September 8, 2000

Leander Barnhill
Office of General Counsel
Executive Office for United States Trustees
901 E Street, NW
Suite 780
Washington, DC 20530

Re: Comments on Study of Privacy Issues in Bankruptcy Data

Dear Ms. Barnhill:

The American Bankers Association (ABA) is pleased to submit these comments in response to the joint request of the Department of Justice, Department of Treasury, and the Office of Management and Budget (the Study Agencies) published in the Federal Register of July 31, 2000. That request invited interested parties to comment on how the filing of bankruptcy affects the privacy of individual consumer information that becomes part of a bankruptcy case. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership — which includes community, regional and money center banks and holding companies, as well as savings associations, trust companies and savings banks — makes ABA the largest banking trade association in the country.

Executive Summary

- The ability of new information technology to make bankruptcy court data that already is public more readily and easily available should be viewed as a substantial improvement in the bankruptcy process.
- The use of the bankruptcy process to gain extraordinary legal relief includes an inherent loss of privacy as private financial matters become the province of the public sector judicial process.
- An individual who has filed for bankruptcy faces substantially less adverse potential consequences of public dissemination of personal financial information than a solvent individual.
- It is worthwhile to consider providing individuals with clear notice as to the inherent loss of financial privacy that accompanies a bankruptcy filing.
- Public policy should aim to maximize bankruptcy case data flows to all parties in interest.
- Creditors require detailed and timely bankruptcy information in order to both assert their own rights as well as to avoid taking actions adverse to the filer due to inadequate or

dated information. Such information is also required to avoid new losses in those limited instances where individuals who have just filed for bankruptcy protection seek additional credit and fail to disclose that filing.

- As information technology improves data flows from trustees to the courts, there is a lessening of any meaningful distinction between public and non-public data.
- Bankruptcy courts sit as courts of equity and therefore must act in a manner that is consistent with other applicable laws and policies.
- Due to the lack of any demonstrated harm, as well as the administrative flexibility that the courts and trustees have to address any problems that do arise, it is premature to consider any statutory change in the Bankruptcy Code regarding data in cases filled by individuals or commercial bankruptcies in which commercial enterprises possess customer and consumer information.

Response to Questions

The threshold questions of this study must be: What are the legitimate privacy expectations of individuals filing for bankruptcy? And are the consequences of any loss of financial data privacy they may experience the same as for individuals who are not filing for bankruptcy?

We would submit that the financial privacy expectations of individuals filing for bankruptcy must, as a realistic matter, be far less than for individuals who do not use the system. This is due to the inherent nature of the process, which utilizes the intervention of a branch of the public sector, the judiciary, to block pending legal actions as well as to extinguish or substantially modify contracts entered into in exchange for credit. In addition to being part of the very nature of an open judicial process, it is desirable that the fact that an individual has filed for bankruptcy protection be disseminated as widely as possible, so that business and individual creditors of the bankrupt can avail themselves of available rights and remedies, and so that others who may be approached by the bankrupt for new credit may protect themselves.

When an individual files for bankruptcy he requests the extraordinary intervention of the judicial process. This intervention is highly unusual in two particular ways. First, an injunction, the automatic stay, is granted upon the mere filing of the petition and halts all pending legal actions against the debtor and his estate. This injunction is granted without necessity of proving the two elements that are usually required for such relief – a showing that immediate harm will be suffered absent the granting of the injunction, as well as a high probability that the petitioner will succeed on the legal merits.

In exchange for this extraordinary relief, the bankrupt must expect that the facts of this public judicial process will become just as public as those of any other civil action. The Bankruptcy Code in fact requires that all documents filed in a case become public records open to public inspection, and the fact that modern technology makes it easier for the public to examine such records should be viewed as a substantial improvement in the judicial process rather than a cause for concern. Given the highly mobile nature of our society, as well as the fact that the credit market is now national in scope, it is indeed appropriate that local bankruptcy court data be available at little or no cost on a nationwide basis.

Individuals who have filed for bankruptcy also, as a general matter, have substantially less exposure to misuse of their financial data. Unlike those of a solvent individual, the credit lines and accounts of a bankrupt will be restricted or closed and thus are not subject to misuse or appropriation by third parties who gain these account numbers.

