To: National Bankruptcy Conference
From: Alan W. Kornberg and Richard G. Mason
Subject: Proposed Amendment to Section 544(b) of the Bankruptcy Code

I. Introduction

This memorandum recommends that Congress amend section 544(b) of the Bankruptcy Code to limit the definition of “applicable law” to include only those rights available to private parties, and exclude sovereign rights of state and federal governments (each a “Government Unit”). Congress should amend section 544(b) to resolve the current split of authority on this issue and impose appropriate limits on the ability of a trustee to avoid transactions under section 544(b).

1 Section 544(b) of the Bankruptcy Code provides in relevant part that “the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is avoidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.” 11 U.S.C. § 544(b).

2 Compare Wagner v. Ultima Homes, Inc. (In re Vaughan Co.), 498 B.R. 297, 304, 305 (Bankr. N.M. 2013) (“Vaughan”) (holding that section 544(b) did not permit the trustee to avail itself of the 10-year look-back period available to the Internal Revenue Service (“IRS”)), and MC Asset Recovery LLC v. Commerzbank AG (In re Mirant Corp.), 675 F.3d 530, 535 (5th Cir. 2013) (“Mirant”) (holding that the Federal Debt Collection Procedures Act (“FDCPA”) was not “applicable law” for the purposes of section 544(b)), with Ebner v. Kaiser (In re Kaiser), 525 B.R. 697, 714 (Bankr. N.D. Ill. 2014) (“Kaiser”) (holding that trustee may avail itself of the look-back period available to the IRS under section 544(b) and Tronox Inc. v. Kerr McGee Corp. (In re Tronox Inc.), 503 B.R. 239, 274 (Bankr. S.D.N.Y. 2013) (“Tronox”) (holding that trustee could rely on the six-year limitations period under the FDCPA to bring an avoidance action under section 544(b) if four-year limitations period under the state’s Uniform Fraudulent Transfer Act had expired).

3 The term “trustee” as used in this memorandum refers to bankruptcy trustees and debtors in possession, as well as any representative authorized to assert a claim on their behalf. The proposed amendment does not address the rights of a creditor to commence an avoidance action under applicable non-bankruptcy law when the trustee may commence a similar action under the Bankruptcy Code, including by operation of section 544(b).
II. **Background**

A. **Overview of Section 544(b) of the Bankruptcy Code**

Section 544(b) of the Bankruptcy Code authorizes the trustee to avoid transactions that are voidable under applicable law by an unsecured creditor holding an allowable claim (a so-called “Triggering Creditor”).\(^4\) This preserves unsecured creditors’ rights under applicable non-bankruptcy law and promotes equality of distribution by effectively transferring such rights to the trustee to pursue for the benefit of all unsecured creditors. Accordingly, although a Triggering Creditor’s claim may only belong to one creditor and such claim may have nominal value, the trustee may recover the full value of the avoided transfer for the benefit of all the estate’s creditors.\(^5\) This is true even where the value of the transfer to be avoided exceeds the amount of the creditor’s claims, or the unsecured creditors already received a full recovery on account of their claims.\(^6\) This principle, the so-called “Moore v. Bay Doctrine” after the Supreme Court case in which it was established,\(^7\) can lead to what some commentators refer to as “outrageous results.”\(^8\) For example, the trustee could use a Triggering Creditor with a $1 claim under section 544(b) to avoid a lien securing a loan for millions of dollars and provide recoveries to creditors with no right to avoid the transfer under applicable non-bankruptcy law.

The trustee’s ability to avoid a transfer is limited in some respects. By invoking section 544(b), the trustee “steps into the shoes” of the Triggering Creditor, subject to all rights and defense applicable to the Triggering Creditors’ claims.\(^9\) Section 544(b) only preserves creditors’ prepetition rights under applicable non-bankruptcy law, however, it does not create an independent right to avoid a transfer.\(^10\)

B. **Section 544(b) and Statutes of Limitation**

1. **General Overview**

Among the many benefits section 544(b) bestows upon a trustee, perhaps the most valuable to the estate is the ability to bring an otherwise time-barred avoidance action where a Triggering Creditor benefits from a longer limitations period under applicable law. Indeed, the most common use of section 544(b) is for a trustee to assert state law fraudulent conveyance remedies to obtain the benefit of the longer look-back

