129(a), because if the secured claim is compensated in securities of the debtor, a valuation of the business would be necessary to determine the value of the consideration. While section 1129(a) does not contemplate a valuation of the debtor's business, such a valuation will almost always be required under section 1129(b) in order to determine the value of the consideration to be distributed under the plan. Once the valuation is performed, it becomes a simple matter to impose the criterion that no claim will be paid more than in full.

Application of the test under subparagraph (A) also requires a valuation of the consideration ''as of the effective date of the plan''. This contemplates a present value analysis that will discount value to be received in the future; of course, if the interest rate paid is equivalent to the discount rate used, the present value and face future value will be identical. On the other hand, if no interest is proposed to be paid, the present value will be less than the face future value. For example, consider an allowed secured claim of $1,000 in a class by itself. One plan could propose to pay $1,000 on account of this claim as of the effective date of the plan. Another plan could propose to give a note with a $1,000 face amount due five years after the effective date of the plan on account of this claim. A third plan could propose to give a note in a face amount of $1,000 due five years from the effective date of the plan plus six percent annual interest commencing on the effective date of the plan on account of this claim. The first plan clearly meets the requirements of subparagraph (A) because the amount received on account of the second claim has an equivalent present value as of the effective date of the plan equal to the allowed amount of such claim.

The second plan also meets the requirements of subparagraph (A) because the present value of the five years note as of the effective date of the plan will never exceed the allowed amount of the secured claim; the higher the discount rate, the less present value the note will have. Whether the third plan complies with subparagraph (A) depends on whether the discount rate is less than six percent. Normally, the interest rate used in the plan will be prima facie evidence of the discount rate because the interest rate will reflect an arms length determination of the risk of the security involved and feasibility considerations will tend to understate interest payments. If the court found the discount rate to be greater than or equal to the interest rate used in the plan, then subparagraph (A) would be complied with because the value of the note as of the effective date of the plan would not exceed the allowed amount of the second claim. If, however, the court found the discount rate to be less than the interest rate proposed under the plan, then the present value of the note would exceed $1,000 and the plan would fail of confirmation. On the other hand, it is important to recognize that the future principal amount of a note in excess of the allowed amount of a secured claim may have a present value less than such allowed amount, if the interest rate under the plan is correspondingly less than the discount rate.

Even if the requirements of subparagraph (A) are complied with, the class of secured claims must satisfy one of the three clauses in paragraph (B) in order to pass muster. It is sufficient for confirmation if the class has accepted the plan, or if the claims of the class are unimpaired, or if each holder of a secured claim in the class will receive property of a value as of the effective date of the plan equal to the allowed amount of such claim (unless he has agreed to accept less). It is important to note that under section 506(a), the allowed amount of the secured claim will not include any extent to which the amount of such claim exceeds the value of the property securing such claim. Thus, instead of focusing on secured creditors or unsecured creditors, the statute focuses on secured claims and unsecured claims.

After the court has applied paragraph (1) to each class of secured claims, it then applies paragraph (2) to each class of unsecured claims. Again two separate components must be tested. Subparagraph (A) is identical with the test under section 1129(b)(1)(A) insofar as the holder of an unsecured claim is not permitted to receive property of a value as of the effective date of the plan on account of such claim that is greater than the allowed amount of such claim. In addition, subparagraph (B) requires compliance with one of four conditions. The conditions in clauses (i)–(iii) mirror the conditions of acceptance unimpairment, or full value found in connection with secured claims in section 1129(b)(1)(B).

The condition contained in section 1129(b)(2)(B)(iv) provides another basis for confirming the plan with respect to a class of unsecured claims. It will be of greatest use when an impaired class that has not accepted the plan is to receive less than full value under the plan. The plan may be confirmed under clause (iv) in those circumstances if the class is not unfairly discriminated against with respect to equal classes and if junior classes will receive nothing under the plan. The second criterion is the easier to understand. It is designed to prevent a senior class from giving up consideration to a junior class unless every intermediate class consents, is paid in full, or is unimpaired. This gives intermediate creditors a great deal of leverage in negotiating with senior or secured creditors who wish to have a plan that gives value to equity. One aspect of this test that is not obvious is that whether one class is senior, equal, or junior to another class is relative and not absolute. Thus from the perspective of trade creditors holding unsecured claims, claims of senior and subordinated debentures may be entitled to share on an equal basis with the trade claims. However, from the perspective of the senior unsecured debt, the subordinated debentures are junior.

This point illustrates the lack of precision in the first criterion which demands that a class not be unfairly discriminated against with respect to equal classes. From the perspective of unsecured trade claims, there is no unfair discrimination as long as the total consideration given all other classes of equal rank does not exceed the amount that would result from an exact aliquot distribution. Thus if trade creditors, senior debt,

and subordinate debt are each owed $100 and the plan proposes to pay the trade debt $15, the senior debt $30, and the junior debt $0, the plan would not unfairly discriminate against the trade debt nor would any other allocation of consideration under the plan between the senior and junior debt be unfair as to the trade debt as long as the aggregate consideration is less than $30. The senior debt could take $25 and give up $5 to the junior debt and the trade debt would have no cause to complain because as far as it is concerned the junior debt is an equal class.

However, in this latter case the senior debt would have been unfairly discriminated against because the trade debt was being unfairly over-compensated; of course the plan would also fail unless the senior debt was unimpaired, received full value, or accepted the plan, because from its perspective a junior class received property under the plan. Application of the test from the perspective of senior debt is best illustrated by the plan that proposes to pay trade debt $15, senior debt $25, and junior debt $0. Here the senior debt is being unfairly discriminated against with respect to the equal trade debt even though the trade debt receives less than the senior debt. The discrimination arises from the fact that the senior debt is entitled to the rights of the junior debt which in this example entitle the senior debt to share on a 2:1 basis with the trade debt.

Finally, it is necessary to interpret the first criterion from the perspective of subordinated debt. The junior debt is subrogated to the rights of senior debt once the senior debt is paid in full. Thus, while the plan that pays trade debt $15, senior debt $25, and junior debt $0 is not unfairly discriminatory against the junior debt, a plan that proposes to pay trade debt $55, senior debt $100, and junior debt $1, would be unfairly discriminatory. In order to avoid discriminatory treatment against the junior debt, at least $10 would have to be received by such debt under those facts.

The criterion of unfair discrimination is not derived from the fair and equitable rule or from the best interests of creditors test. Rather it preserves just treatment of a dissenting class from the class's own perspective.

If each class of secured claims satisfies the requirements of section 1129(b)(1) and each class of unsecured claims satisfies the requirements of section 1129(b)(2), then the court must still see if each class of interests satisfies section 1129(b)(3) before the plan may be confirmed. Again, two separate criteria must be met. Under subparagraph (A) if the interest entitles the holder thereof to a fixed liquidation preference or if such interest may be redeemed at a fixed price, then the holder of such interest must not receive under the plan on account of such interest property of a value as of the effective date of the plan greater than the greater of these two values of the interest. Preferred stock would be an example of an interest likely to have liquidation preference or redemption price.

If an interest such as most common stock or the interest of a general partnership has neither a fixed liquidation preference nor a fixed redemption price, then the criterion in subparagraph (A) is automatically fulfilled. In addition subparagraph (B) contains five clauses that impose alternative conditions of which at least one must be satisfied in order to warrant confirmation. The first two clauses contain requirements of acceptance or unimpairment similar to the first two clauses in paragraphs (1)(B) and (2)(B). Clause (iii) is similar to the unimpairment test contained in section 1124(3)(B), except that it will apply to cover the issuance securities of the debtor of a value as of the effective date of the plan equal to the greater of any fixed liquidation preference or redemption price. The fourth clause allows confirmation if junior interests are not compensated under the plan and the fifth clause allows confirmation if there are no junior interests. These clauses recognized that as long as senior classes receive no more than full payment, the objection of a junior class will not defeat confirmation unless a class junior to it is receiving value under the plan and the objecting class is impaired. While a determination of impairment may be made under section 1124(3)(B)(iii) without a precise valuation of the business when common stock is clearly under water, once section 1129(b) is used, a more detailed valuation is a necessary byproduct. Thus, if no property is given to a holder of an interest under the plan, the interest should be clearly worthless in order to find unimpairment under section 1124(3)(B)(iii) and section 1129(a)(8); otherwise, since a class of interests receiving no property is deemed to object under section 1126(g), the more precise valuation of section 1129(b) should be used.

If all of the requirements of section 1129(b) are complied with, then the court may confirm the plan subject to other limitations such as those found in section 1129(a) and (d).

Subsection (c) of section 1129 governs confirmation when more than one plan meets the requirements of the section. The court must consider the preferences of creditors and equity security holders in determining which plan to confirm.

Subsection (d) requires the court to deny confirmation if the principal purpose of the plan is the avoidance of taxes (through use of sections 346 and 1146, and applicable provisions of State law or the Internal Revenue Code [title 26] governing bankruptcy reorganizations) or the avoidance of section 5 of the Securities Act of 1933 [15 U.S.C. 77e] (through use of section 1145).

REFERENCES IN TEXT

Section 5 of the Securities Act of 1933, referred to in subsec. (d), is classified to section 77e of Title 15, Commerce and Trade.

AMENDMENTS

2005—Subsec. (a)(9)(A). Pub. L. 109–8, § 1502(a)(8)(A), substituted ''507(a)(2) or 507(a)(3)'' for ''507(a)(1) or 507(a)(2)''.

Subsec. (a)(9)(B). Pub. L. 109–8, § 1502(a)(8)(B), substituted ''507(a)(1)'' for ''507(a)(3)''.

Subsec. (a)(9)(C). Pub. L. 109–8, § 710(2), substituted ''regular installment payments in cash—'' and cls. (i) to (iii) for ''deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.''

Subsec. (a)(9)(D). Pub. L. 109–8, § 710(1), (3), added subpar. (D).

Subsec. (a)(14). Pub. L. 109–8, § 213(1), added par. (14).

Subsec. (a)(15). Pub. L. 109–8, § 321(c)(1), added par. (15).

Subsec. (a)(16). Pub. L. 109–8, § 1221(b), added par. (16).

