

American College of Bankruptcy



December 17, 2020

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The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
H-232, The Capitol
Washington, D.C. 20515

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
H-204, The Capitol
Washington, D.C. 20515

The Honorable Mitch McConnell
Majority Leader
United States Senate
S-230, The Capitol
Washington, D.C. 20510

The Honorable Charles E. Schumer
Minority Leader
United States Senate
S-221, The Capitol
Washington, D.C. 20510

Dear Speaker Pelosi, and Leaders McConnell, Schumer, and McCarthy:

The American College of Bankruptcy is an honorary association of almost 900 bankruptcy and insolvency professionals. The College plays an important role in sustaining professional excellence in the bankruptcy field. College Fellows include commercial and consumer bankruptcy attorneys, judges, insolvency accountants, turnaround and workout specialists, law professors, government officials and others in the bankruptcy and insolvency community. Its Fellows share a commitment to the administration and improvement of the bankruptcy system. The College has no political orientation, and is highly selective in the issues on which it takes a position. The policy positions it does take are nonpartisan, focusing entirely on projects and issues that enhance the quality of bankruptcy practice.

We understand that Congress is considering another round of Paycheck Protection Program (“PPP”) assistance for small businesses. In that regard, we write to voice our support for an important reform in the administration of the PPP. We recommend that Congress ensure that there be no blanket prohibition of the receipt by otherwise deserving small businesses, family farmers and individuals of PPP funds, merely because they are debtors in bankruptcy cases.

As you may be aware, the Small Business Administration (SBA) determined, incident to its administration of the PPP, to make any person or entity “presently involved in any bankruptcy” ineligible for PPP assistance. That includes, most obviously, debtors in cases under chapters 11, 12, and 13 of the Bankruptcy Code.

Whether that was proper under existing legislation has been the subject of considerable litigation, with rulings on each side of the controversy, and on the propriety of judicial intervention to address it. We take no position on any of those issues. But whether or not the SBA's determination was required or permissible under existing law, it was unwise as a matter of policy. We believe that America's small businesses, family farmers, and individuals otherwise qualified for PPP assistance should not be foreclosed from governmental assistance by reason of their resort to the bankruptcy system in their efforts to survive.

For nearly 150 years—and especially since the 1938 Chandler Act amendments to the now-superseded Bankruptcy Act as a result of the Great Depression—Congress has recognized the importance of—and has expanded—the bankruptcy system's reorganization provisions. These reorganization provisions are essential to the survival of businesses as going concerns, for the common good of those businesses' creditors, employees, suppliers, and the communities in which they operate. That is as true or more so for America's small businesses, as Congress recognized only last year when (with our support and with the overwhelming support of members of Congress on both sides of the aisle) Congress enacted amendments to chapter 11 of the Bankruptcy Code to make it more available and workable for small businesses.

As you are well aware, the COVID-19 crisis has brought extraordinary hardship to countless businesses. But resort to bankruptcy—with the breathing spell it can provide—provides a critical means to keep those businesses alive, and to keep their workers employed. And our nation's bankruptcy judges have decades of experience in determining which debtors have reasonable hopes of survival, and deserve to survive, and which companies are less suited to continued operation within the bankruptcy system. Our nation's bankruptcy judges are also adept at determining when postpetition financing should be approved and, in connection therewith, balancing the sometimes differing interests of postpetition lenders (as the SBA would be) and the prepetition creditors and debtors who would benefit from the debtors' survival.

To be clear, we are not advocating that the Congress *mandate* PPP assistance to any particular borrower, or category of borrowers, in a case pending under the Bankruptcy Code. Since PPP assistance will be in the form of loans in the first instance, a bankruptcy judge would have the power, and duty, to consider whether any given debtor should be receiving a PPP loan or not. But while we do not expect that every debtor in a bankruptcy case should appropriately be getting PPP assistance, we very much advocate making Congressional statutory law clear in providing that there should be no discrimination against debtors in bankruptcy cases, with respect to the PPP Program or similar Government assistance—and thus that there should be no blanket prohibition of PPP assistance to entities resorting to bankruptcy filings as part of their struggle to survive.

While declining to comment specifically on any legislation pending or proposed in either the Senate or the House, it is the College's view that the tenets we express should be incorporated in any legislation Congress enacts. You are welcome to publicly


cite the College's support of provisions consistent with the foregoing as you deem appropriate to secure those provisions' enactment.

We take no position on any other aspects of bills in which PPP modification or continuation might be implemented.

We note that the views expressed in this statement are those of the American College of Bankruptcy, on whose behalf this statement is issued, and do not necessarily reflect the personal views, if any, of any judge or other Fellow of the College (or any firm or educational institution with which one or more Fellows may be affiliated).

We would be grateful if you would keep us abreast of developments in this area.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Bloom", with a long horizontal flourish extending to the right.

Mark D. Bloom, Chair

A handwritten signature in black ink, appearing to read "Melissa S. Kibler", enclosed within a thin rectangular border.

Melissa S. Kibler, President

cc: Senator Lindsey Graham
Senator Diane Feinstein
Representative Jerrold Nadler
Representative Jim Jordan