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\(^4\) 11 U.S.C § 544(b)(1); *see Tronox*, 503 B.R. at 275.
\(^6\) *See Coleman v. Community Trust Bank (In re Coleman)*, 426 F.3d 719, 726-27 (4th Cir. 2015).
\(^7\) 284 U.S. 4.
\(^9\) *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743, 746 (7th Cir. 2015).
\(^10\) *See, e.g.*, Sherwood Partners, Inc. *v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005) (holding that trustee could not avoid a transfer under section 544(b) where the right to avoid the transfer under applicable state law only applied to state assignees or other custodians, not ordinary unsecured creditors).
periods under these statutes. For example, forty-three states and the District of Columbia have adopted the UFTA, which generally provides a four-year look-back period for fraudulent transfer claims. A trustee may, under section 544(b), avoid a fraudulent transaction where the relevant transfer occurred beyond the two-year look-back period of section 548(a)(1) of the Bankruptcy Code but within the four-year look-back period of the UFTA.\(^\text{12}\)

In this example, section 544(b) functions as Congress intended. A Triggering Creditor’s prepetition, state law rights under the UFTA are preserved in the trustee’s hands to be exercised for the benefit of the estate’s creditors. The trustee, acting as a private litigant (albeit on behalf of the debtor’s estate), commences an action under section 544(b) to assert the rights of another private litigant to avoid a transaction for the benefit of many. This reflects a certain balance: the Bankruptcy Code allows the trustee to “step into the shoes” of the Triggering Creditor to avoid a transfer, but as a private litigant asserting rights of another private litigant under applicable law.

This balance is upset, however, where the trustee uses a Government Unit as a Triggering Creditor under section 544(b). In such instances, the trustee—a private litigant—steps into the shoes of a Government Unit to exercise rights and enjoy benefits available only to the Government Unit by virtue of its sovereign status. This potential imbalance is almost always possible because Government Units are usually creditors, and therefore potential Triggering Creditors, holding claims on account of unpaid taxes outstanding on the petition date. Trustees that use section 544(b) in this manner do so almost exclusively to obtain the benefit of the longer limitations periods (or the complete lack thereof) afforded such claims.

2. Limitation Periods Applicable to Government Units as Sovereigns

As a general matter, claims belonging to a Government Unit (and instrumentalities thereof acting in a sovereign capacity) are not subject to any limitations periods, unless the applicable legislative body expressly imposes one, under the doctrine of *nullum tempus occurrit regi* ("time does not run against the king").\(^\text{13}\) The doctrine of

\(^{11}\) 5-544 COLLIER ON BANKRUPTCY P 544.06 (15th Ed. 2015) ("The state law most frequently used by trustees under section 544(b)(1) is the Uniform Fraudulent Transfer Act."); GINSBERG & MARTIN ON BANKR. § 9.02 (2015) ("The most common use of [section] 544(b) is the trustee’s pursuit of state law fraudulent conveyance remedies.").

\(^{12}\) See *Tronox* at 100, 101 ("The key difference between the two statutes is that under the Bankruptcy Code, the “look back” period for avoiding transfers is two years before the filing of the bankruptcy petition, compared to a four-year limitations period under the [UFTA]."); *Grochocinski v. Zeigler (In re Zeigler)*, 320 B.R. 362, 372 (Bankr. N.D. Ill. 2005) ("An important difference between [section] 548 and the UFTA is that [section] 548 authorizes avoidance of transfers made within [two years] before the bankruptcy filing. Causes of action for fraudulent conveyances can be brought under the UFTA, however, within four years after the transfer was made.") (citations omitted).

\(^{13}\) See generally, Guaranty Trust Co. of N.Y. v. U.S., 304 U.S. 126, 132 (1938) ("So complete has been [nullum tempus’s] acceptance that the implied immunity of the domestic ‘sovereign,’ state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included . . ."); *E.I. Du Pont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924) ("An action . . . to recover upon a liability . . . on behalf of the United States in its
nullum tempus is limited, however, and “will only apply to a [Government Unit] when it is seeking to enforce strictly public rights, that is, when the cause of action accrues to it in its governmental capacity and the suit is brought to enforce an obligation imposed by law as distinguished from one arising out of a voluntary agreement.”