Subsec. (b)(2)(B)(ii). Pub. L. 109–8, § 321(c)(2), inserted before period at end '', except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section''.

Subsec. (e). Pub. L. 109–8, § 438, added subsec. (e).

1994—Subsec. (a)(4). Pub. L. 103–394, § 501(d)(32)(A)(i), substituted period for semicolon at end.

Subsec. (a)(9)(B). Pub. L. 103–394, § 304(h)(7)(i), substituted '', 507(a)(6), or 507(a)(7)'' for ''or 507(a)(6)''.

Subsec. (a)(9)(C). Pub. L. 103–394, § 304(h)(7)(ii), substituted ''507(a)(8)'' for ''507(a)(7)''.

Subsec. (a)(12). Pub. L. 103–394, § 501(d)(32)(A)(ii), inserted ''of title 28'' after ''section 1930''.

Subsec. (d). Pub. L. 103–394, § 501(d)(32)(B), struck out ''(15 U.S.C. 77e)'' after ''Act of 1933''.

1988—Subsec. (a)(13). Pub. L. 100–334 added par. (13).

1986—Subsec. (a)(7). Pub. L. 99–554, § 283(v)(1), struck out ''of'' after ''to''.

Subsec. (a)(9)(B). Pub. L. 99–554, § 283(v)(2), inserted reference to section 507(a)(6).

Subsec. (a)(9)(C). Pub. L. 99–554, § 283(v)(3), substituted ''507(a)(7)'' for ''507(a)(6)''.

Subsec. (a)(12). Pub. L. 99–554, § 225, added par. (12).

1984—Subsec. (a)(1), (2). Pub. L. 98–353, § 512(a)(1), (2), substituted ''title'' for ''chapter''.

Subsec. (a)(4). Pub. L. 98–353, § 512(a)(3), amended par. (4) generally. Prior to amendment, par. (4) read as follows: ''(A) Any payment made or promised by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in, or in connection with, the case, or in connection with the plan and incident to the case, has been disclosed to the court; and (B)(i) any such payment made before confirmation of the plan is reasonable; or (ii) if such payment is to be fixed after confirmation of the plan, such payment is subject to the approval of the court as reasonable.''

Subsec. (a)(5)(A)(ii). Pub. L. 98–353, § 512(a)(4), substituted ''; and'' for the period at the end.

Subsec. (a)(5)(B). Pub. L. 98–353, § 512(a)(5), substituted ''the'' for ''The''.

Subsec. (a)(6). Pub. L. 98–353, § 512(a)(6), inserted ''governmental'' after ''Any''.

Subsec. (a)(7). Pub. L. 98–353, § 512(a)(7)(A), substituted ''of each impaired class of claims or interests'' for ''each class''.

Subsec. (a)(7)(B). Pub. L. 98–353, § 512(a)(7)(B), substituted ''holder's'' for ''creditor's''.

Subsec. (a)(8). Pub. L. 98–353, § 512(a)(8), inserted ''of claims or interests'' after ''each class''.

Subsec. (a)(10). Pub. L. 98–353, § 512(a)(9), substituted ''If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider'' for ''At least one class of claims has accepted the plan, determined without including any acceptance of the plan by any insider holding a claim of such class''.

Subsec. (b)(2)(A)(i)(I), (ii). Pub. L. 98–353, § 512(b)(1), substituted ''liens'' for ''lien'' wherever appearing.

Subsec. (b)(2)(B)(ii). Pub. L. 98–353, § 512(b)(2), inserted ''under the plan'' after ''retain''.

Subsec. (b)(2)(C)(i). Pub. L. 98–353, § 512(b)(3), substituted ''interest'' for ''claim'', and ''or the value'' for ''and the value''.

Subsec. (d). Pub. L. 98–353, § 512(c), inserted ''the application of'' and provisions requiring that in any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by section 1221(b) of Pub. L. 109–8 applicable to cases pending under this title on Apr. 20, 2005, or filed under this title on or after Apr. 20, 2005, with certain exceptions, see section 1221(d) of Pub. L. 109–8, set out as a note under section 363 of this title.

Amendment by sections 213(1), 321(c), 438, 710, and 1502(a)(8) of Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–334 effective June 16, 1988, but not applicable to cases commenced under this title before that date, see section 4 of Pub. L. 100–334, set out as an Effective Date note under section 1114 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by section 225 of Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99–554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99–554.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SUBCHAPTER III—POSTCONFIRMATION MATTERS

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual—

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date; and

(ii) modification of the plan under section 1127 is not practicable; and

(C) unless after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2638; Pub. L. 98–353, title III, § 513, July 10, 1984, 98 Stat. 387; Pub. L. 109–8, title III, §§ 321(d), 330(b), title VII, § 708, Apr. 20, 2005, 119 Stat. 95, 101, 126.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1141(d) of the House amendment is derived from a comparable provision contained in the Senate amendment. However, section 1141(d)(2) of the House amendment is derived from the House bill as preferable to the Senate amendment. It is necessary for a corporation or partnership undergoing reorganization to be able to present its creditors with a fixed list of liabilities upon which the creditors or third parties can make intelligent decisions. Retaining an exception for discharge with respect to nondischargeable taxes would leave an undesirable uncertainty surrounding reorganizations that is unacceptable. Section 1141(d)(3) is derived from the Senate amendment. Section 1141(d)(4) is likewise derived from the Senate amendment.

SENATE REPORT NO. 95–989

Subsection (a) of this section makes the provisions of a confirmed plan binding on the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of the creditor, equity security holder, or partner is impaired under the plan and whether or not he has accepted the plan. There are two exceptions, enumerated in paragraph (2) and (3) of subsection (d).

Unless the plan or the order confirming the plan provides otherwise, the confirmation of a plan vests all of the property of the estate in the debtor and releases it from all claims and interests of creditors, equity security holders and general partners.

Subsection (d) contains the discharge for a reorganized debtor. Paragraph (1) specifies that the confirmation of a plan discharges the debtor from any debt that arose before the date of the order for relief unless the plan or the order confirming the plan provides otherwise. The discharge is effective against those claims whether or not proof of the claim is filed (or deemed filed), and whether or not the claim is allowed. The discharge also terminates all rights and interests of equity security holders and general partners provided for by the plan. The paragraph permits the plan or the order confirming the plan to provide otherwise, and excepts certain debts from the discharge as provided in paragraphs (2) and (3).

Paragraph (2) of subsection (d) makes clear what taxes remain nondischargeable in the case of a corporate debtor emerging from a reorganization under chapter 11. Nondischargeable taxes in such a reorganization are the priority taxes (under section 507) and tax payments which come due during and after the proceeding under a deferred or part-payment agreement which the debtor had entered into with the tax authority before the bankruptcy proceedings began. On the other hand, a corporation which is taken over by its creditors through a plan of reorganization will not continue to be liable for nonpriority taxes arising from the corporation's prepetition fraud, failure to file a return, or failure to file a timely return, since the creditors who take over the reorganized company should not bear the burden of acts for which the creditors were not at fault.

Paragraph (3) specifies that the debtor is not discharged by the confirmation of a plan if the plan is a liquidating plan and if the debtor would be denied discharge in a liquidation case under section 727. Specifically, if all or substantially all of the distribution under the plan is of all or substantially all of the property of the estate or the proceeds of it, if the business, if any, of the debtor does not continue, and if the debtor would be denied a discharge under section 727 (such as if the debtor were not an individual or if he had committed an act that would lead to a denial of discharge), the chapter 11 discharge is not granted.

Paragraph (4) authorizes the court to approve a waiver of discharge by the debtor.

HOUSE REPORT NO. 95–595

Paragraph (2) [of subsec. (d)] makes applicable to an individual debtor the general exceptions to discharge that are enumerated in section 523(a) of the bankruptcy code.

AMENDMENTS

2005—Subsec. (d)(2). Pub. L. 109–8, § 321(d)(1), substituted "A discharge under this chapter does not discharge a debtor who is an individual" for "The confirmation of a plan does not discharge an individual debtor".

Subsec. (d)(5). Pub. L. 109–8, § 321(d)(2), added par. (5).

Subsec. (d)(5)(C). Pub. L. 109–8, § 330(b), added subpar. (C).

Subsec. (d)(6). Pub. L. 109–8, § 708, added par. (6).

1984—Subsec. (a). Pub. L. 98–353, § 513(a), substituted "any creditor, equity security holder, or general partner in" for "any creditor or equity security holder of, or general partner in,".

Subsec. (c). Pub. L. 98–353, § 513(b), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows: ''After confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, of equity security holders, and of general partners in the debtor, except as otherwise provided in the plan or in the order confirming the plan.''

EFFECTIVE DATE OF 2005 AMENDMENT

Amendments by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, with amendments by sections 321(d) and 708 of Pub. L. 109–8 not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, and amendment by section 330(b) of Pub. L. 109–8 applicable with respect to cases commenced under this title on or after Apr. 20, 2005, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1142. Implementation of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2639; Pub. L. 98–353, title III, § 514(a), (c), (d), July 10, 1984, 98 Stat. 387.)

AMENDMENTS

1984—Pub. L. 98–353, § 514(a), substituted ''Implementation'' for ''Execution'' in section catchline.

Subsec. (a). Pub. L. 98–353, § 514(c), struck out the comma after ''shall carry out the plan''.

Subsec. (b). Pub. L. 98–353, § 514(d), inserted ''a'' after ''by''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1143. Distribution

If a plan requires presentment or surrender of a security or the performance of any other act as a condition to participation in distribution under the plan, such action shall be taken not later than five years after the date of the entry of the order of confirmation. Any entity that has not within such time presented or surrendered such entity's security or taken any such other action that the plan requires may not participate in distribution under the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2639.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 1143 fixes a 5-year limitation on presentment or surrender of securities or the performance of any other act that is a condition to participation in distribution under the plan. The 5 years runs from the date of the entry of the order of confirmation. Any entity that does not take the appropriate action with the 5-year period is barred from participation in the distribution under the plan.

§ 1144. Revocation of an order of confirmation

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall—

(1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

(2) revoke the discharge of the debtor.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2639; Pub. L. 98–353, title III, § 515, July 10, 1984, 98 Stat. 387.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

If an order of confirmation was procured by fraud, then the court may revoke the order on request of a party in interest if the request is made before 180 days after the date of the entry of the order of confirmation. The order revoking the order of confirmation must revoke the discharge of the debtor, and contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation.

