The Clearing House

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Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment of Federal Rule of Bankruptcy Procedure 2019

To the Members of the Advisory Committee:

The Clearing House Association L.L.C. ("The Clearing House") appreciates the opportunity to submit a comment on the proposed amendment (the "Proposed Rule") to Federal Rule of Bankruptcy Procedure 2019 ("Rule 2019"). The Clearing House recognizes the calls for modernization of Rule 2019 and acknowledges the Advisory Committee's efforts to synthesize the various and conflicting viewpoints of different constituencies. The Clearing House is generally supportive of many of the revisions to Rule 2019 that have been proposed by the Advisory Committee. Nonetheless, we write this letter to specifically address certain issues with respect to the Proposed Rule that are of particular importance and concern to large, multi-faceted banking institutions, particularly in their role as administrative agent under a credit facility in which the borrower has become a debtor under the Bankruptcy Code ("Administrative Agent"). To assist the Advisory Committee in addressing these concerns, we have included, at the end of this letter, certain suggested revisions to the Proposed Rule (the "Suggested Revisions"). We hope you will find the suggestions set forth herein constructive and helpful.

The banks that are members of The Clearing House are some of the largest and most diverse financial institutions in the world, participating actively in the markets they serve.[1] These banks play a vital role in the restructuring industry, serving in numerous capacities, in particular as Administrative Agent to countless U.S. borrowers. Our members are concerned that

[1] The Clearing House, which was established in 1853 to simplify the exchange of checks and improve the efficiency of the payments system, is an association of leading commercial banks. It regularly files comments reflecting the views of its members on important issues affecting the banking industry. The members of The Clearing House are: Bank of America, N.A., The Bank of New York Mellon, Capital One, N.A., Citibank, N.A., Deutsche Bank Trust Company Americas, HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., The Royal Bank of Scotland, N.V., UBS AG, U.S. Bank, N.A., and Wells Fargo Bank, N.A.

if the Proposed Rule is adopted in its current form, banks may be subject to expansive interpretations of Rule 2019, making it highly impractical (and in certain instances literally impossible) for them to comply, and perhaps leading them to limit their participation in the reorganization process due to the risk of subjecting themselves and the applicable credit agreement syndicate lenders to the potentially drastic consequences of noncompliance. This unintended result would not only disenfranchise an important creditor constituency, but would also harm reorganizations in general by forcing each individual lender in a syndicate that appeared in a case to divulge all of its Economic Interests (as defined below) in a public filing. The end result is likely to make bankruptcy proceedings lengthier, costlier, and more unwieldy. Moreover, it could potentially deprive debtors of the opportunity to interface with a critical counterparty and make a potential source of financing less willing to engage in the chapter 11 process. In many other circumstances, due to the complex realities regarding how Administrative Agents take direction from the syndicate lenders to advance positions in bankruptcy cases, the disclosures arguably required by the Proposed Rule with respect to banks would be of little value and could lead to false inferences being drawn as to the motives of the Administrative Agent and the lenders under a syndicated loan facility (the "Syndicate Lenders"). The Proposed Rule could also be read to require overly broad disclosure of certain claims, interests, pledges, liens, options, participations, or derivative instruments, or any other rights or derivative rights that are affected by the value, acquisition, or disposition of a claim or interest (the "Economic Interests")—even where such Economic Interests would be largely irrelevant (or even unknown) to those individuals directing the activities of the committee or group that would be subject to the Proposed Rule. Such an expansive construction of Rule 2019 could result in increased wasteful litigation and potentially allow the misuse of irrelevant information with no correlative benefit to the reorganization process.

Overview

The Clearing House has four principal concerns.

First and foremost, to the extent that the Proposed Rule could be understood to require an Administrative Agent to reveal the Economic Interests held by each of the Syndicate Lenders, this application of the rule would be patently unworkable. Furthermore, to the extent the Proposed Rule seeks to require the automatic disclosure by the Administrative Agent of its own Economic Interests, simply because it participates in a bankruptcy case in its capacity as Administrative Agent (typically upon the direction, or with the consent, of a specified majority of lenders under the credit facility), we respectfully submit that such a profound departure from current practice is unwarranted, unduly burdensome, serves no discernable purpose, and would likely lead to distracting, costly, and wasteful litigation by dissident hold-out Syndicate Lenders or other competing creditors to the detriment of the debtor and the reorganization process.

In the vast majority of large bankruptcy cases, the Administrative Agent and Syndicate Lenders play a vital and constructive role, particularly at the outset of the case, often providing debtor-in-possession financing and negotiating the terms for the use of cash collateral and other critical "first-day" relief. If this role were hampered or delayed by unduly burdensome disclosure requirements of Proposed Rule 2019, it could become measurably more difficult for debtors to obtain the type of constructive assistance that they often rely upon from their pre-petition lenders at the most critical junctures in the bankruptcy case.

Second, Rule 2019 should not be expanded to require the disclosure of information that is irrelevant to an entity's position in a bankruptcy case. For example, a large financial institution may very well become subject to the Proposed Rule only because one of its business units participates in a group or committee appearing in the case. Nevertheless, the institution may also hold Economic Interests in fiduciary or market-maker capacities, or may hold Economic Interests under the management and control of personnel in other business units separate from the one participating in the group or committee. The holdings in those other areas are ordinarily irrelevant to the decisions made by the individuals managing the business unit participating in the group or committee, and therefore we believe should be carved out of the definition in order to further the policies of the Proposed Rule and to make the disclosures more meaningful and accurate. Similarly, the Proposed Rule should not require disclosure of derivative instruments for which the debtor is not the sole reference entity, or credit default swaps that are resolved through a market-wide settlement protocol.

