

NATIONAL BANKRUPTCY CONFERENCE

*A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration*

December 18, 2015

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Honorable Hank Johnson
Ranking Member,
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
House of Representatives
Washington, DC 20515

Re: Proposed Amendments to Bankruptcy Code to Facilitate Restructuring of Bond and Credit Agreement Debt

Dear Reps. Marino and Johnson and Sens. Grassley and Leahy,

The National Bankruptcy Conference (NBC) is a voluntary, non-partisan, not-for-profit organization composed of about 60 of the nation's leading bankruptcy judges, professors and practitioners. It has provided advice to Congress on bankruptcy legislation for nearly 80 years. I enclose a Fact Sheet, which provides further information about the NBC.

The NBC is pleased to present for your consideration proposed legislation that would facilitate court supervision of bond restructurings under a new chapter 16 of the Bankruptcy Code. The proposal is a result of the NBC's Committee to Rethink Chapter 11, a project that the NBC initiated in 2009 to examine how chapter 11 could be modernized to accommodate substantial changes in finance, economics, and law since it was first adopted in 1978.

The NBC approved the proposal at its 2014 Annual Meeting. I attach a copy of the Report describing the need for the proposal, its principal features, and the reasons for its adoption. While chapter 11 facilitates prepackaged plans that substantially reduce the cost, expense, and disruption of an ordinary chapter 11 case, it can still be an expensive and cumbersome process compared to an out-of-court workout. Recent court decisions under the Trust Indenture Act would require affected lenders' unanimous consent to an out-of-court workout. Chapter 16 proposes a middle ground, preserving both the flexibility of chapter 11's collective action and super-majority voting rules for a workout involving only borrowed money and court supervision of the process to protect the minority while reducing the expense and complexity of using chapter 11's prepackaged plan process.

I also attach copies of a draft of chapter 16 statutory language and of a report updating the 2014 report and describing the statutory language, which the NBC approved at its 2015 Annual Meeting.

We would welcome an opportunity to discuss this proposal with you or your staffs. We believe it would provide an important addition to the Bankruptcy Code's important tool kit of preserving jobs, investments, and businesses.

Sincerely,

/s/ Richard Levin

Richard Levin, Chair
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(212) 891-1601

NATIONAL BANKRUPTCY CONFERENCE

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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**REPORT OF THE NATIONAL BANKRUPTCY
CONFERENCE**

Adopted at the 2014 Annual Meeting

**PROPOSAL FOR A NEW CHAPTER FOR
RESTRUCTURING BOND AND CREDIT
AGREEMENT DEBT (CHAPTER 16)**

REPORT OF THE NATIONAL BANKRUPTCY CONFERENCE
Adopted at the 2014 Annual Meeting

**PROPOSAL FOR A NEW CHAPTER FOR RESTRUCTURING BOND AND CREDIT
AGREEMENT DEBT (CHAPTER 16)**

The *Anglo Irish Bank*¹ decision involved a fact-specific challenge to the modification of noteholders' right to principal or interest upon the vote of a specified majority in amount of the notes issued pursuant to an indenture governed by English law. In contrast to English law, which permits such modifications by a less than unanimous vote, under the U.S. Trust Indenture Act (the "TIA"), the modification of payment terms is prohibited under most indentures (irrespective of their terms) without the unanimous consent of all holders of the securities. The application of this provision of the TIA was a central issue in two recent cases: *Marblegate Asset Management v. Education Management Corp.*, -- F. Supp. 3d --, No. 14 Civ. 8584, 2014 U.S. Dist. LEXIS 178707 (S.D.N.Y. Dec. 30, 2014), and *Meehancombs Global Opportunities Funds, L.P. v. Caesars Entertainment Corp.*, -- F. Supp. 3d --, No. 14 Civ. 7091 (SAS), 2015 U.S. Dist. LEXIS 5111 (S.D.N.Y. Jan. 15, 2015), both of which can be viewed as making out of court restructurings involving bonds covered by the TIA by a less than unanimous bondholder vote more difficult than previously thought.