AMENDMENTS

1984—Pub. L. 98–353 inserted ''if and only'' after ''revoke such order''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1145. Exemption from securities laws

(a) Except with respect to an entity that is an underwriter as defined in subsection (b) of this section, section 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security do not apply to—

(1) the offer or sale under a plan of a security of the debtor, of an affiliate participating in a joint plan with the debtor, or of a successor to the debtor under the plan—

(A) in exchange for a claim against, an interest in, or a claim for an administrative expense in the case concerning, the debtor or such affiliate; or

(B) principally in such exchange and partly for cash or property;

(2) the offer of a security through any warrant, option, right to subscribe, or conversion privilege that was sold in the manner specified in paragraph (1) of this subsection, or the sale of a security upon the exercise of such a warrant, option, right, or privilege;

(3) the offer or sale, other than under a plan, of a security of an issuer other than the debtor or an affiliate, if—

(A) such security was owned by the debtor on the date of the filing of the petition;

(B) the issuer of such security is—

(i) required to file reports under section 13 or 15(d) of the Securities Exchange Act of 1934; and

(ii) in compliance with the disclosure and reporting provision of such applicable section; and

(C) such offer or sale is of securities that do not exceed—

(i) during the two-year period immediately following the date of the filing of the petition, four percent of the securities of such class outstanding on such date; and

(ii) during any 180-day period following such two-year period, one percent of the securities outstanding at the beginning of such 180-day period; or

(4) a transaction by a stockbroker in a security that is executed after a transaction of a kind specified in paragraph (1) or (2) of this subsection in such security and before the expiration of 40 days after the first date on which such security was bona fide offered to the public by the issuer or by or through an underwriter, if such stockbroker provides, at the time of or before such transaction by such stockbroker, a disclosure statement approved under section 1125 of this title, and, if the court orders, information supplementing such disclosure statement.

(b)(1) Except as provided in paragraph (2) of this subsection and except with respect to ordinary trading transactions of an entity that is not an issuer, an entity is an underwriter under section 2(11) of the Securities Act of 1933,[1] if such entity—

(A) purchases a claim against, interest in, or claim for an administrative expense in the case concerning, the debtor, if such purchase is with a view to distribution of any security received or to be received in exchange for such a claim or interest;

(B) offers to sell securities offered or sold under the plan for the holders of such securities;

(C) offers to buy securities offered or sold under the plan from the holders of such securities, if such offer to buy is—

(i) with a view to distribution of such securities; and

(ii) under an agreement made in connection with the plan, with the consummation of the plan, or with the offer or sale of securities under the plan; or

(D) is an issuer, as used in such section 2(11), with respect to such securities.

(2) An entity is not an underwriter under section 2(11) of the Securities Act of 1933[1] or under paragraph (1) of this subsection with respect to an agreement that provides only for—

(A)(i) the matching or combining of fractional interests in securities offered or sold under the plan into whole interests; or

(ii) the purchase or sale of such fractional interests from or to entities receiving such fractional interests under the plan; or

(B) the purchase or sale for such entities of such fractional or whole interests as are necessary to adjust for any remaining fractional interests after such matching.

(3) An entity other than an entity of the kind specified in paragraph (1) of this subsection is not an underwriter under section 2(11) of the Securities Act of 1933[1] with respect to any securities offered or sold to such entity in the manner specified in subsection (a)(1) of this section.

(c) An offer or sale of securities of the kind and in the manner specified under subsection (a)(1) of this section is deemed to be a public offering.

(d) The Trust Indenture Act of 1939 does not apply to a note issued under the plan that matures not later than one year after the effective date of the plan.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2639; Pub. L. 98–353, title III, § 516, July 10, 1984, 98 Stat. 387; Pub. L. 103–394, title V, § 501(d)(33), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1145 of the House amendment deletes a provision contained in section 1145(a)(1) of the House bill in favor of a more adequate provision contained in section 364(f) of the House amendment. In addition, section 1145(d) has been added to indicate that the Trust Indenture Act [15 U.S.C. 77aaa et seq.] does not apply to a commercial note issued under a plan, if the note matures not later than 1 year after the effective date of the plan. Some commercial notes receive such an exemption under 304(a)(4) of the Trust Indenture Act of 1939 (15 U.S.C. § 77ddd(a)(4)) and others may receive protection by incorporation by reference into the Trust Indenture Act of securities exempt under section 3a(3), (7), (9), or (10) of the Securities Act of 1933 [15 U.S.C. 77c(a)(3), (7), (9), (10)].

In light of the amendments made to the Securities Act of 1933 [15 U.S.C. 77a et seq.] in title III of the House amendment to H.R. 8200, a specific exemption from the Trust Indenture Act [15 U.S.C. 77aaa et seq.] is required in order to create certainty regarding plans of reorganization. Section 1145(d) is not intended to imply that commercial notes issued under a plan that matures more than 1 year after the effective date of the plan are automatically covered by the Trust Indenture Act of 1939 since such notes may fall within another exemption thereto.

One other point with respect to Section 1145 deserves comment. Section 1145(a)(3) grants a debtor in possession or trustee in chapter 11 an extremely narrow portfolio security exemption from section 5 of the Securities Act of 1933 [15 U.S.C. 77e] or any comparable State law. The provision was considered by Congress and adopted after much study. The exemption is reasonable and is more restrictive than comparable provisions under the Securities Act [15 U.S.C. 77a et seq.] relating to the estates of decedents. Subsequent to passage of H.R. 8200 by the House of Representatives, the Securities and Exchange Commission promulgated Rule 148 to treat with this problem under existing law. Members of Congress received opinions from attorneys indicating dissatisfaction with the Commission's rule although the rule has been amended, the ultimate limitation of 1 percent promulgated by the Commission is wholly unacceptable.

The Commission rule would permit a trustee or debtor in possession to distribute securities at the rate of 1 percent every 6 months. Section 1145(a)(3) permits the trustee to distribute 4 percent of the securities during the 2-year period immediately following the date of the filing of the petition. In addition, the security must be

[1] See References in Text note below.

of a reporting company under section 13 of the Securities and Exchange Act of 1934 [15 U.S.C. 78m], and must be in compliance with all applicable requirements for the continuing of trading in the security on the date that the trustee offers or sells the security.

With these safeguards the trustee or debtor in possession should be able to distribute 4 percent of the securities of a class at any time during the 2-year period immediately following the date of the filing of the petition in the interests of expediting bankruptcy administration. The same rationale that applies in expeditiously terminating decedents' estates applies no less to an estate under title 11.

SENATE REPORT NO. 95–989

This section, derived from similar provisions found in sections 264, 393, and 518 of the Bankruptcy Act [sections 664, 793, and 918 of former title 11], provides a limited exemption from the securities laws for securities issued under a plan of reorganization and for certain other securities. Subsection (a) exempts from the requirements of section 5 of the Securities Act of 1933 [15 U.S.C. 77e] and from any State or local law requiring registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security, the offer or sale of certain securities.

Paragraph (1) of subsection (a) exempts the offer or sale under section 364 of any security that is not an equity security or convertible into an equity security. This paragraph is designed to facilitate the issuance of certificates of indebtedness, and should be read in light of the amendment made in section 306 of title III to section 3(a)(7) of the 1933 act [15 U.S.C. 77c(a)(7)].

Paragraph (2) of subsection (a) exempts the offer or sale of any security of the debtor, a successor to the debtor, or an affiliate in a joint plan, distributed under a plan if such security is exchanged in principal part for securities of the debtor or for allowed claims or administrative expenses. This exemption is carried over from present law, except as to administrative claims, but is limited to prevent distribution of securities to other than claim holders or equity security holders of the debtor or the estate.

Paragraph (3) of subsection (a) exempts the offer or sale of any security that arises from the exercise of a subscription right or from the exercise of a conversion privilege when such subscription right or conversion privilege was issued under a plan. This exemption is necessary in order to enhance the marketability of subscription rights or conversion privileges, including warrants, offered or sold under a plan. This is present law.

Paragraph (4) of subsection (a) exempts sales of portfolio securities, excluding securities of the debtor or its affiliate, owned by the debtor on the date of the filing of the petition. The purpose of this exemption is to allow the debtor or trustee to sell or distribute, without allowing manipulation schemes, restricted portfolio securities held or acquired by the debtor. Subparagraph (B) of section 1145(a)(4) limits the exemption to securities of a company that is required to file reports under section 13 of the Securities Act [15 U.S.C. 78m] and that is in compliance with all requirements for the continuance of trading those securities. This limitation effectively prevents selling into the market ''cats and dogs'' of a nonreporting company. Subparagraph (C) places a limitation on the amount of restricted securities that may be distributed. During the case, the trustee may sell up to 4 percent of each class of restricted securities at any time during the first 2 years and 1 percent during any 180-day period thereafter. This relaxation of the resale rules for debtors in holding restricted securities is similar to but less extensive than the relaxation in SEC Rule 114(c)(3)(v) for the estates of deceased holders of securities.

Paragraph (5) contains an exemption for brokers and dealers (stockbrokers, as defined in title 11) akin to the exemption provided by section 4(3)(A) of the Securities Act of 1933 [15 U.S.C. 77d(3)(A)]. Instead of being required to supply a prospectus, however, the stockbroker is required to supply the approved disclosure statement, and if the court orders, information supplementing the disclosure statement. Under present law, the stockholder is not required to supply anything.

Subsection (b) is new. The subsection should be read in light of the amendment in section 306 of title III to the 1933 act [15 U.S.C. 77c(a)(7), (9), (10)]. It specifies the standards under which a creditor, equity security holder, or other entity acquiring securities under the plan may resell them. The Securities Act places limitations on sales by underwriters. This subsection defines who is an underwriter, and thus restricted, and who is free to resell. Paragraph (1) enumerates real underwriters that participate in a classical underwriting. A person is an underwriter if he purchases a claim against, interest in, or claim for an administrative expense in the case concerning, the debtor, with a view to distribution or interest. This provision covers the purchase of a certificate of indebtedness issued under proposed 11 U.S.C. 364 and purchased from the debtor, if the purchase of the certificate was with a view to distribution.

