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**Before the House Judiciary Subcommittee on
Regulatory Reform, Commercial and Antitrust Law**

H.R. 3553: “Bankruptcy Administration Improvement Act of 2017”

September 26, 2018

Chairman Marino, Ranking Member Cicilline, and members of the Subcommittee:

Thank you for holding this hearing and for inviting me to testify today on H.R. 3553, the “Bankruptcy Administration Improvement Act of 2017.” I testify here today on behalf of the National Association of Consumer Bankruptcy Attorneys (NACBA)¹ and the low-income clients of the National Consumer Law Center (NCLC).² The clients and constituencies of NCLC and NACBA collectively encompass a broad range of families and households who would be affected by H.R. 3553.³

In my work as an attorney at NCLC, I provide training and technical assistance to attorneys across the country who represent consumers in bankruptcy cases. I am the author and editor of various publications on bankruptcy. I often speak at educational programs for bankruptcy attorneys, trustees, and judges, and I have served as a member of the federal Judicial Conference Advisory Committee on Bankruptcy Rules. My testimony is based on this work and

¹ The National Association of Consumer Bankruptcy Attorneys (NACBA) is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. NACBA has more than 2,000 members located in all 50 states and Puerto Rico. NACBA has been actively involved in promoting reasonable and fair bankruptcy legislation since it was founded in 1992.

² The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Consumer Bankruptcy Law and Practice* (11th ed. 2016) and *Foreclosures and Mortgage Servicing* (5th ed. 2014). NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low income people, conducted training for thousands of legal services and private attorneys on the law and consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC’s attorneys have been closely involved with the enactment of all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws.

³ I am also a Commissioner on the American Bankruptcy Institute’s Commission of Consumer Bankruptcy. However, I am not testifying today as a representative of the Commission.

experience representing consumers in debt collection, bankruptcy and foreclosure defense matters.

NACBA and NCLC appreciate the opportunity to offer their views on H.R. 3553. Chapter 7 trustees serve an important role in the bankruptcy system and they should receive an increase in compensation. NACBA and NCLC have made clear over the years that they support increased compensation for chapter 7 Trustees. The proposed increase in compensation provided for in H.R. 3553, an initial \$60 per case, is reasonable and appropriate. At the same time, we have consistently stated that any such increase should not be borne solely by individual debtors who are experiencing financial hardship. Our concern with H.R. 3553 is that it looks only to struggling families to fund the increase, through higher filing fees, and does not consider alternative funding methods.

Impact of H.R. 3553

H.R. 3553 increases the portion of the trustee's compensation that is derived from chapter 7 filing fees, by raising the amount currently provided in 11 U.S.C. § 330(b)(1) from \$45 to \$105. To pay for this increase, H.R. 3553 would amend the statutory filing fee provided for in 28 U.S.C. § 1930(a)(1)(A) by replacing the amount of \$245 with \$305. Combined with the additional noticing fee of \$75 currently assessed in all chapter 7 cases pursuant to 28 U.S.C. § 1930(b), and another \$15 fee used to provide funds necessary for additional compensation to chapter 7 trustees as required by 11 U.S.C. § 330(b)(2), H.R. 3553 would increase the filing fee paid by chapter 7 debtors from \$335 to \$395.

H.R. 3553 also provides that the trustee compensation amount listed in 11 U.S.C. § 330(b)(1), which would become \$105, is subject to automatic inflation adjustment every three

years according to the formula prescribed in 11 U.S.C. § 104(a). The next scheduled adjustment will occur next year, on April 1, 2019. H.R. 3553 does not address how this increase, and future adjustments every three years, will be funded. Future increases in the amount paid to trustees under 11 U.S.C. § 330(b)(1) will require the Judicial Conference of the United States to either increase the portion of the filing fee it sets under 28 U.S.C. § 1930(b) or reduce expenditures for essential court operations. Given the budgetary challenges that the Judiciary currently faces, it is likely that the automatic adjustments to the \$105-per-case trustee compensation will result in further filing fee increases. This means that if H.R. 3553 were enacted, the chapter 7 filing fee could exceed \$400 sometime next year, making the filing fee paid by financially stressed families in bankruptcy even higher than the amount litigants pay to file a civil action in federal district court.