Some have proposed that U.S. law should permit an indenture to provide for the modification of payment terms by a majority or supermajority vote, without the unanimous consent of those involved (to avoid the "holdout" problem). At the same time, however, the *Anglo Irish Bank* case also illustrates the risk of coercive tactics on the part of issuers where there are no statutory safeguards or limitations on the exercise of power by a majority of the noteholders. (In that case, the terms of the exchange offer included an exit consent under which those who participated in the exchange offer voted to modify the terms of the indenture so that noteholders who rejected the exchange and were "left behind" would receive the functional equivalent of a peppercorn in exchange for the cancellation of their notes.²) Moreover, even if U.S. law permitted public indentures to provide for modification of payment terms with less than unanimous consent, this would not necessarily solve the holdout problem, as there is no guarantee that parties would actually draft non-unanimous consent provisions into new indentures. Indeed, even though syndicated credit facilities are not bound by the TIA and thus

¹ *Assénagon Asset Mgmt. S.A. v. Irish Bank Resolution Corp. Ltd. (Formerly Anglo Irish Bank Corporation Limited)* [2012] EWHC 2090 (Ch).

² In October 2010, Anglo Irish launched an exchange offer, pursuant to which subordinated noteholders were invited to exchange their bonds for new senior notes (for every €1 of subordinated notes, noteholders would receive 20 cents of new senior notes) *provided* that they also voted in favor of a resolution which, if passed by more than 75% of voting noteholders, would allow Anglo Irish to redeem all of the outstanding subordinated notes for a nominal amount (equal to €0.01 per €1,000 in principal amount). The English Chancery Court rejected this "exit consent" as coercive.

could, in theory, provide for less than unanimous consent, in practice, nearly all such facilities still require unanimity.

This memorandum proposes a different solution to the holdout problem in the case of claims for borrowed money involving a trust indenture or under a loan agreement involving multiple lenders. That solution would center on a new, streamlined procedure under a new chapter of the Bankruptcy Code that would permit a court to impose on all members of the affected creditor class a modification of payment terms that has been accepted by the requisite disinterested majority or super majority vote, without triggering the whole panoply of Bankruptcy Code provisions, requirements and limitations that typically accompany the filing of a petition under the Bankruptcy Code.

BACKGROUND

Section 316(b) of the TIA generally provides that an obligor under a qualified indenture cannot extend the maturity or alter the interest rate provided for under that indenture, absent the unanimous consent of affected bondholders. 15 U.S.C. § 77ppp(b) (“the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security . . . shall not be impaired or affected without the consent of such holder . . .”). In the U.S., section 316(b)’s unanimity requirement governs all TIA-qualified indentures without regard to any language in the indentures contrary to or inconsistent with section 316(b), although most qualified indentures contain language that parallels the language in section 316(b). *See* George W. Shuster, Jr., *The Trust Indenture Act and International Debt Restructurings*, 14 Am. Bankr. Inst. L. Rev. 431 (2006). Section 316(b) was enacted during the Great Depression and as part of a package of legislation driven by then-SEC Chairman William O. Douglas (which package also included the Chandler Act amendments to the Bankruptcy Act of 1898) out of concern that the interests of minority stakeholders would be sacrificed for the “desires and conveniences of the dominant group.” H.R. Rep. No. 10292, 75th Congress, Apr. 25, 1938, at 36; *see also* *UPIC & Co. v. Kinder-Care Learning Ctrs, Inc.*, 793 F. Supp. 448, 452 (S.D.N.Y. 1992) (“Enactment of Section 316(b) is attributable to the Securities Exchange Commission’s concern about the motivation of insiders and quasi-insiders to destroy a bond issue through insider control, and the generally poor information about a prospective reorganization available to dispersed individual bondholders.”). While successful in shielding the minority from majority abuse, the unanimity required under the TIA and most U.S. syndicated loan agreements impedes beneficial out of court restructurings.