A person is also an underwriter if he offers to sell securities offered or sold under the plan for the holders of such securities, or offers to buy securities offered or sold under the plan from the holders of such securities, if the offer to buy is with a view to distribution of the securities and under an agreement made in connection with the plan, with the consummation of the plan or with the offer or sale of securities under the plan. Finally, a person is an underwriter if he is an issuer, as used in section 2(11) of the Securities Act of 1933 [15 U.S.C. 77b(11)].

Paragraph (2) of subsection (b) exempts from the definition of underwriter any entity to the extent that any agreement that would bring the entity under the definition in paragraph (1) provides only for the matching combination of fractional interests in the covered securities or the purchase or sale of fractional interests. This paragraph and paragraph (1) are modeled after former rule 133 of the Securities and Exchange Commission.

Paragraph (3) specifies that if an entity is not an underwriter under the provisions of paragraph (1), as limited by paragraph (2), then the entity is not an underwriter for the purposes of the Securities Act of 1933 [15 U.S.C. 77a et seq.] with respect to the covered securities, that is, those offered or sold in an exempt transaction specified in subsection (a)(2). This makes clear that the current definition of underwriter in section 2(11) of the Securities Act of 1933 [15 U.S.C. 77b(11)] does not apply to such a creditor. The definition in that section technically applies to any person that purchases securities with ''a view to distribution.'' If literally applied, it would prevent any creditor in a bankruptcy case from selling securities received without filing a registration statement or finding another exemption.

Subsection (b) is a first run transaction exemption and does not exempt a creditor that, for example, some years later becomes an underwriter by reacquiring securities originally issued under a plan.

Subsection (c) makes an offer or sale of securities under the plan in an exempt transaction (as specified in subsection (a)(2)) a public offering, in order to prevent characterization of the distribution as a ''private placement'' which would result in restrictions, under rule 144 of the SEC, on the resale of the securities.

REFERENCES IN TEXT

Section 5 of the Securities Act of 1933, referred to in subsec. (a), is classified to section 77e of Title 15, Commerce and Trade.

Sections 13 and 15(d) of the Securities Exchange Act of 1934, referred to in subsec. (a)(3)(B)(i), are classified to sections 78m and 78*o*(d), respectively, of Title 15, Commerce and Trade.

Section 2(11) of the Securities Act of 1933, referred to in subsec. (b), was redesignated section 2(a)(11) of the Act by Pub. L. 104–290, title I, § 106(a)(1), Oct. 11, 1996, 110 Stat. 3424, and is classified to section 77b(a)(11) of Title 15, Commerce and Trade.

The Trust Indenture Act of 1939, referred to in subsec. (d), is title III of act May 27, 1933, ch. 38, as added Aug.

3, 1939, ch. 411, 53 Stat. 1149, as amended, which is classified generally to subchapter III (§ 77aaa et seq.) of chapter 2A of Title 15, Commerce and Trade. For complete classification of this Act to the Code, see section 77aaa of Title 15 and Tables.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103–394, § 501(d)(33)(A), in introductory provisions struck out ''(15 U.S.C. 77e)'' after ''Act of 1933'' and substituted ''do not apply'' for ''does not apply'' and in par. (3)(B)(i) struck out ''(15 U.S.C. 78m or 78*o*(d))'' after ''Act of 1934''.

Subsec. (b)(1). Pub. L. 103–394, § 501(d)(33)(B), struck out ''(15 U.S.C. 77b(11))'' after ''Act of 1933''.

Subsec. (d). Pub. L. 103–394, § 501(d)(33)(C), struck out ''(15 U.S.C. 77aaa et seq.)'' after ''Act of 1939''.

1984—Subsec. (a)(3)(B)(i). Pub. L. 98–353, § 516(a)(1), inserted ''or 15(d)'' after ''13'', and ''or 78*o*(d)'' after ''78m''.

Subsec. (a)(3)(B)(ii). Pub. L. 98–353, § 516(a)(2), amended cl. (ii) generally. Prior to amendment, cl. (ii) read as follows: ''in compliance with all applicable requirements for the continuance of trading in such security on the date of such offer or sale; and''.

Subsec. (a)(4). Pub. L. 98–353, § 516(a)(3), substituted ''stockbroker'' for ''stockholder'' in two places.

Subsec. (b)(1). Pub. L. 98–353, § 516(b)(1), inserted ''and except with respect to ordinary trading transactions of an entity that is not an issuer''.

Subsec. (b)(1)(C). Pub. L. 98–353, § 516(b)(2), substituted ''from'' for ''for''.

Subsec. (b)(2)(A)(i). Pub. L. 98–353, § 516(b)(3), substituted ''or combining'' for ''combination''.

Subsec. (b)(2)(A)(ii). Pub. L. 98–353, § 516(b)(4), substituted ''from or to'' for ''among''.

Subsec. (d). Pub. L. 98–353, § 516(c), struck out ''commercial'' before ''note''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1146. Special tax provisions

(a) The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax.

(b) The court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. In the event of an actual controversy, the court may declare such effects after the earlier of—

(1) the date on which such governmental unit responds to the request under this subsection; or

(2) 270 days after such request.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641; Pub. L. 98–353, title III, § 517, July 10, 1984, 98 Stat. 388; Pub. L. 109–8, title VII, § 719(b)(3), Apr. 20, 2005, 119 Stat. 133.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1146 of the House amendment represents a compromise between the House bill and Senate amendment.

Special tax provisions: reorganization: The House bill provided rules on the effect of bankruptcy on the taxable year of the debtor and on tax return filing requirements for State and local taxes only. The House bill also exempted from State or local stamp taxes the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan. The House bill also authorized the bankruptcy court to declare the tax effects of a reorganization plan after the proponent of the plan had requested a ruling from State or local tax authority and either had received an unfavorable ruling or the tax authority had not issued a ruling within 270 days.

The Senate amendment deleted the rules concerning the taxable years of the debtor and tax return filing requirements since the Federal rules were to be considered in the next Congress. It broadened the rule exempting transfers of securities to include Federal stamp or similar taxes, if any. In addition, the Senate amendment deleted the provision which permitted the bankruptcy court to determine the tax effects of a plan.

The House amendment retains the State and local rules in the House bill with one modification. Under the House amendment, the power of the bankruptcy court to declare the tax effects of the plan is limited to issues of law and not to questions of fact such as the allowance of specific deductions. Thus, the bankruptcy court could declare whether the reorganization qualified for taxfree status under State or local tax rules, but it could not declare the dollar amount of any tax attributes that survive the reorganization.

SENATE REPORT NO. 95–989

Section 1146 provides special tax rules applicable to Title 11 reorganizations. Subsection (a) provides that the taxable period of an individual debtor terminates on the date of the order for relief, unless the case has been converted into a reorganization from a liquidation proceeding.

Subsection (b) requires the trustee of the estate of an individual debtor in a reorganization to file a tax return for each taxable period while the case is pending after the order for relief. For corporations in chapter 11, the trustee is required to file the tax returns due while the case is pending (sec. 346(c)(2)).

Subsection (c) exempts from Federal, State, or local stamp taxes the issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan. This subsection is derived from section 267 of the present Bankruptcy Act [section 667 of former title 11].

Subsection (d) permits the court to authorize the proponent of a reorganization plan to request from the Internal Revenue Service (or State or local tax authority) an advance ruling on the tax effects of the proposed plan. If a ruling is not obtained within 270 days after the request was made, or if a ruling is obtained but the proponent of the plan disagrees with the ruling, the bankruptcy court may resolve the dispute and determine the tax effects of the proposed plan.

Subsection (e) provides that prepetition taxes which are nondischargeable in a reorganization, and all taxes arising during the administration period of the case, may be assessed and collected from the debtor or the debtor's successor in a reorganization (see sec. 505(c) of the bill).

HOUSE REPORT NO. 95–595

Section 1146 of title 11 specifies five subsections which embody special tax provisions that apply in a case under chapter 11 of title 11. Subsection (a) indicates that the tax year of an individual debtor termi-

nates on the date of the order for relief under chapter 11. Termination of the taxable year of the debtor commences the tax period of the estate. If the case was converted from chapter 7 of title 11 then the estate is created as a separate taxable entity dating from the order for relief under chapter 7. If multiple conversion of the case occurs, then the estate is treated as a separate taxable entity on the date of the order for relief under the first chapter under which the estate is a separate taxable entity.

Subsection (d) permits the court to authorize the proponent of a plan to request a taxing authority to declare the tax effects of such plan. In the event of an actual controversy, the court may declare the tax effects of the plan of reorganization at any time after the earlier of action by such taxing authority or 270 days after the request. Such a declaration, unless appealed, becomes a final judgment and binds any tax authority that was requested by the proponent to determine the tax effects of the plan.

AMENDMENTS

2005—Pub. L. 109–8 redesignated subsecs. (c) and (d) as (a) and (b), respectively, and struck out former subsecs. (a) and (b) which read as follows:

''(a) For the purposes of any State or local law imposing a tax on or measured by income, the taxable period of a debtor that is an individual shall terminate on the date of the order for relief under this chapter, unless the case was converted under section 706 of this title.

''(b) The trustee shall make a State or local tax return of income for the estate of an individual debtor in a case under this chapter for each taxable period after the order for relief under this chapter during which the case is pending.''

1984—Subsec. (c). Pub. L. 98–353, § 517(a), struck out ''State or local'' before ''law imposing a stamp tax''.

Subsec. (d)(1). Pub. L. 98–353, § 517(b), substituted ''or'' for ''and''.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

SUBCHAPTER IV—RAILROAD REORGANIZATION

§ 1161. Inapplicability of other sections

Sections 341, 343, 1102(a)(1), 1104, 1105, 1107, 1129(a)(7), and 1129(c) of this title do not apply in a case concerning a railroad.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

This section makes inapplicable sections of the bill which are either inappropriate in railroad reorganizations, or relate to matters which are otherwise dealt with in subchapter IV.

§ 1162. Definition

In this subchapter, ''Board'' means the ''Surface Transportation Board''.