Third, the provision in the Proposed Rule authorizing a court to require disclosure by any entity that seeks or opposes the granting of relief, regardless of whether such entity is working as part of a group or committee, does not further the policy goals of Rule 2019, is unnecessary due to the court's and other parties' existing powers to require such disclosure, and may be prone to abuse by litigious parties who request such disclosures, not out of a genuine concern for their economic motivations, but rather to harass and require potentially burdensome disclosure of confidential and proprietary information.

Fourth, members of official committees should not be required to make the disclosures required by the Proposed Rule. The Bankruptcy Code charges the United States Trustee with the duty to appoint the official committee of unsecured creditors in a chapter 11 case (and the members of any other official committees that the United States Trustee deems appropriate or that the court may order). The offices of the United States Trustee already engage in screening processes in selecting members for the official committees. Inclusion of those committees in the Proposed Rule may discourage creditors (particularly banks, for whom disclosure may be particularly onerous) from serving on official committees, and could lead to skewed official committee membership in bankruptcy cases, where the makeup of the official committee will not be appropriately representative of its constituents.

<u>Discussion</u>

I. An Entity Should Not Be Required to Comply with Rule 2019 Solely Because It Serves as Administrative Agent

The Proposed Rule requires that every "entity"[2] that "represents more than one creditor" disclose the Economic Interests of each creditor "represented by the entity." While we do not believe that the Administrative Agent "represents" the Syndicate Lenders in a way that is meant to be covered by this Proposed Rule,[3] the rule potentially could be interpreted by courts and other parties in bankruptcy cases as requiring the Administrative Agent to disclose its own Economic Interests and those of each of the Syndicate Lenders. We respectfully submit that neither disclosure is consistent with the intent of Rule 2019, would be unnecessarily burdensome, and, in certain instances, impossible to provide in any event.

A. Administrative Agent Banks Should Not Be Required to Disclose Economic Interests of Syndicate Lenders

As an initial matter, other than the record holdings in the particular loan facility, the Administrative Agent has no access to, and has no right (contractual or otherwise) to request or demand, any information regarding the Economic Interests held by the Syndicate Lenders. As a result, an Administrative Agent is simply unable to know, let alone disclose, the Economic Interests of the Syndicate Lenders. At most, the Administrative Agent could disclose the record holdings under the facility, but this disclosure would at best show the relative size of the loan positions held by the Syndicated Lenders. If the Proposed Rule nonetheless were to require such unprecedented disclosure, the Administrative Agent would in most instances be simply unable to comply, thus causing the Administrative Agent to refrain from active participation in a bankruptcy case, out of fear that a court would find that it failed to comply with the Proposed Rule and impose remedies as harsh as designating the votes of the Administrative Agent or the Syndicate Lenders under a plan of reorganization or disallowing a proof of claim filed by the Administrative Agent. This situation would certainly not benefit debtors, courts or lenders, or the integrity of the bankruptcy process generally.

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[2] We note that the use throughout the Proposed Rule of the word "entity" rather than "person" is, in certain instances, potentially overbroad. A "person" includes an individual, partnership, and corporation (but not, with certain exceptions, a governmental unit). *See* 11 U.S.C. § 101(41). An "entity" includes not only a person, but also an estate, trust, governmental unit, and United States Trustee. *See* 11 U.S.C. § 101(15). It would seem that where the Proposed Rule is referring to a party serving in a representative capacity, the term "person" is probably more accurate and appropriate than "entity."

[3] As discussed below, the Administrative Agent performs a largely administrative function, and, subject to the terms of the credit agreement, the Syndicate Lenders are generally free to exercise their own rights and advance their own interests separate and apart from those of the Administrative Agent.

Furthermore, even if disclosure by the Administrative Agent of the Economic Interests of the Syndicate Lenders were not impossible, such disclosure would advance no meaningful policy goal, and the information disclosed would be largely irrelevant and potentially misleading. Administrative Agents typically act at the direction of a specified majority of lenders, usually defined in the underlying loan agreement as the "Required Lenders" or "Requisite Lenders."[4] The particular Syndicate Lenders that constitute the Required Lenders may change from decision to decision and are especially fluid in the case of a distressed borrower, where multiple critical decisions often need to be made on a serial, expedited basis. The Administrative Agent's positions are based on communications with the requisite amount of Syndicate Lenders (which may change from decision to decision), and are sometimes based on negative notice (or the non-objection of Syndicate Lenders after being informed of the Administrative Agent's intended course of action). Therefore, no reliable inference can be drawn from the Economic Interests of the Syndicate Lenders as a whole (which would include those who had no role in directing the Administrative Agent and remain largely passive), and requiring such disclosure could even prove harmful if false inferences were drawn, leading to distracting litigation over motivations.

