ADVISORY COMMITTEE
ON
BANKRUPTCY RULES
New Orleans, LA
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Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases

(a) DEFINITIONS. In this rule the following terms have the meanings indicated:

(1) "disclosable economic interest" means any claim, interest, pledge, lien, option, participation, derivative instrument, or any other right or derivative right that grants the holder an economic interest that is affected by the value, acquisition, or disposition of a claim or interest;

(2) "represent" or "represents" means to take a position before the court, or to engage in the solicitation of votes regarding the confirmation of a plan, on behalf of another entity.

(b) DISCLOSURE BY GROUPS, COMMITTEES, AND ENTITIES.

(1) In a chapter 9 or 11 case:

(A) every group or committee that consists of or represents multiple creditors or equity security holders that are (i) acting in concert to advance their common interests and (ii) not composed entirely of affiliates or insiders of one another; and

(B) every entity that represents multiple creditors or equity security holders that are (i) acting in concert to advance their common interests and (ii) not composed entirely of affiliates or insiders of one another;

shall file a verified statement setting forth the information specified in subdivision (c) of this rule.

(2) Notwithstanding paragraph (1) of this subdivision, unless the court orders otherwise, an entity is not required to file a verified statement under this rule solely because of its status as:

(A) an indenture trustee;

(B) an agent for one or more other entities under an agreement for the extension of credit;

(C) a class action representative;

(D) a governmental unit that is not a person; or

(E) an investment advisor that represents individual funds.

(c) INFORMATION REQUIRED. The verified statement shall include:

(1) the pertinent facts and circumstances concerning:

(A) with respect to a group or committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code, the formation of the group or committee, including the name of each entity at whose instance the group or committee was

formed or for whom the group or committee has agreed to act; or

(B) with respect to an entity, the employment of the entity, including the name of each entity at whose instance the employment was arranged;

(2) if not disclosed under subdivision (c)(1), with respect to the entity and with respect to each member of the group or committee:

(A) name and address;

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date the entity was employed or the group or committee was formed; and

(C) with respect to each member of a group or committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code, that claims to represent any entity in addition to the members of the group or committee, the quarter and year in which each disclosable economic interest was acquired, unless acquired more than one year before the petition was filed;

(3) if not disclosed under subdivision (c)(1) or (c)(2), with respect to each creditor or equity security holder represented by the entity, the group, or the committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code:

(A) name and address; and

(B) the nature and amount of each disclosable economic interest held in relation to the debtor as of the date of the statement; and

(4) a copy of the instrument, if any, authorizing the entity, group, or committee to act on behalf of creditors or equity security holders.

(d) SUPPLEMENTAL STATEMENTS. A supplemental verified statement shall be filed whenever an entity, group, or committee takes a position before the court, or solicits votes on the confirmation of a plan, if there has been a material change in the facts disclosed in its last previous statement filed under this rule. The supplemental statement shall set forth the material changes in the facts that are required by subdivision (c) of this rule to be disclosed, including information about any acquisition, sale, or other disposition of a disclosable economic interest by the entity, members of the group or the committee, or creditors or equity security holders that are represented by the entity, group, or committee.

(e) DETERMINATION OF FAILURE TO COMPLY; SANCTIONS.

(1) On motion of any party in interest, or on its own

motion, the court may determine whether there has been a failure to comply with the provisions of this rule.

(2) If the court determines that there has been a failure to comply with the provisions of this rule, it may:

(A) refuse to permit the entity, group, or committee to be heard or to intervene in the case;

(B) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by the entity, group, or committee; or

(C) grant other appropriate relief.

COMMITTEE NOTE

The rule is substantially amended to expand the scope of its coverage and the content of its disclosure requirements. Stylistic and organizational changes are also made in order to provide greater clarity. Because the rule no longer applies only to representatives of creditors and equity security holders, the title of the rule has been changed to reflect its broadened focus on disclosure of financial information in chapter 9 and chapter 11 cases.

The content of subdivision (a) is new. It sets forth two definitions. The first is the definition of the term "disclosable economic interest," which is used in subdivisions (c)(2), (c)(3), and (d). The definition of the term is intended to be sufficiently broad to cover any economic interest that could affect the legal and strategic positions a stakeholder takes in a chapter 9 or chapter 11 case. A disclosable economic interest extends beyond claims and interests owned by a stakeholder and includes, among other types of holdings, short positions, credit default swaps, and total return swaps.