Prior to the 2005 Bankruptcy Act, the total filing fee for a chapter 7 bankruptcy case was \$209. Since that time there have been multiple filing fee increases, as to both the statutory fee and those set by the Judicial Conference. An increase from the current \$335 filing fee to \$395, as proposed under H.R. 3553, would represent an 89 percent increase from the pre-2005 Act period.

In the 2005 Bankruptcy Act, Congress also mandated that debtors go through pre-bankruptcy credit counseling and post-bankruptcy debtor education. This now adds another \$50 to \$100 to the cost of filing bankruptcy.

Not surprisingly, debtors today also face increased legal fees in seeking bankruptcy relief as a result of the 2005 Bankruptcy Act. Attorneys must complete additional forms, perform various calculations of the debtor's income and expenses, and collect additional documents from the debtor such as months' worth of paystubs and tax returns for multiple years. According to a

GAO report on the costs of the 2005 Act, bankruptcy cases now involve a greater number of motions and hearings, which further increase the time an attorney spends on a case.⁴ As a result, the total cost of filing a chapter 7 bankruptcy case has nearly doubled, from under \$1,000 in most cases (an amount many working families could scrape together) to \$2,000 or more, an amount well beyond the reach of many. While it is true that the 2005 Act also imposed additional requirements on trustees, H.R. 3553 asks debtors to pay not only their own attorneys' increased costs but also those of trustees and the court system. Other participants such as creditors who arguably benefit from the 2005 Act should be asked to pay for some of the additional administrative costs, as discussed below.

It is also not surprising that the increased cost of bankruptcy filing has resulted in a denial of access to bankruptcy relief for many financially distressed consumers. Even consumers who would benefit from bankruptcy often do not file because of the cost of filing bankruptcy. This can be best shown by considering the bankruptcy filing rates at the height of the Great Recession. A RAND study of American families during the Great Recession found that by April 2010, 39 percent of households had experienced financial distress.⁵ However, less than 1.4 percent of the 116.7 million American households filed bankruptcy in 2010. There remained a steady decline in bankruptcy filings after 2010, despite the continuation of challenging economic times for a number of years.

⁴ United States Government Accountability Office, "Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," p. 22, June 2008 (finding that the average attorney fee in chapter 7 consumer bankruptcy cases had increased by 51 percent after the 2005 Act).

⁵ RAND Labor and Population, Effects of the Financial Crisis and Great Recession on American Households, Michael Hurd And Susann Rohwedder, Nov. 2010. The study measured financial distress by considering the following factors: if the respondent and/or spouse is unemployed, or if the household is more than two months behind on mortgage payments (or in foreclosure), or if the value of the house is less than the amount of the mortgage.

Some might suggest that a \$60 filing fee increase is modest and would not be a barrier to access for bankruptcy relief. This fails to consider that consumers in financial distress typically live hand-to-mouth and have no savings they can rely upon. A 2017 Federal Reserve Board survey found that 41 percent of all respondents could not cover an unexpected \$400 emergency expense or would have to borrow or sell something to do so.⁶ Another study recently found that half of U.S. families could not come up with \$2,000 in 30 days from savings, friends, family or borrowing to deal with a financial emergency.⁷ It is an enormous struggle for consumers to come up with the costs needed to file bankruptcy relief, and an additional \$60 only makes this more difficult. The ability of some debtors to receive a filing fee waiver also does not diminish the impact of H.R. 3553 because so few debtors actually receive fee waivers.⁸

Alternative Funding Mechanisms

During the 12-month period ending December 31, 2017, there were 472,190 nonbusiness chapter 7 bankruptcy filings.⁹ Assuming a similar annual filing rate, an additional sum of approximately \$28.3 million would be needed to fund the \$60-per-case increase in trustee

⁶ Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2017, May 2018, available at: <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>.