Moreover, the purpose of Rule 2019 has always been to provide disclosure for the benefit of those whose interests were purportedly being represented by others.[5] In the case of a syndicated loan facility, the Syndicate Lenders' rights and obligations are clearly delineated by loan documentation negotiated at arm's-length and entered into among highly sophisticated parties. Loan documentation customarily provides for the ability of the Required Lenders to bind dissenting lenders to certain enumerated decisions required or permitted under the credit facility. The Syndicate Lenders could, but do not, bargain for disclosure of each others' Economic Interests.[6] Significant actions are taken by the Administrative Agent pre-, as well as

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[4] Often the "Required Lenders" or "Requisite Lenders" will be defined in a credit agreement as those holding a simple majority of the relevant debt. In a recent decision in the Philadelphia Newspapers chapter 11 case, in which the debtors moved to require a steering group of pre-petition lenders to file a more complete Rule 2019 statement, Judge Raslavich observed that "pursuant to the terms of the Prepetition Credit Agreement those holding in excess of 50% of the Debtors' outstanding secured debt are authorized to direct the Prepetition Agent to take certain actions on behalf of all of the Prepetition Lenders." *See In re Philadelphia Newspapers, LLC*, Case No. 09-11204 (SR, CJ) [Dkt. No. 1679] (Bankr. E.D. Pa. Feb. 4, 2010).

[5] Rule 10-211, the predecessor to Rule 2019, was aimed at disclosure by "protective committees" that purported to represent the interests of investors who deposited their securities with the committee and relied on the committee to control the reorganization. The goal of disclosure by those acting in a representative capacity has continued under the current rule: "there is not a single substantive difference between Rule 10-211 and Rule 2019." *See In re Premier Int'l Holdings, Inc.*, Case No. 09-12019 (CSS), 2010 Bankr. LEXIS 98, at *37 (Bankr. D. Del. Jan. 20, 2010). *See also In re Northwest Airlines Corp.*, 363 B.R. 701, 704 (Bankr. S.D.N.Y. Feb. 26, 2007) (citing Collier on Bankruptcy, P 10-211.04 (14th ed. 1976)) (noting that Rule 10-211 "provided for disclosure of the 'personnel and activities of those acting in a representative capacity' in order to help foster fair and equitable plans free from deception and overreaching.").

[6] This is not the case with respect to *ad hoc* committees, where there is no document entered into among those lenders on the *ad hoc* committee and those not on the committee that could provide for such disclosure. In

post-, bankruptcy that are dictated by the Required Lenders, and there is no discernable reason why the dissenting lenders should have greater rights to know the Economic Interests of the other Syndicate Lenders simply because the borrower has filed for bankruptcy.

Finally, even if the Administrative Agent were able to somehow divine the Economic Interests of each of the Syndicate Lenders, in many cases disclosure thereof would be tremendously burdensome and costly. It is not uncommon to have several hundred lenders in a syndicate for a large loan facility. Compiling all of the information required to be disclosed under the rule, and providing monthly updates thereto, would demand countless hours from the Administrative Agent, its counsel, and the Syndicate Lenders. In many cases, where the facility is over-secured, these wasteful costs may be borne by the bankruptcy estate.[7] To the extent the Proposed Rule were to greatly increase the burden and cost to banks serving as Administrative Agent, it may increase the amounts banks charge to serve as Administrative Agent in the first place, thus increasing the cost of borrowing for many companies.

We recognize that *ad hoc* committees are often a valuable and important part of the restructuring process, but their role should be distinguished from that of Syndicate Lenders. *Ad hoc* groups are generally formed solely for the purpose participating in a restructuring, with the intent to advocate on behalf of the members. Unlike a syndicated credit facility, where each lender is by definition and automatically a member of the syndicate, membership in an *ad hoc* group is purely voluntary. Each group member is free to assert its rights as a creditor without participating in the group. Thus, it is both reasonable and feasible to require the members electing to advocate through an *ad hoc* group to make disclosures under the Proposed Rule if the *ad hoc* group wishes to appear in the case.

We do not believe that the Proposed Rule was intended to require an Administrative Agent to disclose the Economic Interests of the Syndicate Lenders, and therefore believe that it is crucial that the Proposed Rule be clarified to prevent the inevitable litigation that would ensue over this issue in the event the Proposed Rule were promulgated as proposed. We also note that the same comment has been advanced by the Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA")[8], as well as

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addition, to the extent that an *ad hoc* committee is formed by Syndicate Lenders, such committee operates independently from, and outside the scope of, the negotiated credit documents (and would presumably be subject to the Proposed Rule).

[7] *See* 11 U.S.C. § 506(b) (if a claim is over-secured, post-petition fees and costs may be added as part of the allowed amount of an allowed secured claim).

[8] *See* Letter from Loan Syndications and Trading Association and Securities Industry and Financial Markets Association to Advisory Committee on Bankruptcy Rules at 17-18, 22 (Feb. 1, 2010).

the National Bankruptcy Conference (the "NBC"),[9] and to our knowledge no other commentator has suggested that the Proposed Rule should require such disclosure.

B. Administrative Agent Banks Should Not Be Required to Disclose Their Own Economic Interests

An Administrative Agent appears in a bankruptcy case in its capacity as defined in the syndicated credit agreement, not as an individual Syndicate Lender or creditor generally. Further, to the extent the word "agent" in the term "administrative agent" can be read to imply that the principles of agency law are applicable, the term is a misnomer. *Black's Law Dictionary* defines "agency" as "[a] fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions."[10] An Administrative Agent acts on behalf of the Syndicate Lenders only to the extent provided in the loan documentation, and, most important, the typical loan agreement expressly provides that the Administrative Agent is *not* a fiduciary of the Syndicate Lenders.[11] The NBC notes as well that "the agent is not really an 'agent' in a traditional sense," and concedes that it is arguable that "an agent does not 'represent' each holder of claims under the applicable creditor facility, as the term 'represents' is used in Rule 2019."[12]

