

## Legislative Update: Bankruptcy, Accounting and Privacy

NACM Midwest  
October 14, 2009

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### H.R. 1942: "Business Reorganization and Job Preservation Act of 2009"

- Proposed by Representative Nadler of New York
- Would change section 366 of the Bankruptcy Code to provide automatic rejection of a nonresidential lease if the trustee or debtor in possession does not assume or rejection within 60 days of the petition
- Repeals the 45 day right of reclamation and reducing it to 10 days
- Eliminates the 20-day administrative claim for goods delivered
- Bill has not left the Committee on the Judiciary

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### NACM Proposals for Bankruptcy Code Reform

- Preferences:
  - Shift burden to show ordinary course to the trustee
  - All funds collected should be for the benefit of the unsecured creditor body
  - All paid new value during the 90-days as a defense
  - Increase the minimum preference claim to \$10,000 from the current \$5,000

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## Venue and Preferences

- Currently preference case may not be brought against a creditor outside the creditor's jurisdiction if the claim is less than \$10,000 under 28 U.S.C. § 1409(b)
  - Proposal would require that the amount be raised to \$16,425

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## § 503(b)(9) – 20-Day Deliveries

- Currently, payment of 20-Day Delivery claims are not made until effective date of the plan
  - NACM Proposal would require payment when they fall due
  - Suppliers of services would be included

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## Executory Contracts

- NACM recommends that the Code be clarified to state that no creditor who is a party to an executory contract be required to continue to extend trade credit to a debtor after a bankruptcy case is filed

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## Filing Venue

- Forum shopping should be eliminated
- Debtors would be required to file in the jurisdiction of their headquarters or primary operations
  - This would allow more access to the case by the employees and local vendors as well as allow a case to be administered by a court familiar with the company and operations

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## What can you do?

- NACM is currently discussing these proposed revisions with the House and Senate staff
- Contact your Congressman and Senator to urge them to change the Bankruptcy Code to make it fair for trade creditors as well as debtors and lenders
- Changes to the preference and §503(b)(9) sections will promote more extensions of credit to troubled buyers of goods and services

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## Red Flags

- In effect since January 1, 2008
- Requires certain businesses and organizations to develop, implement and administer Identity Theft Prevention Programs

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## Who is Required to Put in Place a “Red Flag Program”?

- Financial Institutions
- “Creditor”
  - Includes businesses or organizations that regularly defer payment for goods or services or provide goods or services and bill customers later
    - Utility companies, health care providers, telecommunications companies, lawyers, accountants and any company selling on credit terms (company offering its own credit card or selling goods or services which are paid for at a later time)

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## Red Flag Program Requirements

- Reasonable policies and procedures to identify the “red flags” of identity theft in day-to-day operations (suspicious patterns or practices that might indicate identity theft)
- Program must be designed to detect the “red flags”
- Program must spell out appropriate actions you will take if you detect a “red flag”
- Must put in procedures to re-evaluate your program

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## Federal Trade Commission Press Release:

- “We want financial institutions and creditors to know that they are covered by the Red Flags Rules and to understand what is required of them,” said Lydia Parnes, Director of the Bureau of Consumer Protection at the FTC. “We encourage all organizations that have ongoing accounts or relationships with **consumers** to keep an eye out for red flags that signal identity theft. But this rule does not apply to every business or employer; only those entities that are considered creditors or financial institutions are subject to the Red Flags Rules.”

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## FTC Has been Taken to Court over Red Flags

- American Bar Association recently filed suit against the FTC to exempt lawyers from the Red Flags Rule
- FTC has used the definition for “creditor” that is outlined in the Fair and Accurate Credit Transaction Act which was adopted from the ECOA
- Lawyers were never included in the original versions of the Rule and the subsequent releases until the April 30, 2009 deadline extension.

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## Mandatory compliance deadline extended

- The deadline has been pushed back multiple times to the current deadline of November 1, 2009
- Will the deadline be extended further in light of the ABA litigation?

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## Other Percolating Issues

- LIFO to be eliminated?
- Chapter 14?
  - Bill introduced in House to create new chapter for non-bank financial institutions
  - H.R. 3310
- Consumer Financial Protection Agency
  - H.R. 3126 introduced by Rep. Barney Frank

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**Legislation that Should be  
Considered -- ?**

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**THANK YOU  
ANY QUESTIONS?**

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