Thus, a trustee seeking to use a Government Unit as a Triggering Creditor may avoid an otherwise applicable limitations period in two ways: (i) by invoking directly the Government Unit’s sovereign rights under the nullum tempus doctrine, or (ii) claiming that a limitation period imposed on the Government Unit by an appropriate legislative body also applies to the Government Unit’s claim in the hands of the trustee.

(a) **Nellum Tempus Occurrit Regi**

The nullum tempus doctrine provides that “limitations periods do not bind [a Governmental Unit] when it sues to vindicate a public right or interest, absent a clear showing of [legislative] intent to the contrary.” This doctrine “finds its modern justification in the policy that public rights, revenues, and property should not be forfeited due to the negligence of public officials.”

Nullum tempus also immunizes the federal government from statutes of limitation imposed by applicable state law. Accordingly, nullum tempus shields from state law limitation periods claims such as those brought by the IRS to collect unpaid taxes and the Securities and Exchange Commission (“SEC”) to enforce the securities laws. The only limitations periods that apply to such claims are those imposed by Congress. For example, Congress enacted Section 6502 of the Internal Revenue Code governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it.” (citations omitted).

14 Montgomery Cty. v. MicroVote Corp., 23 F. Supp. 2d 553, 555 (E.D. Pa. 1998); see U.S. v. Beebe, 127 U.S. 338, 344 (1888) (“[T]he United States are not bound by any statute of limitations . . . in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest.”) (emphasis added); U.S. v. Summerlin, 310 U.S. 414, 416 (1940) (“It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.”); Vaughan, 498 B.R. at 305; Marshall v. Intermountain Elec. Co., Inc., 614 F.2d 260, 262 n.3 (10th Cir. 1980) (“An action which, although brought in the name of the United States, involves no public rights or interests may be subject to a state statute of limitations.”)

15 SEC v. Rind, 991 F.2d 1486, 1491 (9th Cir. 1993) (citing U.S. v. Summerlin, 310 U.S. 414, 416, 417 (1940); see also Vaughan at 304 (“The doctrine that the United States is not bound by state statutes of limitation in enforcing its rights is known as nullum tempus occurrit regi.”) (citations and quotations omitted).

16 Id. (emphasis added); see also Guaranty Trust Co. of N.Y. v. U.S., 304 U.S. 126, 132 (1938).

17 U.S. v. Thompson, 98 U.S. 486, 490 (1878) (holding that, under the doctrine of nullum tempus, states cannot pass statutes that impose limitations periods on the federal government); Marshall v. Intermountain Elec. Co., Inc., 614 F.2d 260, 262 (10th Cir. 1980) (“Nor will a state limitations period be applied to an action brought by the federal government to vindicate public rights or public interests, absent a clear showing of contrary congressional intent.”).

18 See Vaughan at 303 (“[T]o the extent the IRS seeks to collect taxes using the UFTA, the action would not be governed by any state statute of limitations.”).

19 See SEC v. Rind, 991 F.2d at 1492 (refusing to impose any state or other statute of limitations, absent Congress’s express intent otherwise, on SEC civil enforcement actions.)
(the “IRC”) to impose a 10-year limitations period on the IRS’s ability to bring actions to collect unpaid tax assessments. As a result, the IRS can bring an action to collect an unpaid tax assessment using a state’s UFTA while preserving the benefit of the ten-year look-back provided by IRC section 6502. But it is the doctrine of *nullum tempus*, not IRC section 6502, that exempts the IRS from the four-year look-back period of the UFTA. IRC section 6502 is a limitation on the doctrine of *nullum tempus*, not an exemption from otherwise applicable state law.

(b) *The FDCPA*

Congress enacted the FDCPA to provide “the exclusive procedures [and limitations periods] for the United States to collect debts that are owed to it and to avoid fraudulent transfers as to its own debts.” For the purposes of the FDCPA, a “debt” is one which “if collected will inure directly to the government’s benefit (in contrast to benefiting a third party).” The FDCPA creates “a framework under which the United States might more efficiently collect debts owed to it” by relieving “the federal sovereign’s need to rely on a patchwork of state laws.” “Congress passed the FDCPA with an end game in mind: to lessen the effect of delinquent debts on the massive federal budget deficit now undermining the economic well-being of the Nation.”