Also, as a general matter, the Study Agencies' request for comment makes what we believe is an artificial and increasingly less meaningful distinction between public and non-public data. Information collected by trustees about the administration of particular cases is passed along to the courts at regular intervals and becomes part of the open, public record of the case; as information technology increases the speed and accuracy of these data flows, such data will more rapidly become part of the public record.

We now respond to the specific questions posed by the Study Agencies:

1) Types and amounts of information collected from debtors.

All deposit and credit accounts and identifying numbers, balances in savings and investment accounts, amounts owed on credit accounts, all sources and amounts of income, types and values of non-monetary assets, a budget showing the debtor's regular expenses, and the filer's Social Security number, as well as any other relevant financial or living expense information becomes part of the public record in a given bankruptcy. Parties in interest require all of this information in order that they may avail themselves of their rights in a given case.

The fundamental balance at the heart of bankruptcy law is to provide necessary relief from financial obligations to the debtor while maximizing recovery to various types of creditors subject to the priorities and limits of the law. The only way to fairly achieve this balance in a given case is to make all available information freely available to all interested parties so that they may determine whether they have a stake in a particular case and, if they do, take appropriate action. We do not perceive any greater sensitivity of any particular class of data that would justify excising it from the public record or limit its availability. Aggregations of this type of data has some value in the marketplace, primarily through its dissemination to those who regularly engage in the business of extending credit so that they may be quickly apprised of the facts and circumstances of filings by those they have lent to.

2) Current and future practices for collection, analysis, and dissemination of bankruptcy case data.

We are not aware of the full scope of current practices among the various court districts at this time, but would hope and expect that the Administrative Office of the U.S. Courts and the Executive Office for United States Trustees can provide that information. We are aware that various commercial enterprises now regularly collect basic public data about new bankruptcy filings, check it against the filer's credit histories, and provide notice to listed creditors subscribing to such a service that a borrower has filed for bankruptcy. The rapid availability of such data not only assists lenders in timely assertion of their rights in the bankruptcy process, but assists them in avoiding adverse actions against the debtor – such as repossessions, setoffs, garnishments, and collection calls – that might otherwise be undertaken, in unintended violation

of the automatic stay, where the lender is not aware of the bankruptcy filing. In addition, it enhances the safety and soundness of the financial system by protecting lenders from extending credit to individuals who have just filed for bankruptcy but fail to disclose that fact on their loan application. It is our view that maximizing the collection and dissemination of bankruptcy case data benefits all parties to the process, including the debtor, and that the aim of the court system should be to use available and forthcoming information technology to improve such data flows.

3) Need for access to bankruptcy case financial information.

Creditors need detailed bankruptcy information and electronic information exchange services for several purposes:

- To make a threshold determination of whether a lender has a stake in a particular consumer bankruptcy. Again, such determination also better protects the debtor by preventing the taking of legal actions in violation of the automatic stay.
- To quickly ascertain the accuracy of a borrower's claim that they have filed for bankruptcy, where the communication fails to provide details of the filing. As in other instances, use of the borrower's Social Security number is the only means by which a quick confirmation of the claim can be effected.
- To communicate efficiently with trustees and obtain information about case status and payments made. Many trustees now make such basic information as debtor payments, change in status, modification of the plan, dismissal or discharge actions, and disposition of collateral available to parties in interest via Internet websites. Again, the availability of this data not only assists creditors, but helps protects debtors against adverse legal actions – such as a motion for relief from the stay – where the debtor has made timely payments but they have not been passed on by the trustee.

Lenders need access to all available debtor financial information about all account types, debts, income sources, expenses, etc. In particular, the debtor's full name, aliases, last known address and phone numbers, and Social Security numbers are essential in providing creditors with key information required to allow meaningful assertion of their legal rights, and such basic data must be readily available in a public manner. Such information also assists individuals to obtain credit by clearly differentiating them from bankrupt individuals having the same name.

Finally, we believe that the interests of all parties in bankruptcy would be well served if enterprises could collect, compile, and electronically redistribute information about bankruptcy cases. We strongly supported the provision of the pending bankruptcy reform legislation, S.625, that would have permitted Chapter 13 trustees to provide case status data on a good faith basis to non-profit entities for redistribution to parties in interest, and were disappointed that the Administration objected to its inclusion in a final bill. It is our view that trustees should in fact be required to make data available to parties in interest via electronic means, and to share it with such a non-profit aggregation service; as previously stated, debtors would also reap substantial benefit if such information, particularly payment histories, was readily available to other parties to a case.