(Added Pub. L. 104–88, title III, § 302(1), Dec. 29, 1995, 109 Stat. 943.)

PRIOR PROVISIONS

A prior section 1162, Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641, defined ''Commission'', prior to repeal by Pub. L. 104–88, title III, § 302(1), Dec. 29, 1995, 109 Stat. 943.

EFFECTIVE DATE

Section effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as a note under section 701 of Title 49, Transportation.

§ 1163. Appointment of trustee

As soon as practicable after the order for relief the Secretary of Transportation shall submit a list of five disinterested persons that are qualified and willing to serve as trustees in the case. The United States trustee shall appoint one of such persons to serve as trustee in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641; Pub. L. 99–554, title II, § 226, Oct. 27, 1986, 100 Stat. 3102.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1163 of the House amendment represents a compromise between the House bill and Senate amendment with respect to the appointment of a trustee in a railroad reorganization. As soon as practicable after the order for relief, the Secretary of Transportation is required to submit a list of five disinterested persons who are qualified to serve as trustee and the court will than appoint one trustee from the list to serve as trustee in the case.

The House amendment deletes section 1163 of the Senate amendment in order to cover intrastate railroads in a case under subchapter IV of chapter 11. The bill does not confer jurisdiction on the Interstate Commerce Commission with respect to intrastate railroads.

SENATE REPORT NO. 95–989

[Section 1166 (enacted as section 1163)] Requires the court to appoint a trustee in every case. Since the trustee may employ whatever help he needs, multiple trusteeships are unnecessary and add to the cost of administration. The present requirement of section 77(c)(1) [section 205(c)(1) of former title 11] that the trustee be approved by the Interstate Commerce Commission is unnecessary, since the trustee will be selected either from the panel established under section 606(f) of title 28, or someone certified by the Director of the Administrative Office of the United States Courts as qualified to become a member of that panel.

HOUSE REPORT NO. 95–595

[Section 1162] This section [enacted as section 1163] requires the appointment of an independent trustee in a railroad reorganization case. The court may appoint one or more disinterested persons to serve as trustee in the case.

AMENDMENTS

1986—Pub. L. 99–554 amended section generally, substituting ''relief the Secretary'' for ''relief, the Secretary'' and ''The United States trustee shall appoint'' for ''The court shall appoint''.

EFFECTIVE DATE OF 1986 AMENDMENT

Effective date and applicability of amendment by Pub. L. 99–554 dependent upon the judicial district involved, see section 302(d), (e) of Pub. L. 99–554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

§ 1164. Right to be heard

The Board, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor may raise and may appear and be heard on any issue in a

case under this chapter, but may not appeal from any judgment, order, or decree entered in the case.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641; Pub. L. 104–88, title III, § 302(2), Dec. 29, 1995, 109 Stat. 943.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1164 of the Senate amendment is deleted as a matter to be left to the Rules of Bankruptcy Procedure. It is anticipated that the rules will require a petition in a railroad reorganization to be filed with the Interstate Commerce Commission and the Secretary of Transportation in a case concerning an interstate railroad.

Section 1164 of the House amendment is derived from section 1163 of the House bill. The section makes clear that the Interstate Commerce Commission, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor may raise and appear and be heard on any issue in a case under subchapter IV of chapter 11, but may not appeal from any judgment, order, or decree in the case. As under section 1109 of title 11, such intervening parties are not parties in interest.

HOUSE REPORT NO. 95–595

[Section 1163] This section [enacted as section 1164] gives the same right to raise, and appear and be heard on, any issue in a railroad reorganization case to the Interstate Commerce Commission, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor as is given to the SEC and indenture trustees under section 1109 in ordinary reorganization cases. The right of appeal is denied the ICC, the Department of Transportation, and State and local regulatory agencies, the same as it is denied the SEC.

AMENDMENTS

1995—Pub. L. 104–88 substituted ''Board'' for ''Commission''.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

§ 1165. Protection of the public interest

In applying sections 1166, 1167, 1169, 1170, 1171, 1172, 1173, and 1174 of this title, the court and the trustee shall consider the public interest in addition to the interests of the debtor, creditors, and equity security holders.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2641.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1165 of the House amendment represents a modification of sections 1165 and 1167 of the Senate amendment requiring the court and the trustee to consider the broad, general public interest in addition to the interests of the debtor, creditors, and equity security holders in applying specific sections of the subchapter.

SENATE REPORT NO. 95–989

Section 1165 requires the court, in consideration of the relief to be granted upon the filing of an involuntary petition, to take into account the ''public interest'' in the preservation of the debtor's rail service. This is an important factor in railroad reorganization, which distinguishes them from other business reorganizations. Hence, this section modifies the provisions in sections 303 and 305 that govern generally when the business of a debtor may continue to operate, when relief under the Act sought should be granted, and when the petition should be dismissed.

Section 1167 [enacted as section 1165] imposes on the trustee the obligations, in addition to his other duties and responsibilities, to take into account the ''public interest'' in the preservation of the debtor's rail service.

§ 1166. Effect of subtitle IV of title 49 and of Federal, State, or local regulations

Except with respect to abandonment under section 1170 of this title, or merger, modification of the financial structure of the debtor, or issuance or sale of securities under a plan, the trustee and the debtor are subject to the provisions of subtitle IV of title 49 that are applicable to railroads, and the trustee is subject to orders of any Federal, State, or local regulatory body to the same extent as the debtor would be if a petition commencing the case under this chapter had not been filed, but—

(1) any such order that would require the expenditure, or the incurring of an obligation for the expenditure, of money from the estate is not effective unless approved by the court; and

(2) the provisions of this chapter are subject to section 601(b) of the Regional Rail Reorganization Act of 1973.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2642; Pub. L. 97–449, § 5(a)(2), Jan. 12, 1983, 96 Stat. 2442; Pub. L. 98–353, title III, § 518, July 10, 1984, 98 Stat. 388; Pub. L. 103–394, title V, § 501(d)(34), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1166 of the House amendment is derived from sections 1164 and 1165 of the House bill. An alternative proposal contained in section 1168(1) of the Senate bill is rejected as violative of the principle of equal treatment of all creditors under title 11.

SENATE REPORT NO. 95–989

Section 1168 [enacted as section 1166] makes the trustee subject to the Interstate Commerce Act [49 U.S.C. 10101 et seq.] and to lawful orders of the Interstate Commerce Commission, the U.S. Department of Transportation, and State and regulatory bodies. The approval of the court is required, however, if the order requires the expenditure of money or the incurring of an expenditure other than the payment of certain interline accounts. The limitation of ''lawful orders'' of State commissions to those involving ''safety, location of tracks, and terminal facilities,'' which is contained in present section 77(c)(2) [section 205(c)(2) of former title 11], is eliminated.

Subsection (1) further provides that the debtor must pay in cash all amounts owed other carriers for current balances owed for interline freight, passenger and per diem, including incentive per diem, for periods both prior and subsequent to the filing of the petition, without the necessity of court approval.

Subsection (2) makes the provisions of the chapter subject to section 601(b) of the Regional Rail Reorganization Act [45 U.S.C. 791(b)], which excludes the Interstate Commerce Commission from any participation in the reorganization of certain northeast railroads that have transferred their rail properties to Consolidated Rail Corporation (Conrail).

HOUSE REPORT NO. 95–595

Section 1164 [enacted as section 1166] makes the debtor railroad subject to the provisions of the Interstate

Commerce Act [49 U.S.C. 10101 et seq.] that are applicable to railroads, and the trustee subject to the orders of the Interstate Commerce Commission to the same extent as the debtor would have been if the case had not been commenced. There are several exceptions. The section does not apply with respect to abandonment of rail lines, which is provided for under section 1169, or with respect to merger under a plan, modification of the financial structure of the debtor by reason of the plan, or the issuance or sale of securities under a plan. Further, the orders of the ICC are not effective if the order would require the expenditure or the incurring of an obligation for the expenditure of money from the estate, unless approved by the court, and the provisions of this chapter are subject to section 601(b) of the Regional Rail Reorganization Act of 1973 [45 U.S.C. 791(b)].

[Section 1165 (enacted as section 1166)] The same rules apply with respect to Federal, State, or local regulations. The trustee is subject to the orders of a Federal, State, or local regulatory body to the same extent as the debtor would be if the case had not been commenced. However, any order that would require the expenditure, or the incurring of an obligation for the expenditure, of money is not effective under [until] approved by the court.

REFERENCES IN TEXT

Section 601(b) of the Regional Rail Reorganization Act of 1973, referred to in par. (2), is classified to section 791(b) of Title 45, Railroads.

AMENDMENTS

1994—Par. (2). Pub. L. 103–394 struck out ''(45 U.S.C. 791(b))'' after ''Act of 1973''.

1984—Pub. L. 98–353 directed substitution of ''subtitle IV of title 49'' for ''the Interstate Commerce Act (49 U.S.C. 1 et seq.)'', which substitution had previously been made by Pub. L. 97–449.

1983—Pub. L. 97–449 substituted ''subtitle IV of title 49'' for ''Interstate Commerce Act'' in section catchline, and ''subtitle IV of title 49'' for ''the Interstate Commerce Act (49 U.S.C. 1 et seq.)'' in text.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

§ 1167. Collective bargaining agreements

Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act except in accordance with section 6 of such Act.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2642; Pub. L. 103–394, title V, § 501(d)(35), Oct. 22, 1994, 108 Stat. 4146.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Section 1176 [enacted as section 1167] is derived from present section 77(n) [section 205(n) of former title 11]. It provides that notwithstanding the general section governing the rejection of executory contracts (section 365), neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act [45 U.S.C. 151 et seq.], except in accordance with section 6 of that Act [45 U.S.C. 156]. As reported by the subcommittee this section provided that wages and salaries of rail employees could not be affected by the trustee, but that work rules could be rejected by the trustee. The reorganization court was given the authority to review the trustee's decisions and to settle any disputes arising from the rejection. This provision was withdrawn by the full committee, and hearings will be conducted next year by the Human Resources Committee in the area of rail labor contracts and the trustee's ability to reject them in a bankruptcy situation.