Without the ability to bind dissenting parties — who may choose to hold out to gain negotiating leverage or simply to free-ride off the concessions of others — many distressed companies must turn to a filing under chapter 11 of the Bankruptcy Code to effectuate purely financial restructurings. Although a chapter 11 filing, or the threat of chapter 11, can be used to restructure bond debt over the objections of minority debtholders, a chapter 11 filing is a blunt

and imperfect tool in this context. The debtors are required to incur considerable expense, and, potentially, business disruption in adhering to various administrative requirements, complying with court approval obligations for many transactions and funding a creditors committee. Indeed, the debtor must prepare and file motions for any first-day relief that would be necessary on or soon after the petition date, seek approval of all non-ordinary course transactions during the pendency of the case, prepare a plan and disclosure statement and participate in the proceedings necessary to obtain approval of the disclosure statement and confirmation of a plan. Studies show that it is not unusual for the cost of larger chapter 11 cases to exceed 2% of the debtor's assets.³ Even a prepackaged bankruptcy, where the court proceeding can be as short as 30 days, comes with considerable cost.⁴ Moreover, because a chapter 11 filing may trigger *ipso facto* clauses that are enforceable in the case of certain types of executory contracts (*see* 11 U.S.C. § 365(e)(2)) and securities contracts, forward contracts, commodities contracts, repurchase agreements and swap agreements (*see* 11 U.S.C. §§ 555-56, 559-60), a chapter 11 filing necessitated solely by a holdout problem can inflict serious "collateral damage" on a debtor. Where disinterested financial creditors are the only affected creditors and a supermajority of them can agree to the terms of a restructuring of their obligations, a chapter 11 filing, in any form, may be inefficient and unnecessarily risky. A streamlined court-sanctioned process can provide a far less burdensome alternative that remains consistent with the purpose of the TIA.

The SEC report that served as the basis for the TIA focuses heavily on the need to protect minority stakeholders, but does not suggest an absolute bar on binding holdouts in a negotiated arm's-length workout. SEC Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, June 18, 1936 at 63 ("some coercion may have to be exerted upon minorities" in order to affect workouts). The concern addressed by the TIA is where "the power to coerce should rest, *unchecked*, in the hands of the majority." *Id.* (emphasis added). To prevent abuse, the TIA offers minority stakeholders that are bound to workouts an avenue to judicial review, and the legislative history of the TIA

³ See Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 J. Empirical L. Stud. 111, 140 (2004) (finding that, "for a group of 48 firms with assets ranging from about \$65 million to \$7.5 billion, and averaging \$881 million . . . firms expended, on average, 2.2 percent of assets on professional fees (1.9 percent after the removal of a single outlier)" but cautioning that "[p]rofessional fees and expenses are almost certainly subject to a scale effect."); Stephen J. Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, 17 Fordham J. Corp. & Fin. L. 141, 166-67 (2012) (finding that fees in the largest quartile of cases studied were approximately 2% of the size of the debtor, and noting that "[t]he relationship between size and standardized cost demonstrates a strong downward trend.").

⁴ Although prepackaged bankruptcies are certainly shorter than more traditional proceedings, they are not necessarily cheaper, as debtors must incur considerable expense preparing the prepackaged case prior to the petition date. 17 Fordham J. Corp. & Fin. L. at 178 ("[P]repackaged cases do not appear to be any cheaper than traditional chapter 11 cases, once we account for at least some of the cases' pre-bankruptcy costs Prepackaged cases are only "cheaper" chapter 11 cases in the sense that the fees recorded after the petition is filed are lower.").

makes plain that “[e]vasion of judicial scrutiny of debt-readjustment plans is prevented” by the statute. H.R. Rep. No. 10292, 75th Congress, Apr. 25, 1938, at 35.

Indeed, appellate courts have allowed a majority of lenders to alter the payment terms of debt instruments over minority objections, even when such documents apparently contained unanimous consent provisions, in instances where the court below approved the substantive fairness of such alteration/settlement. *See, e.g., Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 330-31 (2007) (upholding a settlement altering financial terms because “[unanimity] provisions concerning amendment, modification and waiver of . . . agreements [did] not preclude the Administrative Agent and 95.5% of the Lenders from” reaching a post-default settlement binding on all lenders); *In re Delta Air Lines, Inc.* 370 B.R. 537, 549 (Bankr. S.D.N.Y. 2007) (“In default situations where contractual rights are already impaired by exogenous events, non-impairment clauses are moot and the Trustee’s power to sue and settle subject to direction by a majority in amount or a specified minimum percentage will be sustained over the objection of a minority or individual.”) (collecting cases), *aff’d* 309 Fed. Appx. 455 (2d Cir. 2009); *see also In re Residential Capital, LLC*, 497 B.R. 720, 748 (Bankr. S.D.N.Y. 2013) (approving, in the absence of investor consent, a settlement with the insurer involving commutation of rights under insurance policies and noting that “Section 316(b) [of the TIA]’s restrictions on majority action are inapplicable in insolvency proceedings”). While a review in the context of a chapter 11 proceeding—as in *Beal Savings* and *Delta*—is certainly sufficient to provide the judicial oversight envisioned by the TIA, it is not necessary.⁵