⁷ Annamaria Lusardi, Daniel J. Schneider, Peter Tufano, “Financially Fragile Households: Evidence and Implications,” Brookings Papers on Economic Activity, May 2011.

⁸ Ed Flynn, “The Changing Profile of Chapter 7 Filers,” Exhibit 2, American Bankruptcy Institute Journal, September, 2018 (4.7% of 2016 Chapter 7 cases had a fee waiver granted); See also Lois R. Lupica, “The Consumer Bankruptcy Fee Study Final Report,” 20 Am. Bankr. Inst. L. Rev. 17, 107 (“Despite the prominence this issue took in the survey responses, the quantitative data revealed the incidence of IFP filings to be low: 1.9% of all chapter 7 cases.”); Table F-10A2, U.S. Bankruptcy Court, Filing Fee Status for Cases Filed During 12-Month Period Ending March 31, 2012 (3.09 percent of all cases had filing fee waivers).

⁹ Administrative Office of the U.S. Courts, Report F-5A, U.S. Bankruptcy Courts Business and Nonbusiness, Bankruptcy County Cases Commenced, by Chapter of the Bankruptcy Code.

compensation. We urge members of the Subcommittee to consider the following mechanisms for raising the necessary funds that more equitably distribute the costs to various participants in the bankruptcy system, including creditors who directly benefit from the work of trustees, rather than placing the full cost solely upon debtors. Unsecured creditors in particular are the greatest beneficiaries of the trustee's efforts, as they receive virtually all of the distributions in asset cases that have distributions less than \$50,000, where typically there is not a liquidation of secured property.¹⁰

In addition to the compensation paid to chapter 7 trustees from filing fees, they also earn a commission on the amount of assets administered in a case. Under current law, the trustee may receive an amount not to exceed 25 percent of the first \$5,000 disbursed, 10 percent on disbursements between \$5,000 and \$50,000, 5 percent on disbursements between \$50,000 and \$1 million, and 3 percent on amounts of more than \$1 million.¹¹ The maximum allowable fee is paid in more than 90 percent of asset cases, and more than three-quarters of trustee compensation is derived from the percentage fee on disbursements.¹² Chapter 7 trustees were paid approximately \$148 million in trustee fees in chapter 7 asset cases closed in calendar year 2016, and an additional \$108 million in legal fees from those cases.¹³

One way to raise funds for increased trustee compensation without having the cost fully borne by debtors would be to adjust the breakpoints in 11 U.S.C. § 326(a), so that a higher percentage on distributions in smaller asset cases would be paid as compensation to trustees. For

¹⁰ Ed Flynn, "Chapter 7 Asset Cases and Trustee Compensation," Table 4, American Bankruptcy Institute Journal, June, 2014.

¹¹ 11 U.S.C. § 326(a).

¹² Ed Flynn, "Chapter 7 Asset Cases and Trustee Compensation", American Bankruptcy Institute Journal, June, 2014.

¹³ Executive Office of the U.S. Trustees, 2016 Summary Table derived from Chapter 7 Trustee Final Reports, available at: <https://www.justice.gov/ust/file/ch7cy2016.pdf/download>.

example, section 326(a) could be amended to provide that the trustee may receive an amount not to exceed 25 percent of the first \$15,000 disbursed, 10 percent on disbursements between \$15,000 and \$100,000, 5 percent on disbursements between \$100,000 and \$1 million, and 4 percent on amounts of more than \$1 million.¹⁴ Based on the typical breakdown of asset distribution in closed cases,¹⁵ it can be expected that such an amendment to section 326(a) would generate approximately \$40 million in additional trustee compensation annually based on current filings. It also appropriately allocates some of the costs of increased trustee compensation on those creditors who receive distributions in asset cases and directly benefit from the private trustee system.

