THE WHITE HOUSE

WASHINGTON

March 28, 2000

MEMORANDUM

TO: NEC PRINCIPALS

FROM: FINANCIAL PRIVACY WORKING GROUP

RE: SUPPLEMENT ON PRIVACY OF BANKRUPTCY INFORMATION

SUMMARY

This memorandum supplements the March 17 memorandum to NEC Principals regarding Proposed Financial Privacy Legislation, and replaces the section entitled "Prevent Abuses of Bankruptcy Trustees Financial Information Databases." In the interim, the working group has continued to explore options to address concerns about the lack of privacy protection for sensitive financial information gathered in the course of bankruptcy, especially in light of pending proposals for broad distribution of such data, without adequate privacy controls. The working group recommends: (1) we include in our financial privacy package a narrow substantive provision limiting use and disclosure of certain "non-public" bankruptcy data; (2) we announce that the President has directed federal agencies to conduct a study of appropriate privacy protection of "public record" and "non-public" bankruptcy data; and (3) we continue apparently successful efforts to get the Bankruptcy conference committee to make changes to language in the House and Senate bills that could be harmful to financial privacy.

THE PROBLEM

Individuals filing for bankruptcy put their financial information in a number of hands. Public record bankruptcy court filings must include a wide range of sensitive financial data, including: bank and other account numbers, a social security number, itemized income (e.g., salary, income from property, alimony, government assistance); and expenses by category (e.g., rent, food, medical expenses, installment payments). In addition, non-public case administration data is collected by private trustees – private individuals engaged to administer bankruptcy cases (e.g., liquidate assets or collect and distribute payments under a repayment plan). The trustees are required to make this information available to any creditors who file a claim and other "parties in interest." Nothing limits trustees' ability to share such information with others as well.

Consider the following privacy concerns. A growing number of courts are exploring or actually making judicial records available on-line. Previously, "public record" information was accessed only by people who took the time to go to the courthouse to get a record, i.e., people

most often with a real stake in the matter. Now, public record information is increasingly available with the click of a button to curious friends and neighbors, employers, marketers, and predators looking for those most likely to be lured by scams. While this problem is true of all public records, bankruptcy records raise greater concerns because they contain particularly sensitive financial information and because of the special vulnerability of the debtor population.

Another concern is raised by an effort of the private trustees to make the non-public case administration data available more efficiently in a centralized database accessible to bankruptcy creditors across the country. One model the trustees are exploring is to create a trustee-owned "National Data Center" (or "NDC"). When DoJ's Executive Office for U.S. Trustees (EOUST) expressed concerns about privacy, the trustees expressed a willingness to build some protections into the NDC system, but the EOUST's authority to regulate the use and reuse of such information is limited. As a result, with this project, the private trustees could ultimately *and legally* broadly disclose debtors' non-public case administration data in bulk and for profit.

Finally, the Administration shares the concern that there is insufficient statistical information available about bankruptcy cases, making policy judgments difficult. However, as described below, the current bills go too far by urging public access to personally identifiable information not needed for policy analysis, further weakening privacy protections for debtors.

RECOMMENDATIONS

Narrow, Substantive, Privacy Proposal in Financial Privacy Bill. Currently, EOUST is working on privacy guidelines that private trustees would be required to adhere to in the NDC project, and more generally in their handling of debtor information obtained in the course of case administration. However, the EOUST's jurisdiction is limited to the private trustees and does not allow them to restrict use of the non-public data once it is in the hands of creditors, information clearinghouses, and other third parties.

As a result, we propose to include a narrow, substantive protection in the Administration's financial privacy bill. This proposal would prohibit the private trustees from disclosing non-public case administration data, except generally to parties in interest under EOUST guidelines, or with the debtor's affirmative, written consent. It would also prohibit any entity from using or disclosing such data for purposes that are unrelated to case administration, unless again the debtor provider written consent.[1] We believe that this proposal fits well with the Administration's overall effort to apply stronger legally enforceable privacy rights to individuals' sensitive financial data -- rights implicated in a bankruptcy case as much as in a financial institution.

Administration Study. We propose that the President direct the U.S. Trustees, Treasury,

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[1] In accordance with current law and practice, under our proposal, a creditor would be able to examine payment information to other creditors in order to determine the equitable administration of the case.

and OMB, in consultation with the Judicial Conference, to conduct a study of privacy issues raised by bankruptcy data, including its release in electronic form, to be completed by the end of the year. In announcing the study, we could show the special sensitivity of data in an actual public bankruptcy filing and ask whether we think it fair that the price of filing bankruptcy is to have such information available to the whole world. For example, John Q. Public owes creditor Bank ABC, account number 3578912, a monthly mortgage of $2,500; he owes Morristown Cars-Are-Us, for his account number 3425, $360 in car loan payments; he also owed $500 monthly in alimony. John Q. Public earns $30,000 in salary.

Revisions to Language in Bankruptcy Legislation. Both bankruptcy bills include "sense of the Congress" language that public record information from bankruptcy filings should be made available electronically. In addition, the Senate bill includes language making it a duty of private trustees to provide case administration information to a non-profit entity via the Internet. Finally, the House bill contains a provision protecting the trustees from liability in the case of unintended errors in the release of information. These issues were buried in bill text and not widely noticed until after both bills passed.

We are working with Senate Democrats to include a caveat that the release of public bankruptcy data be subject to appropriate privacy and security safeguards as determined by the EOUST and the Judicial Conference of the United States. We are also working to strike the language regarding trustees' *duties* to provide their case data and the liability exemption provision, arguing that such provisions are at best premature before an appropriate plan and EOUST guidelines are established.