Other countries have developed specialized procedures that allow debtors to restructure bank or bond debt with judicial oversight without having to initiate broader insolvency proceedings:

- In England and Wales, a company or any of its creditors may institute a scheme of arrangement pursuant to the Companies Act 2006. A scheme of arrangement is not an insolvency procedure and does not include a moratorium on creditor action. Schemes of arrangement are binding on all members of each class of creditors and shareholders able to vote on the scheme, provided (i) the approval of the relevant majority⁶ of each class is obtained and (ii) the scheme is sanctioned by the court. The scheme is subject to court review and approval and will be approved if it is fair, reasonable and represents a genuine attempt to reach

⁵ *See* James E. Spiotto, *Defaulted Securities: The Prudential Indenture Trustee’s Guide* (1990), at XIX-20 (Section 316(b) “does not (and cannot be read to) bar a settlement on how debt owed pursuant to an indenture will be paid” and “should not be read to ‘hold up’ the rights of the majority” so long as minority interests are adequately represented and the resolution is subject to judicial review.).

⁶ If a simple majority in number of those voting in person or by proxy and a three-quarters majority in value is obtained at any meeting, a further application is made to the court for an order sanctioning the compromise or arrangement.

agreement between a company and its creditors. The question for the reviewing court is not whether the scheme itself is reasonable but whether a creditor could reasonably have approved it. Schemes of arrangement have proven popular with English companies⁷ as well as certain non-English companies⁸ with the requisite connection to the U.K.

- Spain's "cram down" procedure came into force on March 9, 2014 pursuant to Real Decreto-ley 4/2014, de 7 de marzo, por el que se adoptan medidas urgentes en material de refinanciación y reestructuración de deuda empresarial ("Royal Decree-Law 4/2014"). Among other things, Spain's procedures allow a company to cram down a debt modification that (i) extends the term of the debt for up to five years or (ii) converts debt into profit participating loans with a term of no more than five years, so long as it obtains the consent of creditors representing at least 60% of the total outstanding debt. If the scheme is supported by creditors representing at least 75% of the total outstanding debt, then the scheme may cram down a modification that (i) extends the term of the debt for up to ten years, (ii) converts debt into profit participating loans with a term of no more than ten years, (iii) reduces the amount owed, (iv) capitalizes debt (although dissenting lenders may opt for a write off instead of such capitalization), (v) provides for payment in kind, or (vi) converts debt into convertible notes, subordinated debt, PIK interest loans or any other financial instrument with tenor, ranking or other features different from the original debt.⁹
- The Netherlands is considering creating a similar scheme to England's scheme of arrangement.¹⁰

⁷ Adam Gallagher and Victoria Cromwell, *European Update: English Schemes of Arrangement: A Tool for European Restructuring*, 31-8 ABIJ 38 (Sept. 2012) ("The ability to cram down dissenting (and even secured) creditors has made schemes particularly attractive.").

⁸ See, e.g., *Re Magyar Telecom B.V.* [2013] EWHC 3800 (Ch) (Netherlands); *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) (Germany); *Primacom Holding GmbH and others v. Credit Agricole and others* [2011] EWHC 3746 (Ch) (Germany); *In re La Seda de Barcelona SA* [2010] EWHC 1364 (Ch) (Spain).

⁹ See Hogan Lovells, *Royal Decree-Law 4/2014, of 7 March 2014, on Urgent Matters in Relation to Refinancing Agreements and Debt Restructuring*, available at <http://www.hoganlovells.com/files/Publication/0e3ca987-166b-41da-8775-3b0beb3c8ced/Presentation/PublicationAttachment/9178befe-4b40-41ca-9dc0-401a94af4eef/Hogan%20Lovells%20%20RDL%20March%202014.pdf>.

