

September 22, 2010

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Senator Sessions:

The undersigned organizations oppose S. 3675, the Small Business Jobs Preservation Act of 2010, which is scheduled for mark-up on September 23, 2010. S. 3675 would raise borrowing costs for many American businesses and would harm other small businesses that provide products and services to the business that is filing for bankruptcy.

S. 3675 would undermine efforts by Congress to provide greater access to credit for small businesses to spur job growth by overturning the “absolute priority rule.” This anti-abuse rule has been in place for over a century and is one of the major features of insolvency law that ensures fairness and transparency for all economic players. The rule prevents business owners from paying themselves ahead of and at the expense of creditors, including small business creditors.

The Third Circuit Court of Appeals made it clear why the absolute priority rule is important:

The absolute priority rule is judicial invention that predated the Bankruptcy Code. It arose from the concern that because a debtor proposed its own reorganization plan, the plan could be “too good a deal” for that debtor’s owners. LaSalle, 526 U.S. at 444, 119 S.Ct. 1411. See In re Armstrong World Industries, 432 F.3d 507 (3rd Cir. 2005). (Emphasis added)

Importantly, S. 3675 would create uncertainty in the bankruptcy process that would be likely to make lenders even more reluctant to extend credit to small businesses (which is defined very broadly in the bill to include those with up to \$7.5 million in debt). This will have the unintended effect of causing more business entities to seek bankruptcy protection, and will also result in more liquidations rather than reorganizations because its proposed Code changes will make debtor-in-possession (DIP) financing less available.

By overturning current bankruptcy law, S. 3675 would inject risk into the small business credit market making it less available and more expensive for small businesses at the worst possible time. We respectfully request you to vote against S. 3675.

Sincerely,

American Bankers Association
American Financial Services Association
Commercial Finance Association
Consumer Bankers Association
Equipment Leasing and Finance Association
The Financial Services Roundtable
Independent Community Bankers of America

Cc: Members of the Committee on the Judiciary