Administrative Agents perform largely administrative duties under syndicated lending facilities.[13] To the extent an Administrative Agent takes any substantive actions (particularly after an event of default, such as a bankruptcy filing by the borrower), it is required to act as directed by the Required Lenders, with only limited discretion to act in advance of such direction. The Administrative Agent's own holdings are therefore largely irrelevant to the actions it takes in a bankruptcy case, and requiring the disclosure of such holdings could lead courts, debtors, lenders, and other parties to draw misleading conclusions (by, for example, assuming that the Administrative Agent is advancing a position because of its own particular exposure when in reality it is merely the vessel through which the Required Lenders' views are communicated and the Administrative Agent, in its capacity as a Syndicate Lender, may or may not have voted with the Required Lenders). Significantly, in most credit facilities the Administrative Agent is *required* to act upon receiving a direction from the Required Lenders

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[9] *See* Letter from National Bankruptcy Conference to Advisory Committee on Bankruptcy Rules at 4-5 (Feb. 1, 2010) (the "NBC Letter").

[10] BLACK'S LAW DICTIONARY (8th ed. 2004) (emphasis in original).

[11] *See* THE HANDBOOK OF LOAN SYNDICATIONS AND TRADING 354-57 (Allison Taylor & Alicia Sansone eds., 2006) ("[A]n administrative agent is not a fiduciary for any lender.").

[12] *See* NBC Letter at 4.

[13] *See* THE HANDBOOK OF LOAN SYNDICATIONS AND TRADING 355 (Allison Taylor & Alicia Sansone eds., 2006) ("[T]he job of the administrative agent is ministerial only.").

within the scope of the credit documents. The Administrative Agent has no discretion to ignore such a request. Requiring disclosure of the Administrative Agent's holdings would therefore fail to provide germane information or elicit the types of economic motivations sought by Proposed Rule 2019.

Instead, requiring disclosure of an Administrative Agent's own Economic Interests would likely fuel the litigation strategies of dissident hold-out Syndicate Lenders to the detriment of the debtor and the reorganization process. Such dissident lenders, who disagree with actions taken by the Administrative Agent (as directed by the Required Lenders), are nonetheless subject to these actions—both inside and outside of bankruptcy.[14] This is true regardless of the Administrative Agent's own interests in the bankruptcy case. We are not aware of any reported cases holding that minority lenders are not subject to the actions taken by the Administrative Agent at the request of the Required Lenders (as authorized by the credit documents) because of any conflicting interests that the Administrative Agent may hold.[15] We are also not aware of any reported cases where a court, debtor, Syndicate Lender, or any other party in interest sought to compel an Administrative Agent to disclose its holdings under Rule 2019, notwithstanding the fact that Administrative Agents rarely, if ever, currently comply with the rule (for the very reasons expressed herein).[16] As such, Rule 2019 should not be expanded to compel such disclosure.

Finally, as discussed in more detail in Section II below, Administrative Agents tend to be large, complex financial institutions that hold a wide array of Economic Interests for themselves and third parties in the ordinary course of their business, which positions often are not coordinated, either because of information walls or otherwise. Compliance by the

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[14] *See Beal Savings Bank v. Sommer*, 8 N.Y.3d 318, 321 (Mar. 22, 2007) (holding that because the applicable loan documents created a collective action mechanism whereby the agent was authorized to act at the direction of a majority or supermajority of lenders, individual lenders were prohibited from settling disputes on their own and were bound by the will of the majority: "the lenders intended to act collectively in the event of the borrower's default and to preclude an individual lender from disrupting the scheme of the agreements at issue."); *see also In re Metaldyne Corp.*, 409 B.R. 671 (Bankr. S.D.N.Y. Aug. 12, 2009), *aff'd*, No. 09 Civ. 7897 (DLC), 2009 WL 5125116 (S.D.N.Y. Dec. 29, 2009); *In re GWLS Holdings, Inc.*, 2009 Bankr. LEXIS 378 (Bankr. D. Del. Feb. 23, 2009); *In re Delta Airlines Inc.*, 370 B.R. 537 (Bankr. S.D.N.Y. Apr. 25, 2007), *aff'd, Kenton County Bondholders Comm. v. Delta Air Lines, Inc.* (*In re Delta Air Lines, Inc.*), 374 B.R. 516 (S.D.N.Y. Aug. 27, 2007), *aff'd, Ad Hoc Comm. v. Delta Air Lines, Inc.*, No. 07-3979-SK, 2009 U.S. App. LEXIS 2464 (2d Cir. Feb. 9, 2009).

[15] As discussed above, Syndicate Lenders are sophisticated parties whose bargained-for rights are delineated in the credit facility documents. Lenders do not bargain for the right to know the holdings of the Administrative Agent, and there is nothing about a borrower filing for bankruptcy that should increase the rights of the lenders to such information.

[16] We do not believe that Administrative Agents are required to comply with the existing rule, but by and large the same arguments that one could fashion as to why the Administrative Agent would be required to comply with the Proposed Rule (that it is an "entity . . . that . . . represents more than one creditor") would seemingly apply with equal force to the existing rule.

Administrative Agent with the Proposed Rule as currently drafted would be costly and extremely burdensome. The practical result of requiring Administrative Agents to comply with the Proposed Rule could be a significant increase in resignations of Administrative Agents upon a chapter 11 filing. At precisely the moment when the debtor most needs the existing Administrative Agent (who has significant knowledge of the debtor and valuable established relationships with the debtor and the Syndicate Lenders), the Administrative Agent would face an extensive reporting requirement inducing it to resign.[17] The Bankruptcy Code and Bankruptcy Rules should continue to encourage the constructive participation of Administrative Agents.