HOUSE REPORT NO. 95–595

Section 1167 is derived from present section 77(n) [section 205(n) of former title 11]. It provides that notwithstanding the general section governing the rejection of executory contracts (section 365), neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act [45 U.S.C. 151 et seq.], except in accordance with section 6 of that Act [45 U.S.C. 156]. The subject of railway labor is too delicate and has too long a history for this code to upset established relationships. The balance has been struck over the years. This provision continues that balance unchanged.

REFERENCES IN TEXT

The Railway Labor Act, referred to in text, is act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§ 151 et seq.) of Title 45, Railroads. Section 6 of the Act is classified to section 156 of Title 45. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

AMENDMENTS

1994—Pub. L. 103–394 struck out ''(45 U.S.C. 151 et seq.)'' after ''Railway Labor Act'' and ''(45 U.S.C. 156)'' after ''such Act''.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

§ 1168. Rolling stock equipment

(a)(1) The right of a secured party with a security interest in or of a lessor or conditional vendor of equipment described in paragraph (2) to take possession of such equipment in compliance with an equipment security agreement, lease, or conditional sale contract, and to enforce any of its other rights or remedies under such security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment, is not limited or otherwise affected by any other provision of this title or by any power of the court, except that right to take possession and enforce those other rights and remedies shall be subject to section 362, if—

(A) before the date that is 60 days after the date of commencement of a case under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract; and

(B) any default, other than a default of a kind described in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

(i) that occurs before the date of commencement of the case and is an event of default therewith is cured before the expiration of such 60-day period;

(ii) that occurs or becomes an event of default after the date of commencement of the

case and before the expiration of such 60-day period is cured before the later of—

(I) the date that is 30 days after the date of the default or event of the default; or

(II) the expiration of such 60-day period; and

(iii) that occurs on or after the expiration of such 60-day period is cured in accordance with the terms of such security agreement, lease, or conditional sale contract, if cure is permitted under that agreement, lease, or conditional sale contract.

(2) The equipment described in this paragraph—

(A) is rolling stock equipment or accessories used on rolling stock equipment, including superstructures or racks, that is subject to a security interest granted by, leased to, or conditionally sold to a debtor; and

(B) includes all records and documents relating to such equipment that are required, under the terms of the security agreement, lease, or conditional sale contract, that is to be surrendered or returned by the debtor in connection with the surrender or return of such equipment.

(3) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1).

(c)(1) In any case under this chapter, the trustee shall immediately surrender and return to a secured party, lessor, or conditional vendor, described in subsection (a)(1), equipment described in subsection (a)(2), if at any time after the date of commencement of the case under this chapter such secured party, lessor, or conditional vendor is entitled pursuant to subsection (a)(1) to take possession of such equipment and makes a written demand for such possession of the trustee.

(2) At such time as the trustee is required under paragraph (1) to surrender and return equipment described in subsection (a)(2), any lease of such equipment, and any security agreement or conditional sale contract relating to such equipment, if such security agreement or conditional sale contract is an executory contract, shall be deemed rejected.

(d) With respect to equipment first placed in service on or prior to October 22, 1994, for purposes of this section—

(1) the term ''lease'' includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

(2) the term ''security interest'' means a purchase-money equipment security interest.

(e) With respect to equipment first placed in service after October 22, 1994, for purposes of this section, the term ''rolling stock equipment'' includes rolling stock equipment that is substantially rebuilt and accessories used on such equipment.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2642; Pub. L. 98–353, title III, § 519, July 10, 1984, 98 Stat. 388; Pub. L. 103–394, title II, § 201(b), Oct. 22, 1994, 108 Stat. 4120; Pub. L. 106–181, title VII, § 744(a), Apr. 5, 2000, 114 Stat. 175.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1168 of the House amendment incorporates a provision contained in section 1166 of the House bill instead of the provision contained in section 1175 of the Senate amendment for the reasons stated in connection with the discussion of section 1110 of the House amendment.

SENATE REPORT NO. 95–989

Section 1175 [enacted as section 1168] continues the protection accorded in present section 77(j) [section 205(j) of former title 11] to the rights of holders of purchase-money equipment security, and of lessors or conditional vendors of railroad rolling stock, but accords to the trustee a limited period within which to assume the debtor's obligation and to cure any defaults. The rights of such lenders are not affected by the automatic stay and related provisions of sections 362 and 363, or by any power of the court, unless (1) within 60 days after the commencement of the case (or such longer period as may be agreed to by the secured party, lessor or conditional vendor) the trustees, with the approval of the court, agrees to perform all of the debtor's obligations under the security agreement, lease or conditional sale contract, and (2) all defaults are cured within the 60-day period. Defaults described in section 365(b)(2)—defaults which are breaches of provisions relating to the insolvency or financial condition of the debtor, or the commencement of a case under this title, or the appointment of a trustee—are for obvious reasons, excepted.

HOUSE REPORT NO. 95–595

[Section 1166] This section [enacted as section 1168], derived with changes from the last sentence of present section 77(j) [section 205(j) of former title 11], protects the interests of rolling stock equipment financers, while providing the trustee with some opportunity to cure defaults, agree to make payments, and retain and use the equipment. The provision is parallel to section 1110, concerning aircraft equipment and vessels.

AMENDMENTS

2000—Pub. L. 106–181 amended section catchline and text generally, substituting present provisions consisting of subsecs. (a) to (e) for former subsecs. (a) to (d) which contained somewhat similar provisions.

1994—Pub. L. 103–394 amended section generally. Prior to amendment, section read as follows:

''(a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, rolling stock equipment or accessories used on such equipment, including superstructures and racks, that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, the debtor to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless—

''(1) before 60 days after the date of the commencement of a case under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract, as the case may be; and

''(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—

''(A) that occurred before such date and is an event of default therewith is cured before the expiration of such 60-day period; and

''(B) that occurs or becomes an event of default after such date is cured before the later of—

''(i) 30 days after the date of such default or event of default; and

''(ii) the expiration of such 60-day period.

''(b) The trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section, may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.''

1984—Subsec. (b). Pub. L. 98–353 inserted a comma after ''approval''.

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106–181 applicable only to fiscal years beginning after Sept. 30, 1999, see section 3 of Pub. L. 106–181, set out as a note under section 106 of Title 49, Transportation.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103–394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1169. Effect of rejection of lease of railroad line

(a) Except as provided in subsection (b) of this section, if a lease of a line of railroad under which the debtor is the lessee is rejected under section 365 of this title, and if the trustee, within such time as the court fixes, and with the court's approval, elects not to operate the leased line, the lessor under such lease, after such approval, shall operate the line.

(b) If operation of such line by such lessor is impracticable or contrary to the public interest, the court, on request of such lessor, and after notice and a hearing, shall order the trustee to continue operation of such line for the account of such lessor until abandonment is ordered under section 1170 of this title, or until such operation is otherwise lawfully terminated, whichever occurs first.

(c) During any such operation, such lessor is deemed a carrier subject to the provisions of subtitle IV of title 49 that are applicable to railroads.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2643; Pub. L. 97–449, § 5(a)(3), Jan. 12, 1983, 96 Stat. 2442; Pub. L. 98–353, title III, § 520, July 10, 1984, 98 Stat. 388.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1169 of the Senate amendment is deleted from the House amendment as unnecessary since 28 U.S.C. 1407 treating with the judicial panel on multi-district litigation will apply by its terms to cases under title 11.

SENATE REPORT NO. 95–989

Section 1177 [enacted as section 1169] continues, essentially without change, the provisions relating to the rejection by the trustee of a lease of a line of railroad now contained in section 77(c)(6) [section 205(c)(6) of former title 11]. Subsection (a) requires the lessor of a line of railroad to operate it if the lease is rejected by the trustee and the trustee, with the approval of the court, elects not to operate the leased line. Subsection (b), however, further provides that if operation by the lessor is impractical or contrary to the public interest, the court shall require the trustee to operate the line for the account of the lessor until the operation is lawfully terminated. Subsection (c) provides that during such operation, the lessor is a carrier subject to the Interstate Commerce Act [49 U.S.C. 10101 et seq.].

HOUSE REPORT NO. 95–595

[Section 1168] This section [enacted as section 1169] governs the effect of the rejection by the trustee of an unexpired lease of railroad line under which the debtor is the lessee. If the trustee rejects such a lease, and if the trustee, within such time as the court allows, and with the approval of the court, elects not to operate the leased line, then the lessor under the lease must operate the line.

Subsection (b) excuses the lessor from the requirement to operate the line under certain circumstances. If operation of the line by the lessor is impracticable or contrary to the public interest, the court, on request of the lessor, must order the trustee to continue operation of the line for the account of the lessor until abandonment is ordered under section 1169, governing abandonments generally, or until the operation is otherwise lawfully terminated, such as by an order of the ICC.

Subsection (c) deems the lessor a carrier subject to the provisions of the Interstate Commerce Act [49 U.S.C. 10101 et seq.] during the operation of the line before abandonment.

AMENDMENTS

1984—Subsec. (c). Pub. L. 98–353 directed substitution of ''subtitle IV of title 49'' for ''the Interstate Commerce Act (49 U.S.C. 1 et seq.)'', which substitution had previously been made by Pub. L. 97–449.

1983—Subsec. (c). Pub. L. 97–449 substituted ''subtitle IV of title 49'' for ''the Interstate Commerce Act (49 U.S.C. § 1 et seq.)''.

§ 1170. Abandonment of railroad line

(a) The court, after notice and a hearing, may authorize the abandonment of all or a portion of a railroad line if such abandonment is—

(1)(A) in the best interest of the estate; or

(B) essential to the formulation of a plan; and

(2) consistent with the public interest.

(b) If, except for the pendency of the case under this chapter, such abandonment would require approval by the Board under a law of the United States, the trustee shall initiate an appropriate application for such abandonment with the Board. The court may fix a time within which the Board shall report to the court on such application.

(c) After the court receives the report of the Board, or the expiration of the time fixed under subsection (b) of this section, whichever occurs first, the court may authorize such abandonment, after notice to the Board, the Secretary of Transportation, the trustee, any party in interest that has requested notice, any affected shipper or community, and any other entity prescribed by the court, and a hearing.