The second definition is of "represent" or "represents." The definition is intended to limit the ambiguity in the term by providing that representation requires active participation in the case or a proceeding on behalf of another entity – either by taking a position on a matter before the court or by soliciting votes on the confirmation of a plan. Thus, for example, an attorney who is retained and consulted by a creditor or equity security holder to monitor the case, but who does not advocate any position before the court or engage in solicitation activities on behalf of that client, does not represent the creditor or equity security holder for purposes of this rule..

Subdivision (b)(1) specifies who is covered by the rule's disclosure requirements. In addition to an entity or committee that *represents* more than one creditor or equity security holder, the amendment extends the rule's coverage to committees that *consist of* more than one creditor or equity security holder. Official committees are no longer excluded from the rule's coverage, except as specifically indicated. The rule also applies to a group of creditors or equity security holders that act in concert to advance common interests (except when the group consists exclusively of affiliates or insiders of each other), even if the group does not call itself a committee.

Subdivision (b)(2) excludes certain entities from the rule's coverage. Even though these entities may represent multiple creditors or equity security holders, they do so under formal legal arrangements of trust or contract law that preclude them from acting on the basis of conflicting economic interests. For example, an indenture trustee's responsibilities are defined by the indenture, and individual interests of bondholders would not affect the trustee's representation.

Subdivision (c) sets forth the information that must be included in a verified statement required to be filed under this rule. Subdivision (c)(1) continues to require disclosure concerning the formation of a committee or group, other than an official committee, and the employment of an entity.

Subdivision (c)(2) specifies information that must be disclosed with respect to the entity and each member of the committee and group filing the statement. In the case of a committee or group, the information about the nature and amount

of a disclosable economic interest must be specifically provided on a member-by-member basis, and not in the aggregate. The quarter and year in which disclosable economic interests were acquired by each member of a committee or group (other than an official committee) that claims to represent others must also be specifically provided, except for a disclosable economic interest acquired more than a year before the filing of the petition. Although the rule no longer requires the disclosure of the precise date of acquisition or the amount paid for disclosable economic interests, nothing in this rule precludes the discovery of that information when it is relevant or its disclosure when ordered by the court pursuant to its authority outside this rule.

Subdivision (c)(3) specifies information that must be disclosed with respect to creditors or equity security holders that are represented by an entity, group, or committee. This provision does not apply with respect to those represented by official committees. The information required to be disclosed under subdivision (c)(3) parallels that required to be disclosed under subdivision (c)(2)(A) and (B). The amendment also clarifies that under (c)(3) the nature and amount of each disclosable economic interest of represented creditors and shareholders must be stated as of the date of the verified statement.

Subdivision (c)(4) requires the attachment of any instrument authorizing the filer of the verified statement to act on behalf of creditors or equity security holders.

Subdivision (d) requires the filing of a supplemental statement at the time an entity, group, or committee takes a position before the court or solicits votes on a plan if there has been a material change in any of the information contained in its last filed statement. The supplemental verified statement must set forth the material changes that have occurred regarding the information required to be disclosed by subdivision (c) of this rule.

Subdivision (e) addresses the court's authority to determine whether there has been a violation of this rule and to impose a sanction for any violation. It no longer addresses the court's authority to determine violations of other applicable laws regulating the activities and personnel of an entity, group, or committee.

Comments and Testimony on Rule 2019

09-BK-010 – Thomas E. Lauria, Esq. – In his testimony he advocated the repeal of Rule 2019. In support of this position, he argued that the rule chills creditor participation and may violate due process. Furthermore, he contended, the rule applies in a discriminatory fashion to distressed debt investors, who add value to a reorganization case, and it is used tactically by parties. He advocated the use of customized discovery in place of Rule 2019 to identify conflicts.

09-BK-152 – Thomas Lauria, Esq. – In his written comments he continues to advocate the repeal of Rule 2019.