¹⁰ See Linklaters, *Banking Update: The Preliminary Draft for a New Dutch Insolvency Act: Old Ideas Parading as New Ones?*, Feb. 2, 2009, available at <http://www.linklaters.com/Publications/Publication2051Newsletter/PublicationIssue20090202/Pages/PublicationIssueItem3926.aspx>.

Moreover, many jurisdictions allow principal and interest terms to be modified without any court oversight, if permitted by the loan documents:

- Without an equivalent of section 316(b) of the TIA, Germany, France, Italy, Spain, England and the Netherlands all permit indentures to provide that a majority or supermajority of debtholders may modify the payment terms for all (including dissenting) debtholders. The debtholders' freedom of contract is generally respected¹¹ without court review, although courts might not enforce revised financial terms in subsequent proceedings if the amendment process is deemed to be oppressive or an abuse of the power of the majority to bind the minority.¹²
- Certain South American jurisdictions have similar rules. In Peru and Brazil, for instance, an indenture may provide that a majority (or supermajority) of debtholders can agree to modify the principal and interest terms of the indenture and bind any dissenting holders.¹³ Likewise, in Chile, if the indenture is silent, any change to the payment provisions of an indenture requires unanimous approval, but the indenture may be drafted to allow for modification of such terms with a supermajority of holders of 75% or more.¹⁴

A new chapter of the Bankruptcy Code, with the provisions outlined below, would be consistent with the spirit of the TIA and current U.S. jurisprudence, and build upon the progress of several other developed countries.

THE PROPOSED NEW CHAPTER OF THE BANKRUPTCY CODE.

The basic elements of the proposal are as follows:

1. A new chapter of the Bankruptcy Code will provide for a new type of summary proceeding that could be instituted: (i) only by the debtor and (ii) only for the limited

¹¹ Freedom of contract is a fundamental principle of English law, such that English courts often function to enforce consensual bargains. *See, e.g. Printing and Numerical Registering Co. v. Sampson* (1875) L.R. 19 Eq 462 (“if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”).

¹² *See, e.g. Anglo Irish Bank, supra* note 2.

¹³ Ley General de Sociedades [General Law of Corporations], art. 323, (Peru) available at <http://www.congreso.gob.pe/ntley/Imagenes/Leyes/26887.pdf>.

¹⁴ Ley 18.045 de Mercado de Valores, Diario Oficial, Oct. 22, 1981, as amended March 19, 1994, *available at* https://www.svs.cl/sitio/english/legislacion_normativa/marco_legal/ley18045_ingles_07122011.pdf.

purpose of modifying the rights of one or more classes of claims for borrowed money under an indenture or a loan agreement.

2. The filing of a case under this new chapter would trigger virtually none of the provisions, requirements or prohibitions ordinarily triggered by the filing of a case under the Bankruptcy Code. Thus, for example:

(a) There would be no “estate.”

(b) There would be no automatic stay.

(c) There would be no avoiding powers. However, the running of the applicable reach-back periods under sections 544, 545, 547 548, and 553 of the Bankruptcy Code would be tolled during the pendency of this proceeding.

(d) During the pendency of the case, the debtor would not be subject to any restrictions that would not apply in the absence of a bankruptcy filing. There would be no restriction on the payment of prepetition debt. The debtor would not require court approval for any transaction including, for example, the sale, use or lease of property outside the ordinary course of business, debt incurrence or the settlement of a dispute.

(e) There would be no provision for the appointment of a creditors or equity committee; no provision for the appointment of an examiner; and no provision for the appointment of a trustee.