4) Privacy interests in bankruptcy.

As stated earlier, we believe that when an individual elects to use a public judicial process to extinguish or modify their financial obligations they must expect that the fact of their filing as well as detailed personal financial information will become part of the public record. A substantial loss of financial privacy is inherent in the bankruptcy process. Also, as earlier stated, the potential adverse effects of third party access to detailed financial data are inherently less in the bankruptcy context because the filing individual's credit lines will have been canceled or frozen, while their liquid assets are likely to be insubstantial or nonexistent. Any concerns about aggressive marketing of new credit to the debtor during or post-bankruptcy should be addressed through applicable consumer credit and protection laws, not by restricting access to bankruptcy data to the overwhelming majority of legitimate users. It must be recognized that post-bankruptcy rehabilitation and the "fresh start" must include the opportunity to build a new credit history; legitimate lenders who wish to offer credit to affected individuals should not face unnecessary obstacles to identifying them.

5) Effect of technology on access to and privacy of bankruptcy information

All of the information in a bankruptcy case is public information under current law. Information technology has the potential to make that public information more readily available to the general public. This should not be viewed as a flaw but as a substantial improvement in the operation of the public judicial process. Any attempt to restrict public access to such information would, in our view, be a misguided attempt to perpetuate preexisting inefficiencies and deterrents to public access.

We do, however, recognize one countervailing consideration. The ABA has repeatedly made clear that it supports limiting public displays of Social Security numbers because of the significant potential to perpetrate identity theft with that information. While it is absolutely critical that lenders continue to receive timely notice of the Social Security numbers of those who have filed for bankruptcy, we would not be adverse to limiting access to the general public. It must be recognized, however, that excising Social Security numbers from all public records of individual bankruptcy filings could constitute a major administrative challenge to the court system.

6) Current business or governmental models for protecting privacy and ensuring appropriate access to bankruptcy records.

We do not know of any models for protecting individual privacy in bankruptcy. Again, bankruptcy is an inherently public process in which the filer must anticipate that detailed financial information will become part of a record available to the general public. We do not believe that the potential for technology to improve such public access justifies removing various categories of data from the public record.

7) Principles for handling bankruptcy data; recommendations for policy, regulatory or statutory change.

We believe that the paramount public policy principle that should govern this area is that the

utilization of technologies that better facilitate the dissemination of public information to the public should be viewed as a positive development and not as cause for concern. Easier access to this information that already is in the public domain is a highly positive development. We would oppose any attempts to transform currently available public information to information that is only available on a conditional or restricted basis, if at all. We would also oppose any proposal to restrict electronic access to information that is readily available in physical form, as such policy would only create unnecessary inefficiencies that would most severely impact small business and individual creditors. Finally, any attempt to restrict currently available data or electronic access thereto would likely impose substantial and unnecessary burdens on the court and trustee system.

We would have no objection to providing individuals contemplating a bankruptcy notice with clear and detailed notice about the public nature of bankruptcy filings, including the uses and disclosure of personal financial information by the court and trustees. Both Congress and the Administration have indicated strong support for policies, such as mandatory pre-bankruptcy credit counseling, to ensure that individuals fully understand all the legal, credit access, and personal implications of a bankruptcy filing, as well as available opportunities for financial rehabilitation outside of the legal process. Debtors should certainly have the same access to case information held by the trustee as other parties in interest.

We have no objection to, and indeed support, allowing public bankruptcy data to be aggregated and distributed by third parties for a reasonable fee. The market can best determine whether the value added to public information justifies the fee that is requested.

Finally, we think it is premature to consider any policy, regulatory or statutory changes in this area. Again, it is our overarching belief that the use of new technology to make already public information available more easily and efficiently represents a substantial improvement in the bankruptcy process. There has yet to be any demonstrated problem, much less actual harm, flowing from the availability of such information. The availability of this information both protects lenders and enhances the ability of solvent individuals to obtain credit. Many local newspapers have long published lists of new individual bankruptcy filings that include detailed public information, such as principal creditors and amounts owed, including child support. The Internet and other information technology improvements merely move those practices into the digital age. If any unforeseen and significant problems do arise, both the courts and the Office for U.S. Trustees have considerable administrative latitude to address them, and should attempt to do so before statutory change is considered.