For these reasons, The Clearing House believes that Administrative Agents should not be required to disclose their own holdings under Rule 2019 simply based upon their role as Administrative Agents.[18]

Proposed Solution

To address our concerns expressed in this Part I, the Suggested Revisions exclude from the scope of the rule, "a financial institution in its capacity as an agent under a credit agreement or similar financial accommodation contract,"[19] which is the same suggestion made by the LSTA and SIFMA.[20]

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[17] Many credit agreements permit the Administrative Agent to resign without having to find a replacement agent willing to serve in that role, and in certain cases no other institution is prepared to step into this role after a bankruptcy filing.

[18] In the highly unlikely event that the Administrative Agent's holdings were ever relevant to a bankruptcy case, the Administrative Agent could be required to make disclosures under traditional discovery rules.

[19] Although The Clearing House submits this letter to advance the position of banks, which traditionally serve as Administrative Agents under credit facilities rather than as Indenture Trustees under bond indentures, The Clearing House would be supportive of the NBC's comment to similarly clarify the rule with respect to Indenture Trustees and bondholders.

[20] We would alternatively support the exclusion of an "agent" and the adoption of the NBC's proposed definition of the term "agent" (i.e., "an entity, other than an indenture trustee, that is an agent for one or more other entities under an agreement pursuant to which such other entity or entities have extended credit"). The Clearing House, however, respectfully disagrees with the NBC's position that an Administrative Agent that seeks or opposes relief from the court should be required to make disclosure under Rule 2019 "so that other lenders in whose interest the agent may purport to speak and the court are aware of the agent's actual economic interest." *See* NBC Letter at 5. Furthermore, the NBC's proposed limitation of the circumstances under which the rule would apply (to make the Administrative Agent subject to the rule only if it "seeks or opposes the granting of relief, or takes any position before the court with respect to a request for, or opposition to, the granting of relief") would encourage inaction, and would therefore likely have the perverse effect of depriving the court of the valuable information of knowing where the lenders stand on a particular issue.

II. The Scope of Economic Interests Required to Be Disclosed Should Be Circumscribed to Better Capture the Economic Incentives of Multi-Faceted Financial Institutions

Financial institutions (particularly banks) regularly engage in diverse businesses through which they may hold positions which technically could fall within the definition of "disclosable economic interests" under the Proposed Rule, but, because of the capacity in which the institution holds them, will have little or no influence on the motivations of the individuals whose participation in a group or committee subjects the institution to Rule 2019. Requiring disclosure of those interests would run counter to the purpose of the Proposed Rule. Rather than making transparent the factors that might influence the members of a group or committee, disclosure of such information would in fact cloud the issue and might very well lead the court and others to an erroneous conclusion. Such holdings should be excluded from the scope of the Proposed Rule.

A. Entities Should Not Be Required to Disclose Economic Interests Held on Behalf of Third Parties

Certain Economic Interests are held by financial institutions on behalf of third parties (such as in custodial or fiduciary accounts, asset-management accounts, and private-banking accounts), where customers or third parties hold the beneficial interest, even though the financial institution may be the legal record holder. We do not believe that disclosure of these interests is required by the Proposed Rule, but to the extent it is within the scope of the rule, disclosure thereof would not further the goals of the Proposed Rule because, put simply, the financial institution does not act for its own account with respect to these Economic Interests in the bankruptcy proceeding. Indeed, the institution may be barred by contract, law, or regulation from disclosing information about its customers. To require such disclosure when the institution has not joined a group or committee in its capacity as the holder of these third-party interests would put the institution in an untenable position.

Furthermore, on a practical level, disclosure of Economic Interests held in accounts for other parties would be extraordinarily difficult to coordinate and manage at a large financial institution, where these accounts are often held for numerous customers with many transactions occurring throughout every day. A snapshot of these types of holdings would not be useful to a court or other parties seeking to determine where an entity's legal and economic interests lie.

To that end, the Suggested Revisions exclude from the scope of the rule "economic interests held in custodial or fiduciary accounts, asset-management accounts, and private-banking accounts, to the extent such entity is not the beneficial owner of such economic interests."

B. Entities Should Not Be Required to Disclose Economic Interests Held in the Entity's Capacity as Market-Making Intermediary

Financial institutions often serve as market-maker with respect to a debtor's Economic Interests (particularly securities and derivative instruments). In this capacity, the institution is providing a service to its customers and to the securities or derivatives market by supplying liquidity. The institution typically holds such Economic Interests on a shorter-term basis, and maximization of the long-term recovery on such assets is not the institution's primary focus at the time. Thus, to the extent the court and other parties are trying to ascertain an institution's economic motivations, disclosure of its Economic Interests held in a market-maker capacity will only muddy the waters.

There are also practical concerns with requiring disclosure of positions held as a market-maker. The institution will hold inventory of securities or derivatives and quote prices to act as intermediary in buying them from and selling them to its clients. As such, the Economic Interests held in this capacity fluctuate regularly based on clients' purchases and sales. A single institution may act as a market-maker in numerous securities and derivatives, in which a high volume of trades occurs daily at different prices, thus making it extremely difficult for the institution to provide accurate or timely statements of its Economic Interests in this capacity. An institution as market-maker will typically seek to hedge itself against any one position or sell it off altogether. Consequently, a snapshot at any particular point in time would be misleading as far as that institution's motives with respect to its true economic interests.