09-BK-013 – Richards, Kibbe & Orbe LLP (Jon Kibbe and Michael Friedman) – In their testimony they supported the proposed amendments to the rule with the exception of the requirement of disclosure of the date of purchase of disclosable economic interests and, upon court order, the purchase price. They argued that disclosure of the date of purchase is tantamount to disclosure of the purchase price, which information is rarely relevant. Imposing this requirement will discourage the participation of *ad hoc* groups in chapter 11 cases.

09-BK-028 – Richards, Kibbe & Orbe LLP – As in their testimony, their written comments state their opposition to the disclosure of pricing and purchase date information.

09-BK-015 – The Loan Syndications and Trading Association ("LSTA") (Elliot Ganz) – Mr. Ganz testified that LSTA and the Securities Industry and Financial Markets Association ("SIFMA") no longer advocate the repeal of Rule 2019. He stated, however, that the organizations oppose the amendments to the extent they "would compel public disclosure of an investor's most confidential and proprietary information: the date and price at which that investor purchased (and/or sold) its bankruptcy claims." He argued that, should a court question the bona fides of a party and desire the disclosure of pricing information, it would have inherent authority to require the party to reveal that information.

09-BK-026 – LSTA and SIFMA – The written comments elaborate on Mr. Ganz's testimony urging the elimination of pricing and purchase date disclosures. They also make several suggestions about changes in the wording of the rule

- The definition of "disclosable economic interest" should take account of the creation of ethical walls within an organization and should define "derivative" to eliminate the need for disclosure "when an entity's derivative positions have no material bearing on the entity's voice in the restructuring process."
- Agents and affiliated entities should not be subject to disclosure requirements

under the rule that apply to entities representing multiple creditors or equity security holders.

- Under (c)(2) the verified statement should provide information as of the date the disclosing entity appeared in the case, rather than when the group or committee was formed or the entity was employed.
- Supplemental statements should be required only when the disclosing entity seeks to participate in matters before the court.
- Subdivision (e) should only refer to the court's authority to determine failure to comply with Rule 2019, not to other applicable law or improprieties in connection with a solicitation; (e)(2), which refers to the materials the court may examine in making its determination, should be deleted; and the provision regarding the court's authority to hold invalid any authority, acceptance, rejection, or objection should be deleted.

09-BK-017 – Bankruptcy Judge Kathryn Ferguson (D.N.J.) – She is critical of proposed Rule 2019(d), which requires supplemental statements to be filed "monthly, or as the court otherwise orders." She argues that the term "monthly" is ambiguous and the requirement is unduly burdensome and wasteful.

09-BK-018 – Angelo, Gordon & Co., LP (Forest Wolfe) – Mr. Wolfe testified that price information and trade data are extremely sensitive and should generally not have to be revealed. He also argued that the term "group" should not apply to the situation in which various funds are represented by one investment advisor.

09-BK-019 – Bankruptcy Judge Robert Gerber (S.D.N.Y.) – Judge Gerber testified in support of the proposed amendments. He stated that the date of acquisition and the price paid for a disclosable economic interest is sometimes relevant, but that the rule could still be effective if it required only disclosure of the general period of time in which such an interest was acquired. He said that, if the rule were so revised, the Committee Note should state that the court retains authority to order the disclosure of date and price information upon a showing of relevancy or other cause. He also urged the expansion of the definition of "disclosable economic interest" to include short positions, credit default swaps, and total return swaps.

09-BK-020 – Akin Gump Strauss Hauer & Feld LLP (Abid Qureshi) – In Mr. Qureshi's testimony, the firm opposed the disclosure of price and date information. He argued that the price at which an interest was purchased is irrelevant and that these requirements will contribute to the strategic and abusive use of the rule. He further urged the Committee to make the rule as clear as possible so that compliance with it becomes routine and motion practice is reduced.

09-BK-024 – National Bankruptcy Conference ("NBC") – NBC supports the proposed rule but suggests that revisions or clarifications are needed to address three aspects of the rule:

- *Disclosure by law firms representing multiple holders of claims or interests.* NBC argues that disclosure should not be required when two or more clients are not acting in concert to advance a common interest; when affiliated entities are jointly represented; or when the firm does not appear in court on behalf of a client to seek or oppose the granting of relief.
- *Application of the rule to indenture trustees and agent banks.* NBC urges revision of the rule to make it clear that indenture trustees and agents banks are not required to make disclosures under the rule, except, with respect to agents, when they take positions in court.
- *Price and purchase date information.* NBC argues that the rule as proposed appears to authorize a court to require disclosure of price information without any showing of relevance and, even when the disclosure of price information is not required, that information can be determined from the required disclosure of the date of purchase. NBC recommends that the rule's authorization for the disclosure of price information be applicable only to those who claim to act on behalf of or in the interest of creditors or equity security holders other than themselves.