Consumer Information in Commercial Bankruptcies

Although not a part of the formal Study, the Study Agencies invited comments about the effect of a business bankruptcy on consumer/customer information that the business has collected. This issue has recently received extensive attention in the media due to the attempt of the failed Toysmart.com retailer to auction off such information that it held. In July, Toysmart.com reached a settlement agreement with the Federal Trade Commission (FTC) under which it would be permitted to sell its customer database as part of its bankruptcy plan, subject to numerous conditions. Under the settlement, the information could be conveyed to a purchaser only if it was in the family-related commerce market, purchased the entire web site, and agreed not to sell the

database without obtaining permission from the individuals included in it. Bankruptcy Judge Carol Kenner subsequently voided that agreement. She ruled, without prejudice, that any such agreement was premature in the absence of a buyer for the customer information. Judge Kenner noted that "the function of any court is to resolve actual conflicts" and that concerns about potential abuse of the database were hypothetical until a purchaser was identified. The Judge was responding, in part, to filings by creditors who asserted that the FTC terms were unduly constraining efforts to locate a purchaser, and who also noted that any disposition of the database asset would require notice to the FTC and approval by the bankruptcy court.

The ABA believes that Judge Kenner reached the appropriate conclusion in this case. More generally, we note that bankruptcy courts are courts of equity with a long history of balancing bankruptcy law with other Federal laws and public policies. Bankruptcy courts cannot approve a sale that would violate other Federal laws, including consumer protection laws. Further, a court order is subject to strong enforcement mechanisms and will generally provide greater protection to customers and consumers than any pledge made to them by the business prior to filing for bankruptcy protection.

The Study Agencies' request asked that comments not address pending legislative proposals or regulatory activities. While we will honor that request, we do note that, as a general mater, the highest degree of protection for the interests of a failed business' customers can be assured by leaving the bankruptcy court in control over those business assets that relate to their interests. Assets that are deemed to not be "property of the estate" cannot be used or sold by the debtor as part of its reorganization plan or for the benefit of creditors. Such non-estate assets may not be used as part of the debtor's regular business operations either prior to or after reorganization even where such use is consistent with its publicly stated privacy policy and applicable law, cannot be protected from misuse by third parties, and cannot be conveyed to a purchaser even where that transfer is part of a sale of the entire ongoing business and the buyer agrees to respect the failed company's privacy policy. Non-estate assets also fall outside the protection of the automatic stay and the jurisdiction of the court and could be subject to seizure and disposal by parties with claims against the debtor. Although an individual secured creditor might benefit from such action, creditors overall would be adversely affected because a valuable asset crucial to a successful reorganization or sale of the business would be lost to the debtor.

Bankruptcy policy favors maximizing the value of the estate for the benefit of creditors, including such parties as employees who are due back wages. It is important that this objective be carefully balanced against other public policy concerns. The bankruptcy court, acting as a court of equity, will generally be in the best position to balance such concerns based upon the specific facts and circumstances of a case. It is also important that consumer and customer information not be subject to more stringent conditions when a business seeks bankruptcy protection, as any resulting inability to utilize or realize the value of a key asset will be a strong deterrent to using the bankruptcy laws to reorganize. Such deterrence would tend to increase lost jobs, decrease creditor recovery, and harm the overall economy.

We believe it is premature to consider any new law governing the use of customer and consumer data in the commercial bankruptcy context. We also believe that, as a general matter, applicable privacy law and policy should be the same regardless of whether a business is a viable going

concern or is a troubled enterprise utilizing the bankruptcy process. Any legislative proposal for dealing with customer and consumer information held by a troubled company must be carefully considered to assure that it does not deter use of the bankruptcy process, conflict with the overall goals of bankruptcy, reduce the ability of the business to successfully reorganize, or undermine the ability of the court to safeguard the interests of individuals who have provided data to the company.