Given the highly fluid nature of the market-making activity, as well as the financial institution's goals in holding inventory of securities or derivatives, disclosure of Economic Interests held in such capacity would not be particularly meaningful (and, indeed, potentially misleading) and would also be unduly burdensome and costly to provide. To address this issue, the Suggested Revisions exclude from the scope of the rule: "economic interests held in an entity's capacity as market-making intermediary."

C. Entities Should Not Have to Disclose Derivative Instruments That Reference Multiple Entities

Financial institutions often hold derivative instruments referencing multiple entities,[21] including those linked to indices or baskets of assets of which the debtor forms a small part. These portfolio derivative trades express a counterparty's view regarding a market sector rather than any one company and provide extremely limited exposure to any one name in the portfolio. This can be likened to an investor holding a stock mutual fund—the performance of an individual stock will affect the value of the fund only to a minimal extent. These derivatives are

[21] A derivative instrument referencing multiple entities derives its value from a specified collection of other assets, rather than a single other asset.

not relevant for the purpose of Rule 2019 disclosure because the value of the derivative will only change incrementally with respect to the debtor's bankruptcy case.

Therefore, disclosure of these types of derivatives will not enhance the court's and other parties' visibility of the entity's motivations because the entity's actions in the bankruptcy case would not likely be materially influenced by its holding of a derivative instrument that references multiple entities. In practice, disclosure of these types of interests will create unduly burdensome obligations on the financial institution because the organization, at various levels, may retain derivative exposure to a number of market standard indices or bespoke baskets of assets of which the debtor is included. Moreover, multiple entity trades include "tranched" positions in respect of which a loss threshold must be met before the derivative buyer recovers in respect of a particular debtor's default.

To address this issue, the Suggested Revisions exclude from the scope of the rule "any derivative instrument, other right, or derivative right that does not reference the debtor alone."

D. Entities Should Not Be Required to Disclose Credit Default Swaps in Respect of Which a Market-Wide Settlement Protocol Has Been Announced

The Proposed Rule should not require disclosure of credit default swaps in respect of which a market-wide settlement protocol (an "Auction") has been announced. A credit default swap (often referred to as CDS) is a swap contract in which the buyer makes a series of payments to the swap seller, and in exchange receives a payoff if the debtor undergoes a "Credit Event," such as a bankruptcy filing. Once the debtor defaults and files for bankruptcy, payment under the credit default swap is triggered.

The Auction is promulgated by the International Swaps and Derivatives Association, and is a well-established, transparent process for settling credit derivatives.[22] A core set of established credit derivatives dealers (large financial institutions) are the sole participants in the Auction. The Auction process is structured to mitigate recovery-motivated activity and to settle credit derivatives quickly—often towards the outset of the bankruptcy case. The Auction process yields a recovery at which most credit default swaps across the market are settled. A key part of the Auction process involves the transfer of non-derivative claims against the debtor. Such claims would of course be disclosable under the Proposed Rule, but requiring disclosure of the credit default swap itself is unlikely to provide any meaningful insight into the holder's recovery motives in the debtor's bankruptcy case and would not serve to further the policies underlying Rule 2019.

To address this issue, the Suggested Revisions exclude from the scope of the rule "any credit default swap in respect of which a market-wide settlement protocol has been announced."

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[22] See http://www.isda.org/protocol/cdsprotocols.html for a link to CDS auction protocols in some recent large bankruptcy cases.

E. A Business Unit Subject to Rule 2019 Should Not Be Required to Disclose Economic Interests That Are Not Relevant to Its Decisions

It is typical for large banks to hold Economic Interests in various separate business units within the same legal entity (each, a "Business Unit"). Each Business Unit typically has personnel that manage the Economic Interests held solely by that unit. It is usually the case that when a large bank participates in a group or committee appearing in a bankruptcy case, it does so through a particular Business Unit, such as a credit trading desk, which is not aware of, influenced by, or able to influence positions held elsewhere in the institution. Without the ability to control or manage Economic Interests held elsewhere, each Business Unit realistically considers only the particular Economic Interests it controls or manages when taking positions with respect to the bankruptcy case. To reflect this reality, and to ensure that Rule 2019 disclosures are meaningful and informative, entities should not be required to disclose Economic Interests that are managed or controlled by Business Units other than the one whose activities make the entity subject to Rule 2019.[23]

To address this issue, the Suggested Revisions define "disclosable economic interest" to include just those Economic Interests "that are under the management and control of the business unit at the entity that renders the entity subject to this Rule." We note that this is the same language suggested by the LSTA and SIFMA in their comment to the Proposed Rule.

III. Entities Acting Alone Should Not Be Subject to Rule 2019

The Proposed Rule authorizes a court, "on motion of a party in interest or on its own motion," to require disclosure by any entity (regardless of whether such entity is working as part of a group or committee) that "seeks or opposes the granting of relief." We believe that this provision should not be incorporated into the rule, since such provision could be interpreted to mean that a court could require disclosure even if such information would be irrelevant to any issue before the court.

