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*A Voluntary Organization Composed of Persons Interested in the  
Improvement of the Bankruptcy Code and Its Administration*

September 12, 2005

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Washington, D.C. 20510

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Honorable Joseph I. Lieberman, Ranking Member  
Committee on Homeland Security  
and Government Affairs  
United States Senate  
Washington, D.C. 20510

Re: S. 662 (The Postal Accountability and Enhancement Act)

Dear Senators:

The National Bankruptcy Conference ("NBC") writes to alert you to the serious issues raised by S. 662 (The Postal Accountability and Enhancement Act), which was reported by the Senate Committee on Homeland Security and Governmental Affairs on July 14, 2005, and placed on the Senate Legislative Calendar. The NBC is a non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws. It has been working cooperatively with Congress on bankruptcy legislation since the 1930's.

Section 404(f) of S. 662 provides:

"To the extent that the Postal Service engages in conduct with respect to the provision of competitive products, it shall be considered a person for purposes of the Federal bankruptcy laws."

Currently, "person" for purposes of the Federal bankruptcy laws is defined in section 101(41) of the Bankruptcy Code, 11 U.S.C. § 101 et seq., to include "individual, partnership and corporation, but . . . not . . . governmental unit" except in limited circumstances (discussed below). A "governmental unit" is defined in

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section 101(27) as "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

The NBC believes that section 404(f) of S. 662 is unworkable and would have serious unintended consequences for the United States Postal Service ("USPS") and the bankruptcy system. We note that H.R. 22 – a similar bill passed by the House on July 26, 2005, after consideration by the House Committee on the Judiciary – does not contain this provision. (We understand that the Senate Committee on the Judiciary, which has jurisdiction over legislation relating to bankruptcy, has not similarly considered S. 662.)

Making the USPS a "person" under the Federal bankruptcy laws "to the extent that" the USPS engages in competitive conduct would make the USPS, or at least a portion of it, eligible to be a debtor under the Bankruptcy Code, on both a voluntary and involuntary basis, under chapters 7 (liquidation) and 11 (reorganization) of the Bankruptcy Code. See 11 U.S.C. §§ 109 & 303. There are several problems with this. While bankruptcy ultimately results in the discharge of excessive debt, it accomplishes this result by a sale of the debtor's assets to generate cash to pay creditors, by a transfer of some or all of the ownership to creditors, or by a combination of these approaches. Neither of these results is appropriate for the USPS, which provides an essential governmental function; it should not fall into private ownership based on the rulings of a bankruptcy court, rather than on considered public policy debate in and decision by Congress. We doubt that Congress intends to make ownership of the USPS transferable. Yet section 404(f) of S. 662 might do just that.

Further, even though there appears to be an effort in section 404(f) to bifurcate the USPS for bankruptcy purposes into one part that provides "competitive products" and another part that does not, it is not clear that the assets of the USPS can be separated in that way. For example, since its facilities and employees are used in providing both competitive and noncompetitive products, those rights and contracts would appear to be subject to bankruptcy court jurisdiction under section 404(f) for purposes of sale, rejection, modification, etc. In addition, neither bankruptcy law nor any otherwise applicable law provides any readily-ascertainable principles for separating assets and liabilities of a single legal entity that engages in two related but distinct kinds of activities.

Making the USPS a "person" under the Federal bankruptcy laws has other ramifications as well, as there are at least 41 sections of the Bankruptcy Code in which the word "person" is used. One of those is section 1102(b)(1) & (2), which provides that only "persons" may be appointed as members of official creditors' and equity security holders' committees in chapter 11 cases. Congress specifically determined, in 1978 and again in 1994, that "governmental units" should be excluded from serving on such committees except in certain limited situations specified in section 101(41), *i.e.*, when the governmental unit is a creditor or equity security holder (a) by operation of a loan guarantee, (b) as receiver or liquidating agent of an entity that is a "person," (c) as guarantor of a pension benefit, such as the FDIC, or (d) as owner of an asset held by a state employee pension plan. In each of these instances, the governmental unit's position is derivative of the rights of another. That is different from the USPS having a claim as a creditor in its own right – a situation that would not entitle any other "governmental unit" to serve on an official chapter 11 creditors' committee. There is no justification for providing the USPS with rights and powers no other "governmental unit" has. Even if there were such a justification, it is not clear how just a portion of the USPS would be eligible to serve.

In short, the NBC opposes section 404(f) of S. 662 because it is unworkable and ill-advised. It could have serious unintended consequences for the USPS -- which could even be subject to

an involuntary bankruptcy petition – and for its employees and the creditors of its core business. And, it would create an exception for the USPS alone to long-standing limitations on the role of governmental units in bankruptcy cases. For these reasons, we urge you to submit and support an amendment to remove section 404(f) from S. 662 before voting on the measure.

Thank you for considering these issues. We would be pleased to discuss this provision and its ramifications with you or your staff, at your or their pleasure.

Very truly yours,



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