3. *Ipsa facto* clauses triggered by the filing of this new type of proceeding would be unenforceable — without exception. There would be no exception to this absolute prohibition on the enforceability of *ipsa facto* clauses for “safe harbored” contracts like swap and repurchase agreements; nor for contracts of the type described in Section 365(c) of the Bankruptcy Code; nor for any other contract or right, whether or not executory (to negate the *American Airlines*¹⁵ ruling). The fact that the debtor has asked a court to make a debt restructuring binding on the dissenters within an accepting class should not, by itself, be permitted to trigger defaults and forfeitures. Because this proceeding would not trigger any automatic stay, parties could exercise all of their rights in the event of any other type of default, *provided* that any involuntary chapter 7 or chapter 11 petition filed after the filing of a case under this new chapter would be held in abeyance until the earliest to occur of: (i) confirmation of a plan; (ii) the dismissal of the case; and (iii) the 90th day following the filing of the petition (or such later date as the court may fix for cause). In addition, a “change in control” provision triggered by a change in control resulting from the provisions of a confirmed plan would be unenforceable.

¹⁵ *In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013).

4. The petition would have to be accompanied by the filing of the plan¹⁶ and, if the debtor solicited consents prior to the petition date in accordance with Section 4(b)(i) below, the previously solicited acceptances upon which the debtor intends to rely to obtain confirmation of the plan. Only the debtor could propose a plan. In order to approve the proposed modification, the bankruptcy court would have to make the following findings:

(a) A super majority (either two thirds or seventy five percent) in amount of all claims in the class (whether or not voted) accepted the plan. (There would be no numerosity requirement.) Consent must be affirmative; an abstention would be the functional equivalent of a “no” vote. However, for purposes of tabulating the vote, debt held by the following parties would be disregarded and will not be treated as part of the claims in the class (*i.e.*, will be excluded from the denominator of the voting fraction as well as the numerator) in determining whether the requisite majority has accepted the plan: (i) debt held by the issuer or any affiliate or insider of the issuer; and (ii) debt held by parties who were found to have disqualifying conflicts of interest, akin to those that would result in vote disqualification under the modified version of section 1126(e) proposed in the Mayer/Pachulski Memo on Classification and Voting as finally approved by the Conference. Moreover, notwithstanding Section 510(a) of the Code or any provision in any contract or applicable law, and except as otherwise provided in the last sentence of this subparagraph, only the registered or beneficial holder of a claim in a class that is impaired under the plan could vote that claim. Thus, provisions in intercreditor agreements that purport to give “senior” creditors the power to vote the claims of “junior” creditors would be nullified for purposes of the plan vote.¹⁷ *Provided, however*, that the foregoing nullification and unenforceability of voting provisions in intercreditor agreements will not apply to the vote of any class if: (A)(i) the class does not consist of claims arising under publicly issued debt and (ii) all holders of claims in the class have ceded their right to vote their claims pursuant to an intercreditor agreement or (B)(i) holders of claims in the class have ceded their right to vote to insurers of such claims and (ii) such insurers are the economic stakeholder with respect to such claims.

(b) the solicitation of consents either: (i) if accomplished prior to the petition date, complied with applicable non-bankruptcy law; or (ii) if accomplished subsequent to the petition date, included the provision to each creditor in the impaired class, along with the ballot, of a disclosure statement approved by the court as complying with Section 1125 following a

¹⁶ The new chapter of the Bankruptcy Code would contemplate a “plan” that is far more limited than plans in a chapter 11 context.

¹⁷ The rationale for this element of the proposal is that the basic premise underlying the weight given to the supermajority vote is that dissenters are being bound by the vote of other members of the same class who share their economic interest in maximizing the recovery of that class. This rationale breaks down when the majority of the claims are voted, not by holders of claims in the class that would be bound by the vote, but by a creditor or creditors in some other class whose interests are adverse to those of the creditors who will be bound by the vote.

disclosure statement hearing. Thus, if the debtor chose the second option, there would be both a hearing to approve the disclosure statement (followed by a vote on the plan), and a hearing on confirmation of the plan.