Finally, we note that certain self-declared privacy advocates have made public statements indicating that their advocacy of severe restrictions on the use of customer and consumer information in the commercial bankruptcy context is part of a broader agenda to prevent the exchange of customer information in all business mergers and acquisitions. Such broad legal restrictions on the ability to convey or use customer data would inevitably distort economic decisions, create unnecessary inefficiencies, and have significant negative repercussions for the overall information-based economy.

Conclusion

We appreciate the opportunity to comment and this matter. Please let us know if we can be of further assistance.

Sincerely,

Beth L. Climo
Managing Director

Appendix

Sec. 1028. Fraud and related activity in connection with identification documents and information

(a) Whoever, in a circumstance described in subsection (c) of this section -

(1) knowingly and without lawful authority produces an identification document or a false identification document;
(2) knowingly transfers an identification document or a false identification document knowing that such document was stolen or produced without lawful authority;
(3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor) or false identification documents;
(4) knowingly possesses an identification document (other than one issued lawfully for the use of the possessor) or a false identification document, with the intent such document be used to defraud the United States;
(5) knowingly produces, transfers, or possesses a document-making implement with the intent such document-making implement will be used in the production of a false identification document or another document-making implement which will be so used;

(6) knowingly possesses an identification document that is or appears to be an identification document of the United States which is stolen or produced without lawful authority knowing that such document was stolen or produced without such authority; or
(7) knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; shall be punished as provided in subsection (b) of this section.

(b) The punishment for an offense under subsection (a) of this section is -
(1) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than 15 years, or both, if the offense is -

(A) the production or transfer of an identification document or false identification document that is or appears to be -
(i) an identification document issued by or under the authority of the United States; or
(ii) a birth certificate, or a driver's license or personal identification card;
(B) the production or transfer of more than five identification documents or false identification documents;
(C) an offense under paragraph (5) of such subsection; or
(D) an offense under paragraph (7) of such subsection that involves the transfer or use of 1 or more means of identification if, as a result of the offense, any individual committing the offense obtains anything of value aggregating $1,000 or more during any 1-year period;

(2) except as provided in paragraphs (3) and (4), a fine under this title or imprisonment for not more than three years, or both, if the offense is -

(A) any other production, transfer, or use of a means of identification, an identification document, or a false identification document; or
(B) an offense under paragraph (3) or (7) of such subsection;

(3) a fine under this title or imprisonment for not more than 20 years, or both, if the offense is committed -

(A) to facilitate a drug trafficking crime (as defined in section 929(a)(2));
(B) in connection with a crime of violence (as defined in section 924(c)(3)); or
(C) after a prior conviction under this section becomes final;

(4) a fine under this title or imprisonment for not more than 25 years, or both, if the offense is committed to facilitate an act of international terrorism (as defined in section 2331(1) of this title);
(5) in the case of any offense under subsection (a), forfeiture to the United States of any personal property used or intended to be used to commit the offense; and
(6) a fine under this title or imprisonment for not more than one year, or both, in any other case.

(c) The circumstance referred to in subsection (a) of this section is that -

(1) the identification document or false identification document is or appears to be issued by or under the authority of the United States or the document-making implement is designed or suited for making such an identification document or false identification document;
(2) the offense is an offense under subsection (a)(4) of this section; or
(3) either -
(A) the production, transfer, possession, or use prohibited by this section is in or affects interstate or foreign commerce; or
(B) the means of identification, identification document, false identification document, or document-making implement is transported in the mail in the course of the production, transfer, possession, or use prohibited by this section.

(d) In this section -

(1) the term "document-making implement" means any implement, impression, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an identification document, a false identification document, or another document-making implement;

(2) the term "identification document" means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals;

(3) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any -

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
(C) unique electronic identification number, address, or routing code; or
(D) telecommunication identifying information or access device (as defined in section 1029(e));

(4) the term "personal identification card" means an identification document issued by a State or local government solely for the purpose of identification;
(5) the term "produce" includes alter, authenticate, or assemble; and
(6) the term "State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States.

(e) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States, or any activity

authorized under chapter 224 of this title.

(f) Attempt and Conspiracy. - Any person who attempts or conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(g) Forfeiture Procedures. - The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(h) Rule of Construction. - For purpose of subsection (a)(7), a single identification document or false identification document that contains 1 or more means of identification shall be construed to be 1 means of identification.