09-BK-025 and 09-BK-104 – Martin Bienenstock, Esq. – He proposes that parties covered by Rule 2019 be allowed to make three certifications in lieu of the verified statement of disclosures. These certifications would address:

- the aggregate dollar amount of prepetition claims held against the debtor and the aggregate dollar amount of such postpetition claims;
- whether the party holds other disclosable economic interests that may increase in value if the debtor's estate declines in value; and
- whether the party holds claims or other disclosable economic interests in an affiliate of the debtor that may increase in value if the debtor's estate declines in value.

Alternatively, Mr. Bienenstock suggests that any pleading that asserts that the party holds claims against the estate must also disclose whether the party holds any economic interests that may increase in value if claims against any of the debtors' estates or their affiliates' estates decrease in value. He argues that the rule should apply to official committees. Finally, he urges that any comment in the Committee Note referring to the court's authority to order the disclosure of pricing and acquisition date information make clear that current standards of materiality and relevance are not being altered, nor are new rights of discovery being created.

09-BK-036 – Regiment Capital Advisors LP – It endorses LSTA's comments and opposes the

disclosure of pricing and purchase date information.

09-BK-094 – Bankruptcy Judge D. Michael Lynn (N.D. Tex.) – He suggests that the definition of "disclosable economic interest" should turn on the value of the debtor or its estate. He would not require disclosure by members of official committees, and he would limit the parties that would be permitted to move under (b) for disclosure by entities who are seeking or opposing relief. He questions whether the rule applies to collective bargaining agents and class action representatives. He expresses concerns about the possibility of (c)(3) being applied too broadly or too narrowly to unofficial committees. He would not require members of official committees to file supplemental statements because doing so might create holes in ethical walls. Finally, he worries generally that making the rule applicable to official committees intrudes on the U.S. trustee's authority.

09-BK-114 – Insolvency Law Committee of the Business Law Section of the Cal. State Bar – The Committee opposes the provisions in (e)(1)(B) and (C) that authorize the court to determine violations of rules and laws other than Rule 2019, as well as the sanction provisions of (e)(3). Although it recognizes that current Rule 2019 has similar provisions, it contends that, read broadly, these provisions are constitutionally questionable. The Committee asserts that the disclosure requirements are overly burdensome, both with respect to the initial disclosures regarding each committee member and monthly supplements. It questions what constitutes a group, and it expresses concern that the rule does not apply to official committee members.

09-BK-116 – The Clearing House Association LLC – It seeks clarification that the rule does not require disclosure by an administrative agent of the economic interests of syndicate lenders or its own holdings (merely because it is participating in the case as an agent). It would delete the provision in (b) that authorizes the court to order disclosure by parties in interest that seek or oppose the granting of relief, and it does not believe the rule should apply to official committees. Finally, it would limit the economic interests that must be disclosed in several respects.

09-BK-127 – Prof. Adam Levitin (Georgetown Law School) – He opposes the disclosure of purchase price and purchase date information.

09-BK-131 – Managed Funds Association – It opposes the disclosure of purchase price and purchase date information.

09-BK-133 – State Bar of California Committee on Federal Courts – It endorses the views of the Insolvency Law Committee (09-BK-114). It also believes that the rule should only apply to an

entity, group, or committee that participates in the case as a representative of multiple creditors or equity security holders, as opposed to a standing organization with purposes beyond the scope of the case that participates in other ways (such as by filing an amicus brief). Furthermore, the rule should not apply to separate creditors or equity security holders that by way of shorthand are referred to by a collective name (such as "the Equipment Lessors").

09-BK-144 – Commercial Finance Association – It urges a clarification that the rule is not intended to apply to an agent for a group of lenders in a syndicated credit facility, to funds represented by the same investment manager, or to affiliated creditors.

09-BK-153 – n/a, transmittal message for comment 09-BK-152