This amendment would represent a radical departure from the existing rule and the purpose and policy behind its predecessor's enactment, which is to provide creditors with the information necessary to determine whether entities that purport to represent them have interests

[23] The S.E.C. has expressed strong support for the participation of large financial institutions in bankruptcy cases. Multi-service financial institutions are vital to the reorganization process because, according to the S.E.C., "[s]uch institutions have skills and expertise that are likely to be useful" and a policy that discourages such organizations from actively contributing "would be contrary to the best interests of public investors." To that end, the S.E.C. recognized the importance of establishing separate Business Units within an organization to manage the interests held with respect to a debtor apart from other interests held by the firm. This practice, the S.E.C. noted, is essential in encouraging these sophisticated institutions to meaningfully contribute to bankruptcy cases. *See* Memorandum of the Securities and Exchange Commission as Amicus Curiae in Support of Motion of Fidelity Mgmt. & Research Co., *In re Federated Dep't Stores Inc.*, No. 1-90-00130, 1991 WL 11688857 (Bankr. S.D. Ohio Jan. 22, 1991).

that are aligned with such creditors' interests.[24] To expand the rule to include any entity acting on its own behalf—and with no conceivable duties to any other parties—would clearly not serve such a policy.[25] We do not believe that parties should be entitled to know of the Economic Interests held by individual entities without having to show cause that such information is relevant to a dispute at hand.

Whatever the motivations of a party appearing on its own behalf, its positions will be as stated in its papers or in open court. The party's reasons for its positions presumptively will be based upon its holdings. If those positions do not comport with the known holdings, that will be apparent to the court and to other parties in interest, and the court can discount the party's arguments accordingly. By definition, a party acting on its own is not representing the interests of any other party in interest, so disclosure should be unnecessary. To the extent there are unique circumstances that render the Economic Interests of an entity relevant, the traditional rules of discovery as well as Bankruptcy Rule 2004 should suffice to uncover them.[26] In fact, this provision would likely lead to abusive litigation by parties who will request such disclosures as a matter of course, without any legitimate suspicions as to the entity's improper economic motivations, but simply to harass opponents. Such collateral and unnecessary litigation will divert the valuable time and resources of bankruptcy courts and debtors away from reorganizing the business enterprise.

The Suggested Revisions therefore delete the last sentence of section (b) of the Proposed Rule.[27]

IV. Members of an Official Committee Should Not Be Required to Comply with Rule 2019 Solely Because They Serve on Such Committee

Appointment of an official committee of unsecured creditors (a "Creditors' Committee") is mandatory under the Bankruptcy Code.[28] The United States Trustee is directed to appoint a

[24] *See supra* note 5.

[25] It is well settled that creditors do not owe any duties to one another in collecting their claims. *See, e.g.*, *In re W.T. Grant Co.*, 699 F.2d 599 (2d Cir. 1983).

[26] Under Bankruptcy Rule 2004, any party may broadly seek discovery from any other party in connection with "any . . . matter relevant to the case." *See* Fed. R. Bankr. P. 2004.

[27] Alternatively, The Clearing House would support an amendment to the Proposed Rule requiring that an entity could be ordered to comply with the Proposed Rule only for cause shown.

[28] Although this letter focuses on the effects of the Proposed Rule on Creditors' Committees, which are the official committees on which a bank would traditionally serve, if at all, The Clearing House submits that the arguments in this section also apply to other official committees, including an official committee of equity security holders or an official retiree committee. As such, The Clearing House supports exempting from the Proposed Rule all members of official committees appointed under section 1102 or 1114 of the Bankruptcy Code.

Creditors' Committee as soon as practicable after the petition date.[29] The Creditors' Committee serves a core function in the reorganization process, ensuring that the debtor's unsecured creditors are adequately represented and have an active voice in the proceeding. The ability of the United States Trustee to appoint a Creditors' Committee depends on its ability to find representative unsecured creditors that are willing to serve.[30] To the extent that large financial institutions, such as the members of The Clearing House, hold unsecured claims, they will often be precisely the type of creditor that the United States Trustee would solicit to serve on a Creditors' Committee. The Proposed Rule would discourage many of these essential creditors from participating on Creditors' Committees, thus impairing the United States Trustee's ability to find sufficient representative and willing creditors. Moreover, if large unsecured creditors are deterred from participating on Creditors' Committees, those committees would become less representative of the class as a whole,[31] with the potential consequence that one of the debtor's primary negotiating partners in a reorganization, the Creditors' Committee, could have incentives that are not well-aligned with the unsecured creditors as a whole.

The United States Trustee, in selecting sufficiently representative members to serve on the Creditors' Committee, will typically require disclosure of the types and amounts of claims held by potential members. In the Southern District of New York, for example, in order to determine the pool of potential Creditors' Committee members, the United States Trustee typically mails the twenty largest unsecured creditors a "Creditors' Committee Acceptance Form"[32] to solicit both interest and information on the types of claims that the creditors hold. This procedure is consistent with the common United States Trustee practice of choosing the members of the Creditors' Committee from those holding the twenty largest unsecured claims as filed by the debtor,[33] and more specifically of following the recommendation of the Bankruptcy

[29] 11 U.S.C. § 1102(a)(1) ("[A]s soon as practicable after the order for relief under chapter 11 of this title, the United States trustee *shall* appoint a committee of creditors holding unsecured claims") (emphasis added). There is an exception for small business debtors. *See* 11 U.S.C. § 1102(a)(3).

[30] *See* 11 U.S.C. § 1102(b)(1) (a Creditors' Committee "shall ordinarily consist of the persons, *willing to serve*, that hold the seven largest claims against the debtor . . . .") (emphasis added); *see also* Collier on Bankruptcy P 1102.02 (16th ed. 2009) ("While appointment of a creditors' committee is mandatory under the Code, it may not always be practical. If the United States trustee cannot find creditors willing to serve, it will not be able to appoint a committee.").

