

Legal Update

BANKRUPTCY RULE 2019 AMENDMENTS WOULD RESOLVE DISCLOSURE DEBATE IN CREDITORS' FAVOR

June 2010

Proposed amendments to the Federal Rules of Bankruptcy Procedure would resolve an ongoing debate concerning the disclosure required of participants in bankruptcy cases in favor of preserving the confidentiality of members of creditor groups.

As discussed in a [prior alert](#), recent decisions have reached conflicting conclusions regarding whether Bankruptcy Rule 2019 requires members of groups of creditors or equity holders (whether denominated as ad hoc committees, informal committees, or groups sharing common counsel) to provide disclosure concerning their positions, including such information as the amounts of claims or equity securities held, the times when the claims or equity securities were acquired, the amounts paid for the claims or equity securities, and the details of any sales or other dispositions. As discussed in another [prior alert](#), an interim draft of proposed amendments to Rule 2019 not only would have incorporated expressly most aspects of those decisions that required disclosure, but also would have further expanded the scope of the disclosure required by the Rule. However, after months of public hearings and debate, the

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Advisory Committee on Bankruptcy Rules substantially modified the interim draft. The proposed amendments would resolve the conflict in the case law by clarifying which entities are required to provide disclosure and by reducing significantly the amounts of disclosure required.

Among the highlights of the proposed amended Rule 2019:

- In a change from the interim draft, the court is not authorized to require disclosure of the amount paid for an economic interest.
- In a change from the interim draft, only groups or committees that claim to represent others in addition to their members must disclose the date each economic interest in the debtor was acquired (unless acquired at least one year pre-petition), and even this disclosure need be only by quarter and year.
- In a change from the interim draft, the court may not require similar disclosure from entities that are not acting in concert with other entities.
- Disclosure is required by every "group or committee that consists of or represents, and every entity that represents, multiple creditors or equity security holders that are (A) acting in concert to advance their common interests, and (B) not composed entirely of affiliates or insiders of one another."
- "Represents" means taking a position before the court or soliciting votes regarding confirmation of a plan, and does not include passively monitoring a case.
- Indenture trustees, agents for lender groups, class action representatives, and, in most respects, official committees are excluded from those required to provide such disclosure.
- The information required to be disclosed includes all "economic interests" held in relation to the debtor by each member of the committee or group as of the petition date. "Economic interest" is broadly defined to cover any economic interest in the debtor, including derivative positions.
- If any fact in a prior disclosure has changed materially, the disclosure must be updated when the group takes a position before the court or solicits votes.

The proposed rule amendments have been transmitted to the Standing Committee on Rules and Procedure of the Judicial Conference of the United States. If approved by the Standing Committee, the amendments will then be submitted to the Judicial Conference, and then to the Supreme Court, and then to Congress.

The adoption of these amendments will not be binding until the amended rule is approved by Congress. Until that time, the present rule applies and creditors and interest holders should take care and consult with counsel regarding their disclosure obligations.

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