(d)(1) Enforcement of an order authorizing such abandonment shall be stayed until the time for taking an appeal has expired, or, if an appeal is timely taken, until such order has become final.

(2) If an order authorizing such abandonment is appealed, the court, on request of a party in interest, may authorize suspension of service on a line or a portion of a line pending the determination of such appeal, after notice to the Board, the Secretary of Transportation, the trustee, any party in interest that has requested notice, any affected shipper or community, and any other entity prescribed by the court, and a hearing. An appellant may not obtain a stay of the enforcement of an order authorizing such suspension by the giving of a supersedeas bond or otherwise, during the pendency of such appeal.

(e)(1) In authorizing any abandonment of a railroad line under this section, the court shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11326(a) of title 49.

(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2643; Pub. L. 96–448, title II, § 227(a), Oct. 14, 1980, 94 Stat. 1931; Pub. L. 98–353, title III, § 521, July 10, 1984, 98 Stat. 388; Pub. L. 104–88, title III, § 302(2), Dec. 29, 1995, 109 Stat. 943; Pub. L. 109–8, title XII, § 1217, Apr. 20, 2005, 119 Stat. 195.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95–989

Subsection (a) of section 1178 [enacted as section 1170] permits the court to authorize the abandonment of a railroad line if the abandonment is consistent with the public interest and either in the best interest of the estate or essential to the formulation of a plan. This avoids the normal abandonment requirements of generally applicable railroad regulatory law.

Subsection (b) permits some participation by the Interstate Commerce Commission in the abandonment process. The Commission's role, however, is only advisory. The Commission will represent the public interest, while the trustee and various creditors and equity security holders will represent the interests of those who have invested money in the enterprise. The court will balance the various interests and make an appropriate decision. The subsection specifies that if, except for the pendency of the railroad reorganization case, the proposed abandonment would require Commission approval, then the trustee, with the approval of the court, must initiate an application for the abandonment with the Commission. The court may then fix a time within which the Commission must report to the court on the application.

Subsection (c) permits the court to act after it has received the report of the Commission or the time fixed under subsection (b) has expired, whichever occurs first. The court may then authorize the abandonment after notice and a hearing. The notice must go to the Commission, the Secretary of Transportation, the trustee, and party in interest that has requested notice, any affected shipper or community, and any other entity that the court specifies.

Subsection (d) stays the enforcement of an abandonment until the time for taking an appeal has expired, or if an appeal has been taken, until the order has become final. However, the court may, and after notice and a hearing, on request of a party in interest authorize termination of service on the line or a portion of the line pending the determination of the appeal. The notice required is the same as that required under subsection (c). If the court authorizes termination of service pending determination of the appeal, an appellant may not obtain a stay of the enforcement of the order authorizing termination, either by the giving of a supersedeas bond or otherwise, during the pendency of the appeal.

AMENDMENTS

2005—Subsec. (e)(1). Pub. L. 109–8 substituted ''section 11326(a)'' for ''section 11347''.

1995—Subsecs. (b), (c), (d)(2). Pub. L. 104–88 substituted ''Board'' for ''Commission'' wherever appearing.

1984—Subsec. (a). Pub. L. 98–353, § 521(a), inserted ''of all or a portion'' after ''the abandonment''.

Subsec. (c). Pub. L. 98–353, § 521(b), inserted a comma after ''abandonment''.

Subsec. (d)(2). Pub. L. 98–353, § 521(c), substituted ''such abandonment'' for ''the abandonment of a railroad line'', and ''suspension'' for ''termination'' in two places.

1980—Subsec. (e). Pub. L. 96–448 added subsec. (e).

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Section 710 of Pub. L. 96–448 provided that:

''(a) Except as provided in subsections (b), (c), and (d) of this section, the provisions of this Act and the amendments made by this Act [see Tables for classification] shall take effect on October 1, 1980.

''(b) Section 206 of this Act [enacting former section 10712 of Title 49, Transportation] shall take effect on January 1, 1981.

''(c) Section 218(b) of this Act [amending former section 10705 of Title 49] shall take effect on October 1, 1983.

''(d) Section 701 of this Act [enacting section 1018 of Title 45, Railroads, and amending sections 231f, 825, 906, 913, 914, 1002, 1005, 1007, and 1008 of Title 45] shall take effect on the date of enactment of this Act [Oct. 14, 1980].''

§ 1171. Priority claims

(a) There shall be paid as an administrative expense any claim of an individual or of the personal representative of a deceased individual against the debtor or the estate, for personal injury to or death of such individual arising out of the operation of the debtor or the estate, whether such claim arose before or after the commencement of the case.

(b) Any unsecured claim against the debtor that would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the

date of the order for relief under this title shall be entitled to the same priority in the case under this chapter.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2643; Pub. L. 98–353, title III, § 522, July 10, 1984, 98 Stat. 388.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1171 of the House amendment is derived from section 1170 of the House bill in lieu of section 1173(a)(9) of the Senate amendment.

HOUSE REPORT NO. 95–595

[Section 1170] This section [enacted as section 1171] is derived from current law. Subsection (a) grants an administrative expense priority to the claim of any individual (or of the personal representative of a deceased individual) against the debtor or the estate for personal injury to or death of the individual arising out of the operation of the debtor railroad or the estate, whether the claim arose before or after commencement of the case. The priority under current law, found in section 77(n) [section 205(n) of former title 11], applies only to employees of the debtor. This subsection expands the protection provided.

Subsection (b) follows present section 77(b) of the Bankruptcy Act [section 205(b) of former title 11] by giving priority to any unsecured claims that would be entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the date of the order for relief under the bankruptcy laws. As under current law, the courts will determine the precise contours of the priority recognized by this subsection in each case.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98–353 substituted ''the same'' for ''such''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1172. Contents of plan

(a) In addition to the provisions required or permitted under section 1123 of this title, a plan—

(1) shall specify the extent to and the means by which the debtor's rail service is proposed to be continued, and the extent to which any of the debtor's rail service is proposed to be terminated; and

(2) may include a provision for—

(A) the transfer of any or all of the operating railroad lines of the debtor to another operating railroad; or

(B) abandonment of any railroad line in accordance with section 1170 of this title.

(b) If, except for the pendency of the case under this chapter, transfer of, or operation of or over, any of the debtor's rail lines by an entity other than the debtor or a successor to the debtor under the plan would require approval by the Board under a law of the United States, then a plan may not propose such a transfer or such operation unless the proponent of the plan initiates an appropriate application for such a transfer or such operation with the Board and, within such time as the court may fix, not exceeding 180 days, the Board, with or without a hearing, as the Board may determine, and with or without modification or condition, approves such application, or does not act on such application. Any action or order of the Board approving, modifying, conditioning, or disapproving such application is subject to review by the court only under sections 706(2)(A), 706(2)(B), 706(2)(C), and 706(2)(D) of title 5.

(c)(1) In approving an application under subsection (b) of this section, the Board shall require the rail carrier to provide a fair arrangement at least as protective of the interests of employees as that established under section 11326(a) of title 49.

(2) Nothing in this subsection shall be deemed to affect the priorities or timing of payment of employee protection which might have existed in the absence of this subsection.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2644; Pub. L. 96–448, title II, § 227(b), Oct. 14, 1980, 94 Stat. 1931; Pub. L. 104–88, title III, § 302(2), Dec. 29, 1995, 109 Stat. 943; Pub. L. 109–8, title XII, § 1218, Apr. 20, 2005, 119 Stat. 195.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1172 of the House amendment is derived from section 1171 of the House bill in preference to section 1170 of the Senate amendment with the exception that section 1170(4) of the Senate amendment is incorporated into section 1172(a)(1) of the House amendment.

Section 1172(b) of the House amendment is derived from section 1171(c) of the Senate amendment. The section gives the Interstate Commerce Commission the exclusive power to approve or disapprove the transfer of, or operation of or over, any of the debtor's rail lines over which the Commission has jurisdiction, subject to review under the Administrative Procedures Act [5 U.S.C. 551 et seq. and 701 et seq.]. The section does not apply to a transfer of railroad lines to a successor of the debtor under a plan of reorganization by merger or otherwise.

The House amendment deletes section 1171(a) of the Senate amendment as a matter to be determined by the Rules of Bankruptcy Procedure. It is anticipated that the rules will specify the period of time, such as 18 months, within which a trustee must file with the court a proposed plan of reorganization for the debtor or a report why a plan cannot be formulated. Incorporation by reference of section 1121 in section 1161 of title 11 means that a party in interest will also have a right to file a plan of reorganization. This differs from the position taken in the Senate amendment which would have permitted the Interstate Commerce Commission to file a plan of reorganization.

SENATE REPORT NO. 95–989

Section 1170 adds to the general provisions required or permitted in reorganization plans by section 1123. Subsection (1) requires that a reorganization plan under the railroad subchapter specify the means by which the value of the claims of creditors and the interests of equity holders which are materially and adversely affected by the plan are to be realized. Subsection (2) permits a plan to include provisions for the issuance of warrants. Subsection (3) requires that the plan provide for fixed charges by probable earnings for their payment. Subsection (4) requires that the plan specify the means by which, and the extent to which, the debtor's rail service is to be continued, and shall identify any rail service to be terminated. Subsection (5) permits other appropriate provisions not inconsistent with the chapter. With the exception of subsection (4), the requirements are comparable to those of present section 77(b) [section 205(b) of former title 11]; subsection (4) emphasizes the public interest in the preservation of rail transportation.

Section 1171 imposes on the court, rather than the Interstate Commerce Commission, as in present section 77 [section 205 of former title 11], the responsibility for the plan of reorganization. The Commission is empowered to make final decisions subject only to review by the court under the standards of the Administrative Procedure Act [5 U.S.C. 551 et seq. and 701 et seq.] as to any part of the plan which deals with transportation matters, such as the grant of operating rights of or over, or transfer of, the debtor's rail lines to other carriers.

Subsection (a) requires the trustee to file a plan of reorganization within 18 months after the petition is filed, and permits the court, for good cause shown, to extend such time limit. Subsection (b) permits a plan to be proposed by any interested person, and permits the trustee to revise his plan at any time before it is approved by the court.