The FDCPA contains provisions “similar to the UFTA under which the United States can pursue its claims of similar nature.” “Section 3306(b) of the FDCPA provides, with certain exceptions, a six-year statute of limitations from the date of the challenged transfer for actual and constructive fraudulent transfer claims under the FDCPA.”

3. **Overview of Applicable Case Law: The Split in Authority**

Courts are divided whether a trustee may use Government Units as a Triggering Creditor under section 544(b) and thereby obtain the benefit of the limitations

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20 IRC section 6502 provides, in relevant part, that “[w]here the assessment of any tax imposed by this title has been made within the period of limitation applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun . . . within 10 years after the assessment of the tax.” 26 U.S.C. § 6502(a)(1).

21 See Vaughan at 303, 304.

22 Although this memorandum limits its analysis of legislatively imposed limitations periods to those under the FDCPA, the analysis and arguments would apply equally to a similar statutory scheme enacted by a state legislature.


24 Id. (emphasis added).


26 Id.

27 *Tronox* at 272.

28 Id.

29 There do not appear to be any cases deciding whether a trustee can use a state government as a Triggering Creditor under section 544(b). Nonetheless, as discussed supra note 20, the rationale for prohibiting a trustee from using the federal government as a Triggering Creditor applies equally to attempts to use state governments as a Triggering Creditor.
periods applicable to their claims.\textsuperscript{30} The issue typically arises when a trustee seeks to rely on section 544(b) to benefit from a longer statute of limitations period afforded to the federal government under the FDCPA or IRC section 6502.

Courts allowing a trustee to use section 544(b) to use the federal government as a Triggering Creditor reason that the plain language of section 544(b) imposes no limits on the definition of “applicable law” or places any limits on which unsecured creditors may serve as a Triggering Creditor.\textsuperscript{31} Notwithstanding the trustee’s status as a private litigant, these cases hold that, for the purposes of section 544(b), “applicable law” includes laws and prerogatives that apply only to the federal government acting in its sovereign capacity. In such cases, trustees have commenced claims under section 544(b) to use the 10-year limitations period available to the IRS\textsuperscript{32} and the six-year limitations period under the FDCPA.\textsuperscript{33} Notably, these decisions do not address either the limited applicability of the \textit{nullum tempus} doctrine or the propriety of permitting a private litigant (the trustee) the ability to wield rights and prerogatives belonging to the federal government.

In contrast, courts that refused to allow a trustee to use a Government Unit as a Triggering Creditor have done so precisely for those reasons. These courts hold that Congress, in enacting section 544(b), did not intend to vest sovereign powers in a trustee pursuing unsecured creditors’ private interests.\textsuperscript{34} Under these cases, sovereign rights of a Government Unit—or statutes that apply solely to claims belonging to a Government Unit—do not constitute “applicable law” under section 544(b). For the reasons set forth below, Congress should amend section 544(b) to adopt the holdings of the cases that properly refuse to allow a trustee to use a Government Unit as a Triggering Creditor.

\textbf{III. Congress Should Amend Section 544(b) to Limit the Definition of “Applicable Law” to Remedies Available to Private Parties}

Cases that hold that rights and prerogatives unique to Government Units constitute “applicable law” for the purposes of section 544(b) ignore the rationale and limited scope of such rights and suppose a Congressional intent that is belied by applicable case law and the legislative history of section 544(b).

\textsuperscript{30} See supra note 3.
\textsuperscript{31} See, e.g., Kaiser at 711; Tronox at 273, 274
\textsuperscript{32} See e.g., Kaiser at 711; see also Vaughan at 303 (collecting cases holding that trustee pursuing state law fraudulent transfer claims is subject to the ten-year look back period available to the IRS, provided the IRS is an unsecured creditor of the estate).
\textsuperscript{34} See e.g., Vaughan at 305; MC Asset Recovery, at *4 (“Applying the FDCPA in any case in which the United States holds an unsecured claim would not only result in the exclusive procedures of the United States being made available to a private estate representative for the benefit of private creditors, but would greatly expand the intended reach of section 544(b).”).
A. The Nullum Tempus Doctrine Should Not Constitute “Applicable Law” under Section 544(b)

The nullum tempus doctrine should not constitute “applicable law” under section 544(b) for two reasons. First, nullum tempus protects a Government Unit only when it acts in its sovereign capacity. Second, even when a Government Unit is acting in its sovereign capacity, nullum tempus applies only when the Government Unit seeks to enforce public rights or protect the public interest.