[31] *See* Collier on Bankruptcy P 1102.02 (16th ed. 2009) ("Another problem faced by United States trustees is a concern over appointing a committee if the only persons willing to serve do not appear to adequately represent the interests of creditors generally. The [Bankruptcy] Code is clear, however, that a committee is to be appointed in each case and a committee must be assembled from those willing to serve.").

[32] *See* http://www.justice.gov/ust/r02/docs/faqs/NY/CredComForm.wpd for a copy of the form.

[33] *See* Collier on Bankruptcy P 1102.02 (16th ed. 2009) ("The United States trustee will usually choose the members of the creditors' committee from the list of the holders of the twenty largest unsecured claims filed by the debtor pursuant to *Rule 1007(d) of the Federal Rules of Bankruptcy Procedure*.").

Code to "ordinarily" appoint the creditors "that hold the seven largest claims against the debtor."[34] The United States Trustee in the Southern District of New York requires creditors responding to its Creditors' Committee Acceptance Form to specify the type of claims they own and the amount of unsecured claims. This disclosure allows the United States Trustee to carry out its statutory duty to appoint a representative Creditors' Committee. Therefore, we believe, the authority to request disclosure of the Economic Interests of Creditors' Committee members should rest solely with the United States Trustee, whose statutory directive already includes the power to request from willing creditors the types of disclosures sought by the Proposed Rule.

In sum, a well-working and comprehensive statutory scheme already exists in the Bankruptcy Code to elicit disclosure of holdings of potential Creditors' Committee members to determine if their respective holdings are consistent with their role on a Creditors' Committee. The United States Trustee may request additional disclosures of Economic Interests if it believes any potential member may not adequately represent the class and may, and often does, request updated disclosures. There is consequently no need to duplicate the authority previously granted to the United States Trustee by including members of official committees in the Proposed Rule, especially given the large reporting burden, and corresponding disincentive to serve, that it would place on all creditors (and large financial institutions in particular). For these reasons, The Clearing House believes that members of official committees should not be subject to the disclosure requirements of the Proposed Rule.[35]

The Suggested Revisions therefore exempt the members of "a committee appointed pursuant to §§ 1102 or 1114 of the Code" from the disclosure requirements specified in Proposed Rule 2019(c)(2).

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[34] *See* 11 U.S.C. § 1102(b)(1).

[35] To the extent the grant of authority to the Bankruptcy Court in the Proposed Rule to order any entity to make disclosures under the rule is adopted, the Bankruptcy Court would have the authority to order such disclosure of any member of an official committee pursuant to the rule on a case-by-case basis. (The Clearing House does not believe that the Bankruptcy Court should have such authority under the Proposed Rule, as discussed in Section III above.) Furthermore, even if the Bankruptcy Court would not have the authority to require disclosure by a member of the official committee under Rule 2019, such official committee member could be required to make such disclosures under traditional discovery rules in the event that the official committee member's Economic Interests were ever relevant.

Conclusion

The Clearing House respectfully requests that the Proposed Rule be revised as set forth in the Suggested Revisions for the reasons set forth herein and we thank you for your consideration. If you have any questions about this letter, please contact Joseph R. Alexander, Senior Vice President and Senior Counsel, at 212-612-9234.

Very truly yours,

Paul Saltzman

Exhibit A

The Clearing House's Suggested Revisions to Proposed Rule 2019[36]

Rule 2019. Disclosure Regarding Creditors and Equity Security Holders in Chapter 9 and Chapter 11 Cases

(a) DEFINITION. In this rule

"disclosable economic interest" means those economic interests in relation to the debtor that are under the management and control of the business unit at the entity that renders the entity subject to this Rule, other than (i) economic interests held in custodial or fiduciary accounts, asset-management accounts, and private-banking accounts, to the extent such entity is not the beneficial owner of such economic interests; (ii) economic interests held in an entity's capacity as market-making intermediary; (iii) any derivative instrument, other right, or derivative right that does not reference the debtor alone; and (iv) any credit default swap in respect of which a market wide settlement protocol has been announced; and

"~~disclosable~~ economic interest" means any claim, interest, pledge, lien, option, participation, or 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.

(b) DISCLOSURE BY ENTITIES, GROUPS, COMMITTEES, INDENTURE TRUSTEES, AND OTHER PARTIES IN INTEREST. In a chapter 9 or 11 case, every entity, group, or committee, as to each, that consists of or represents more than one creditor or equity security holder (other than a financial institution in its capacity as an agent under a credit agreement or similar financial accommodation contract) and, unless the court directs otherwise, every indenture trustee, shall file a verified statement setting forth the information specified in subdivision (c) of this rule. ~~On motion of a party in interest, or on its own motion, the court may also require disclosure of some or all of the information specified in subdivision (c)(2) by an entity that seeks or opposes the granting of relief.~~

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

...

(2) if not disclosed under subdivision (c)(1), with respect to the entity or indenture trustee, and with respect to each member of the group or committee, other than a committee appointed pursuant to §§ 1102 or 1114 of the Code:

....

[36] The Clearing House does not express a view on the aspects of the Proposed Rule that are not discussed herein or included in the Suggested Revisions. Our failure to comment on any such aspects does not necessarily indicate our support thereof.