Subsections (c), (d) and (e) require the court, when a plan is submitted by the trustee or, if the court deems it worthy of consideration, a plan submitted is proposed by any other person proposes the transfer of, or operation of or over, any of the debtor's lines by other carriers, to refer to such provisions of the plan to the Interstate Commerce Commission. The Commission, within 240 days, and after a hearing if the Commission so determines, is to report to the court the effects of such provisions of the plan in the light of national transportation policy and sections 5(3)(f)(A), (B), and (D), (F)–(I) of the Interstate Commerce Act [49 U.S.C. 11350(b)(1), (2), (4), (6)–(9)]. The report of the Commission is conclusive in all further hearings on the plan by the court, subject only to review pursuant to 5 U.S.C. 706(2)(A)–(D).

HOUSE REPORT NO. 95–595

[Section 1171 (enacted as section 1172)] A plan in a railroad reorganization case may include provisions in addition to those required and permitted under an ordinary reorganization plan. It may provide for the transfer of any or all of the operating railroad lines of the debtor to another operating railroad.

Paragraph (1) contemplates a liquidating plan for the debtor's rail lines, much as occurred in the Penn Central case by transfer of operating lines to ConRail. Such a liquidating plan is not per se contrary to the public interest, and the court will have to determine on a case-by-case basis, with the guidance of the Interstate Commerce Commission and of other parties in interest, whether the particular plan proposed is in the public interest, as required under proposed 11 U.S.C. 1172(3).

The plan may also provide for abandonment in accordance with section 1169, governing abandonment generally. Neither of these provisions in a plan, transfer or abandonment of lines, requires ICC approval. Confirmation of the plan by the court authorizes the debtor to comply with the plan in accordance with section 1142(a) notwithstanding any bankruptcy law to the contrary.

AMENDMENTS

2005—Subsec. (c)(1). Pub. L. 109–8 substituted ''section 11326(a)'' for ''section 11347''.

1995—Subsecs. (b), (c)(1). Pub. L. 104–88 substituted ''Board'' for ''Commission'' wherever appearing.

1980—Subsec. (c). Pub. L. 96–448 added subsec. (c).

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109–8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109–8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–448 effective Oct. 1, 1980, see section 710(a) of Pub. L. 96–448, set out as a note under section 1170 of this title.

NONAPPLICATION OF SUBSEC. (c)

For provision that subsec. (c) of this section does not apply to Amtrak and its employees, see section 142(d) of Pub. L. 105–134, set out in an Employee Protection Reforms note under section 24706 of Title 49, Transportation.

§ 1173. Confirmation of plan

(a) The court shall confirm a plan if—

(1) the applicable requirements of section 1129 of this title have been met;

(2) each creditor or equity security holder will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the value of property that each such creditor or equity security holder would so receive or retain if all of the operating railroad lines of the debtor were sold, and the proceeds of such sale, and the other property of the estate, were distributed under chapter 7 of this title on such date;

(3) in light of the debtor's past earnings and the probable prospective earnings of the reorganized debtor, there will be adequate coverage by such prospective earnings of any fixed charges, such as interest on debt, amortization of funded debt, and rent for leased railroads, provided for by the plan; and

(4) the plan is consistent with the public interest.

(b) If the requirements of subsection (a) of this section are met with respect to more than one plan, the court shall confirm the plan that is most likely to maintain adequate rail service in the public interest.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2644; Pub. L. 98–353, title III, § 523, July 10, 1984, 98 Stat. 388.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1173 of the House amendment concerns confirmation of a plan of railroad reorganization and is derived from section 1172 of the House bill as modified. In particular, section 1173(a)(3) of the House amendment is derived from section 1170(3) of the Senate amendment. Section 1173(b) is derived from section 1173(a)(8) of the Senate amendment.

SENATE REPORT NO. 95–989

Section 1173 adapts the provisions dealing with reorganization plans generally contained in section 1130 to the particular requirements of railroad reorganization plans, as set out in present section 77(e) [section 205(e) of former title 11]. Subsection (a) specifies the findings which the court must make before approving a plan: (1) The plan complies with the applicable provisions of the chapter; (2) the proponent of the plan complies with the applicable provisions of the chapter; (3) the plan has been proposed in good faith; (4) any payments for services or for costs or expenses in connection with the case or the plan are disclosed to the court and are reasonable, or, if to be paid later, are subject to the approval of the court as reasonable; (5) the proponent of the plan has disclosed the identity and affiliations of the individuals who will serve as directors, officers, or voting trustees, such appointments or continuations in office are consistent with the interests of creditors, equity security holders, and the proponent the public, and has

disclosed the identity and compensation of any insider who will be employed or retained under the plan; (6) that rate changes proposed in the plan have been approved by the appropriate regulatory commission, or that the plan is contingent on such approval; (7) that confirmation of the plan is not likely to be followed by further reorganization or liquidation, unless it is contemplated by the plan; (8) that the plan, if there is more than one, is the one most likely to maintain adequate rail service and (9) that the plan provides the priority traditionally accorded by section 77(b) [section 205(b) of former title 11] to claims by rail creditors for necessary services rendered during the 6 months preceding the filing of the petition in bankruptcy.

Subsection (b) continues the present power of the court in section 77(e) [section 205(e) of former title 11] to confirm a plan over the objections of creditors or equity security holders who are materially and adversely affected. The subsection also confirms the authority of the court to approve a transfer of all or part of a debtor's property or its merger over the objections of equity security holders if it finds (1) that the ''public interest'' in continued rail transportation outweighs any adverse effect on creditors and equity security holders, and (2) that the plan is fair and equitable, affords due recognition to the rights of each class, and does not discriminate unfairly against any class.

Subsection (c) permits modification of a plan confirmed by a final order only for fraud.

HOUSE REPORT NO. 95–595

[Section 1172] This section [enacted as section 1173] requires the court to confirm a plan if the applicable requirements of section 1129 (relating to confirmation of reorganization plans generally) are met, if the best interest test is met, and if the plan is compatible with the public interest.

The test in this paragraph is similar to the test prescribed for ordinary corporate reorganizations. However, since a railroad cannot liquidate its assets and sell them for scrap to satisfy its creditors, the test focuses on the value of the railroad as a going concern. That is, the test is based on what the assets, sold as operating rail lines, would bring.

The public interest requirement, found in current law, will now be decided by the court, with the ICC representing the public interest before the court, rather than in the first instance by the ICC. Liquidation of the debtor is not, per se, contrary to the public interest.

AMENDMENTS

1984—Subsec. (a)(4). Pub. L. 98–353 substituted ''consistent'' for ''compatible''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98–353, set out as a note under section 101 of this title.

§ 1174. Liquidation

On request of a party in interest and after notice and a hearing, the court may, or, if a plan has not been confirmed under section 1173 of this title before five years after the date of the order for relief, the court shall, order the trustee to cease the debtor's operation and to collect and reduce to money all of the property of the estate in the same manner as if the case were a case under chapter 7 of this title.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2644.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 1174 of the House amendment represents a compromise between the House bill and Senate amendment on the issue of liquidation of a railroad. The provision permits a party in interest at any time to request liquidation. In addition, if a plan has not been confirmed under section 1173 of the House amendment before 5 years after the date of order for relief, the court must order the trustee to cease the debtor's operation and to collect and reduce to money all of the property of the estate in the same manner as if the case were a case under chapter 7 of title 11. The approach differs from the conversion to chapter 7 under section 1174 of the Senate bill in order to make special provisions contained in subchapter IV of chapter 11 applicable to liquidation. However, maintaining liquidation in the context of chapter 11 is not intended to delay liquidation of the railroad to a different extent than if the case were converted to chapter 7.

Although the House amendment does not adopt provisions contained in sections 1170(1), (2), (3), or (5), of the Senate amendment such provisions are contained explicitly or implicitly in section 1123 of the House amendment.

SENATE REPORT NO. 95–989

Section 1174 permits the court to convert the case to a liquidation under chapter 7 if the court finds that the debtor cannot be reorganized, or if various time limits specified in the subchapter are not met. Section 77 [section 205 of former title 11] does not authorize a liquidation of a railroad under the Bankruptcy Act [former title 11]. If the railroad is not reorganizable, the only action open to the court is to dismiss the petition, which would in all likelihood be followed by a State court receivership, with all of its attendant disadvantages. If reorganization is impossible, the debtor should be liquidated under the Bankruptcy Act.

CHAPTER 12—ADJUSTMENT OF DEBTS OF A FAMILY FARMER OR FISHERMAN WITH REGULAR ANNUAL INCOME

SUBCHAPTER I—OFFICERS, ADMINISTRATION, AND THE ESTATE

Sec.
1201. Stay of action against codebtor.
1202. Trustee.
1203. Rights and powers of debtor.
1204. Removal of debtor as debtor in possession.
1205. Adequate protection.
1206. Sales free of interests.
1207. Property of the estate.
1208. Conversion or dismissal.

SUBCHAPTER II—THE PLAN

1221. Filing of plan.
1222. Contents of plan.
1223. Modification of plan before confirmation.
1224. Confirmation hearing.
1225. Confirmation of plan.
1226. Payments.
1227. Effect of confirmation.
1228. Discharge.
1229. Modification of plan after confirmation.
1230. Revocation of an order of confirmation.
1231. Special tax provisions.

CODIFICATION

Chapter repealed effective Oct. 1, 1998, by Pub. L. 99–554, title III, § 302(f), Oct. 27, 1986, 100 Stat. 3124, as amended by Pub. L. 103–65, § 1, Aug. 6, 1993, 107 Stat. 311. Chapter, as in effect on Sept. 30, 1998, reenacted for the period beginning on Oct. 1, 1998, and ending on Apr. 1, 1999, by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610. Chapter reenacted for successive periods running from Mar. 31, 1999, to July 1, 2005, by Pub. L. 105–277, div. C, title I, § 149(a), Oct. 21, 1998, 112 Stat. 2681–610, as successively amended by Pub. L. 106–5, Mar. 30, 1999, 113 Stat. 9; Pub. L. 106–70, Oct. 9, 1999, 113 Stat. 1031; Pub. L. 107–8, May 11, 2001, 115 Stat. 10; Pub. L. 107–17, June 26, 2001, 115 Stat. 151; Pub. L. 107–170,