Nullum tempus does not apply where the Government Unit acts as “a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through whom one private person can conduct litigation against another private person.” Thus, courts have held that nullum tempus does not apply where private litigants are subrogees or assignees of a Government Unit’s claims. The missing element in each of these cases, notwithstanding the moving parties’ status as a subrogee or assignee of a Government Unit’s rights, is the presence of a Government Unit acting in its sovereign capacity. The same element is lacking in an action brought by a trustee under section 544(b). Nullum tempus simply does not apply where the trustee seeks to use a Government Unit “merely to form a conduit” between the trustee and the transferee to assert an otherwise time-barred avoidance action under section 544(b).

In addition, nullum tempus only applies where a Government Unit acts to enforce public rights and protect public interests. Courts have refused to apply nullum tempus to claims that, although asserted by a Government Unit, only serve private interests. This requirement supplies an additional basis for prohibiting a trustee from

35 U.S. v. Beebe, 127 U.S. at 347 (emphasis added); see also Marshall v. Intermountain Elec. Co., Inc., 614 F.2d 260, 262 n.3 (10th Cir. 1980) (“An action which, although brought in the name of the United States, involves no public rights or interests may be subject to a state statute of limitations. In such a case the federal government functions as a mere conduit for the enforcement of private rights which could have been enforced by the private parties amongst themselves).

36 See, e.g., McCloskey & Co., v. Wright, 363 F. Supp. 223, 228 (E.D. Va. 1973) (“The law appears to be well-settled, however, that an assignee of a government claim may not rely upon the government’s immunity to the statute of limitations where it is intended to enforce the claim for private benefit.”); Sch. Dist. Of the Borough of Aliquippa v. Md. Casualty Co., 402 Pa Super. 569, 581-83 (Pa. Sup. Ct. 1991) (holding that subrogee of school district could not invoke nullum tempus to assert time-barred claim notwithstanding that nullum tempus applied to claims brought by the school district); Fid. & Deposit Co. of Md. V. First. Nat. Bank, 54 S.W. 2d 964, 965 (Tenn. 1932) (“While the subrogees stood in the shoes of the creditor whose debt they paid, as equitable assignees, they were only assignees of the debt and of all the securities for its payment. It cannot be said they became assignees of the state’s sovereign right of exemption from the operation of the statute of limitations.”); see also 1148 Davol St. LLC v. Mechanics Mill One LLC, 21 N.E. 3d 547, 552, 553 (Mass. App. Ct. 2014) (holding that transferee of public land could not avail itself of the statute of limitations period available to state actions to recover land to defeat a claim of adverse possession).

37 See Vaughan at 304 (“[Nullum tempus] may only be used to enforce public rights and protect public interest.”); Marshall v. Intermountain Elec. Co., 614 F.2d 260, 263 n.3 (10th Cir. 1980).

38 See Id. at 304 (“Therefore, if an action brought in the name of the United States does not involve public rights or interests, state statutes of limitation typically apply.”); Kinder v. Coleman & Yates Coal Co., 974 F. Supp. 868, 872-75 (W.D. Va. 1997) (holding that federal government, as administrator of the Black Lung Disability Trust, could not invoke nullum tempus because the relevant enforcement action did “not
availing itself of the *nullum tempus* doctrine under section 544(b). In seeking to avoid a transfer under section 544(b), the trustee does so to benefit the private interests of the unsecured creditors and *nullum tempus* does not apply.

Even assuming, *arguendo*, that a trustee can cloak itself in the sovereign capacity of a Government Unit, *nullum tempus* still does not apply because a section 544(b) avoidance action is not an action to enforce public rights or advance public interests. Rather, it is an action brought by a private estate representative—the trustee—to increase the recoveries of a limited pool of private litigants—the unsecured creditors. That a Government Unit may be a member of that pool, and, therefore, may receive a *pro rata* portion of the amount recovered by the trustee does not change the result. Congress did not enact section 544(b) to advance public interests or enforce public rights. Whatever “public interest” may be served by a private estate representative commencing an action to avoid a transfer to a private transferee for the benefit of a pool of unsecured creditors, almost all of whom are private parties, it is far too slight to warrant the application of the *nullum tempus* doctrine under applicable law.\(^39\)