Some have suggested that an adjustment to the commission breakpoints would only benefit the trustees in asset cases, and that trustees in certain locations have few asset cases. A solution for this issue would be to further amend section 326(a) to provide that a small percentage of the trustee commission in each asset case be added to the fund created by 11 U.S.C. § 330(b)(2), and then distributed to all trustees to help pay for the \$60-per-case increase in trustee compensation. For example, under the adjusted breakpoint formula I have proposed, a trustee would receive a \$2,500 commission in an asset case with a \$10,000 distribution. If section 326(a) were amended to provide that 5 percent of the commission be added to the fund created by 11 U.S.C. § 330(b)(2), the trustee's commission would be \$2,375, and \$125 would be paid into the section 330(b)(2) fund. By setting the percentage reduction at a low amount such as 5 percent, trustees will continue to have appropriate financial incentives to pursue liquidation of assets. This change would benefit all trustees, and it would generate approximately \$7.5 million

¹⁴ A bill providing for larger percentage increases at the breakpoints, H.R. 2667, was introduced in the 112th Congress.

¹⁵ Ed Flynn, "Chapter 7 Asset Cases and Trustee Compensation," Tables 2 and 4, American Bankruptcy Institute Journal, June, 2014.

in additional funds based on current filings to help pay for the \$60-per-case increase in trustee compensation. Obviously this approach could create an even larger fund if a higher percentage is used, such as 10 percent.

Another alternative method that again asks creditors to bear some of the costs for increased trustee compensation would be to require that creditors pay a small filing fee when they file a proof of claim in asset cases. While the Bankruptcy Court Miscellaneous Fee Schedule currently imposes charges for many services provided by the bankruptcy courts, creditors are not required to pay a fee for filing a proof of claim. Any filing fee imposed could be limited to claims filed by entities that frequently file bankruptcy claims, so that individual creditors and small businesses who file less than a certain amount, such as less than 100 claims per year, would be exempt. Even a small fee of less than \$5 per claim under such a proposal could generate significant funds to defray the \$60-per-case trustee increase.

We strongly support the assurance in Section 2 of H.R. 3553 that indigent debtors who receive filing fee waivers will not be charged for any increase in trustee compensation, and we urge that this be retained in any bill voted upon by the Subcommittee. We believe, however, that Congress should seek a method for providing trustees with compensation in fee waiver cases, without raising filing fees. The alternative methods we have suggested for increasing contributions to the fund created by 11 U.S.C. § 330(b)(2) could provide a source of funding that would permit trustees to receive some compensation in fee waiver cases.

Finally, if debtors are asked to pay for a portion of the trustee fee increase, there should be a corresponding reduction for debtors in the cost of filing bankruptcy. This could be accomplished through a variety of amendments to reduce the needless and burdensome paperwork requirements that were imposed by the 2005 Act. For example, the requirement that

all debtors and their attorneys collect pay stubs covering a rigid prepetition time-period of six months, in order to calculate “current monthly income,” could be replaced with a system that would permit below-median income debtors to establish their safe-harbor status from the means test with a year-to-date paystub or a prior year’s income tax return (or transcript) and certification of current income. Another change that would reduce costs would be to eliminate the pre-bankruptcy credit counseling requirement for cases in which credit counseling offers no solution, such as when a debtor must file a bankruptcy to deal with a foreclosure, wage garnishment, or vehicle repossession. Changes such as these would reduce the cost of filing bankruptcy.

In conclusion, NACBA and NCLC value the role of chapter 7 Trustees in the functioning of our bankruptcy system. Increased compensation for chapter 7 Trustees will help ensure that our bankruptcy system will continue to attract and retain competent and experienced private trustees. However, it is critical that financially distressed consumers not be asked to bear this increase alone.

We stand ready to work with this Subcommittee and other interested parties in devising a fair and balanced approach to this issue.