Accordingly, the doctrine of *nullum tempus* should not constitute “applicable law” for the purposes of section 544(b). The trustee cannot avail itself of the benefits of the doctrine because it is not a Government Unit acting in its sovereign capacity and, even if it were, an action under section 544(b) does not protect public rights or advance public interests.\(^40\)

B. The FDCPA Does Not Constitute Applicable Law Under Section 544(b)

As discussed above, Congress enacted the FDCPA to provide the exclusive civil procedures for the United States to collect debts owed to it and to avoid fraudulent transfers to collect those debts.\(^41\) Importantly, a “debt” as defined under the FDCPA is one that “if collected, will inure directly to the government’s benefit (*in contrast to benefitting a third party*).”\(^42\) Thus, like the *nullum tempus* doctrine, the FDCPA provides the federal government—when acting to collect debts in its sovereign capacity—with immunity from otherwise applicable limitations periods. In addition, and again like the *nullum tempus* doctrine, the FDCPA applies only when the debt to be collected “inures to the government’s benefit”—it does “not apply to obligations which began as purely private loan or contract obligations.”\(^43\)

The FDCPA should not constitute “applicable law” under section 544(b) for many of the same reasons stated above regarding the *nullum tempus* doctrine. “Applying the FDCPA in any case in which the United States holds an unsecured claim serve a broad public policy” but rather had “specific individual beneficiary and provided only the “equivalent of money damages.””),

\(^39\) *See Kinder*, 974 F. Supp. at 872-75.

\(^40\) *See Schlossberg v. Barney*, 380 F.3d 174, 181 (4th Cir. 2004) (“[W]e do not believe that Congress intended a bankruptcy trustee to wield the extraordinary collection powers of the federal government.”).

\(^41\) *See supra* § II.B.2.b.

\(^42\) *MC Asset Recovery, LLC*, 2008 WL 8832805 at *2.

\(^43\) *Id.* at *2.
would not only result in the exclusive procedures of the United States being made available to a private estate representative for the benefit of private creditors, but would greatly expand the intended reach of section 544(b).”  

Because the United States is a creditor in almost every bankruptcy case (based upon taxes owed by the debtor), treating the FDCPA as “applicable law” under section 544(b) would effectively re-write “the Bankruptcy Code itself by, for example, grafting the FDCPA’s six-year statute of limitations on the Code’s existing fraudulent transfer framework.”

That Congress did not intend this result is evidenced by Section 3003(c)(1) of the FDCPA, which provides that the “[FDCPA] shall not be construed to supersede or modify the operation of [the Bankruptcy Code].” Legislative history confirms that the FDCPA should not constitute “applicable law” under section 544(b): “The [FDCPA] was carefully worded to make clear that the act would have absolutely no effect on the Bankruptcy Code; *even provisions of the Bankruptcy Code making reference to nonbankruptcy law are to be read as if [the FDCPA] did not exist.*” Taken together, Section 3003(c)(1) and the relevant legislative history make clear Congress did not intend that that FDCPA could be co-opted by the trustee for the benefit of private creditors under section 544(b).

Those cases that reach a contrary result and hold that the FDCPA constitutes “applicable law” under section 544(b) assume without discussion that the rights afforded Government Units as sovereigns may be wielded by the trustee as a private litigant. The court in *In re Tronox, Inc.*, for example, held that the FDCPA constitutes “applicable law” under section 544(b) notwithstanding that it only applies to the federal government’s claims. Comparing the FDCPA to the UFTA, the *Tronox* court reasoned that the “UFTA is also a remedy for the ‘exclusive use’ of creditors who can sue under that statute. It is incorporated in Federal law because of the operation of § 544(b), not because of anything contained in its own text, and there is no reason to treat the FDCPA any differently.” But the critical difference between the UFTA and the FDCPA is that the UFTA is available to all private creditors, whereas the FDCPA is only available to the federal government acting in its sovereign capacity. The *Tronox* decision does not consider the limitations on the purpose and applicability of the *nullum tempus* doctrine discussed above, however, and therefore expands the scope of section 544(b) to encompass applicable law that should not apply in the hands of private litigants like the trustee.

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44 Id. at *4; Schlossberg, 380 F.3d at 181.
45 Id.
46 28 U.S.C. § 3003(c); see also Mirant at 535; MC Asset Recovery at *2.
48 See MC Asset Recovery at *4.
50 See *Tronox* at 274.
51 Id.
C. **Section 544 Only Incorporates State Law, It Does Not Subordinate It**

A final basis for adopting the proposed amendment is that section 544 of the Bankruptcy Code is derivative of state, not federal, law.52 Congress, by enacting section 544, intended to “incorporate state law [into the Bankruptcy Code], not subordinate it.”53 Congress never “intended a bankruptcy trustee to wield the extraordinary collection powers of the federal government.”54

The Fourth Circuit recognized this limitation on the scope of section 544 in *Schlossberg v. Barney*, holding that a chapter 7 trustee could not avail itself of the IRS’s unique right to assert a tax lien against property held in tenancy by the entirety under section 544(a).55 The Fourth Circuit reasoned that “[n]othing in the legislative history of [section 544] suggests that Congress intended a bankruptcy trustee to be capable of invoking the [IRS’s] sovereign prerogative to attach property that ordinary secured creditors could not reach.”56

Section 544(b) cannot both incorporate state law and simultaneously eviscerate any limitations contained therein by permitting the trustee to step into the shoes of Government Units to whom such limitations do not apply. If Congress intended to grant such power to the trustee, it would have done so directly, not through the back door of section 544(b).

D. **Implications for the Moore v. Bay Doctrine**

As discussed above, the Moore v. Bay Doctrine generally provides that the trustee’s ability to avoid a transfer under section 544(b) is not limited by the size of the Triggering Creditor’s claim. The doctrine implicitly accepts and takes no issue with expanding the Triggering Creditor’s rights to apply for the benefit of all unsecured creditors, regardless of the size of the Triggering Creditor’s claim or whether other creditors that share in the recovery would have a right to avoid the transfer under applicable non-bankruptcy law. Thus, the Moore v. Bay Doctrine would seem to accept the effects of using a Government Unit as a Triggering Creditor.

Accordingly, the amendment proposed in this memorandum seeks to override the Moore v. Bay Doctrine in the limited circumstance where the trustee seeks to

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52 See, e.g., *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 n.7 (1994) (describing section 544(b) as applying to “transfers voidable under state law”); *In re Truong*, 285 Fed. App’x 837, 839 (3d Cir. 2008) (“Section 544(b)(1) is a vehicle in which a trustee may recover fraudulently transferred assets of the debtor’s property under a state’s fraudulent transfer laws.”) (emphasis added); *Vaughan* at 302 (Section 544(b) is most often used to recover transfers that would be voidable under state law); *In re Equip. Acquis. Resources, Inc.*, 742 F.3d 743, 747 (7th Cir. 2014) (“Unlike [section 548, [section] 544(b) is derivative of state law—that is, law external to the Bankruptcy Code.”) (emphasis added); see also H.R. Doc. No. 137, 93rd Cong., 1 Sess. At 30 (1973) (noting that section 70(e) of the Bankruptcy Act, the section of the Bankruptcy Act from which section 544(b) was derived, gives the trustee “the rights under state law of any actual creditor or creditors . . .”) (emphasis added).

53 *Vaughan* at 305; see also H.R. Doc. No. 137, 93rd Cong., 1 Sess. At 30 (1973).

54 *Schlossberg*, 380 F.3d at 181.

55 380 F.3d at 181.

56 Id.
use a Government Unit as the Triggering Creditor.\textsuperscript{57} Notwithstanding the doctrine’s tacit acceptance of a trustee co-opting creditor’s rights for the benefit of all unsecured creditors, for all the reasons set forth above the doctrine goes too far in allowing trustees to utilize the rights of Government Units as sovereign entities for the benefit of unsecured creditors.

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For all the foregoing reasons, Congress should amend section 544(b) to limit the definition of “applicable law” to remedies available only to private parties, not Government Units. Such an amendment would resolve the current split in authority and impose appropriate limits on a trustee’s ability to avoid transactions under section 544(b).

\textsuperscript{57} Notwithstanding this limited departure from established precedent, the proposed amendment to section 544(b) does not address, and is not intended to affect, transferees’ rights under sections 502(d) and 502(h) of the Bankruptcy Code, or under applicable state and federal non-bankruptcy law.