(c) the plan offers and provides the same treatment in all respects to all creditors in the class, whether they accepted or rejected the plan, unless a creditor agrees to less favorable treatment. No payment by the debtor to any creditor in the class could be made outside the plan. Thus, a consent fee or the like could not be paid only to those who accepted the proposal, and no member of the class could receive any special consideration in exchange for its vote. Further, no fee or other compensation shall be paid in connection with any “Exit Financing” to any holder of claims in an impaired class unless the opportunity to participate, and obtain such fee or other compensation, is offered to every “Qualified Holder” in such class on a basis proportionate to its claims relative to the claims of all Qualified Holders in such class. “Exit Financing” means any loan, any purchase of notes, stock or other property, or any other financing contemplated by the Chapter 16 plan. A “Qualified Holder” is a person who is qualified to participate in such exit financing under applicable nonbankruptcy law. Moreover, no other consideration could be provided to any member of the class, directly or indirectly, that was not offered to all members of the class; provided, however, that the debtor’s pre-petition or post-petition payment of the professional fees incurred by a creditor or group of creditors in connection with the negotiation and documentation of the plan would not constitute grounds for denying confirmation, so long as the court found that the creditor or group of creditors had played a material role in the negotiation and documentation of the plan. A finding by the court that this condition had not been satisfied would not be grounds for requiring disgorgement of any professional fees so paid by the debtor; it would simply be grounds for denying confirmation. Any such payment would have to be disclosed in the Disclosure Statement, and any party holding a claim in the same class as the recipient of the payment could object to confirmation of the Plan on the grounds that the recipient did not satisfy the “material role” requirement referred to above.

(f) The plan satisfies the “best interests” test contained in Section 1129(a)(7) as to: (i) every holder of a claim in an impaired class of unsecured claims who rejected the plan; and (ii) if the plan modifies the rights of holders of claims in a secured creditor class with respect to their collateral in a manner that could not be accomplished under the terms of the applicable contracts by the vote of those holders of claims in the class who accepted the plan, every holder of a claim in a class of secured claims who rejected the plan.

5. Notice of the hearing on confirmation of the plan and of the opportunity to object to the plan must be served on all creditors on the day the petition is filed. Creditors in the affected class would be given 25 days’ notice of the deadline for objecting to confirmation of the plan. If no objection is timely filed, the court shall confirm the plan without further hearing. If an objection is filed, the hearing must be held.

6. If, at the hearing, it appears that the debtor has not obtained the requisite majority of acceptances, whether as a result of the disqualification of votes (a disqualified vote would count, in substance, as an abstention), or otherwise, confirmation would be denied and the case dismissed, without prejudice to the debtor's right to refile another case under this chapter (or any other chapter of the Bankruptcy Code) and try again. There would be no provision for conversion of a case under this chapter to a case under chapter 7 or chapter 11 of the Bankruptcy Code.

7. If a case under this chapter is dismissed for failure to obtain the requisite plan acceptances, or otherwise, any future Bankruptcy Code proceeding by or against the debtor would have to be filed in the same court in which the first proceeding was filed.

8. Section 1145 of the Bankruptcy Code would apply to securities issued under the plan.

9. The Plan would be binding on only the debtor and the class or classes of creditors affected by the plan. There would be no discharge of any debt other than the specific class or classes of debt affected by the plan; as to such classes, the obligations of the debtor would be governed by the plan.

DISCUSSION

The primary benefit of the above proposal would be that a debtor seeking to modify a class of debt without unanimous consent would not be subject to all of the costs and burdens incident to a typical chapter 11 case: There would be no limitation or prohibition on the payment of prepetition debt; no need for court approval for out of the ordinary course of business transactions or, indeed, any other type of transaction, etc. The court's jurisdiction and control over the debtor would be limited to determining whether to approve the proposed debt modification and make it binding on the dissenters. Further, the broadened prohibition against the enforcement of *ipso facto* clauses would prevent the collateral damage that might otherwise accompany a chapter 11 filing.

Some time ago, the Committee discussed a similar concept. During those discussions, the following concerns (which are not necessarily consistent with one another) were expressed:

A. One committee member questioned the need for a special Bankruptcy Code provision for filing a summary proceeding in the bankruptcy court to obtain approval of the modification. Given the relative speed with which prepackaged plans involving the modification of the rights of a single class of creditors (such as bank debt or bonds) or even multiple classes of liquidated debt for borrowed money can be confirmed, the summary proceeding really would not

add very much in the way of greater speed, efficiency or economy. The countervailing argument is that the new proceeding would be substantially more streamlined and inexpensive and have less of an impact on creditors whose claims are not being modified than a prepackaged chapter 11 case, because there would be no automatic stay, no requirement of court approval for non-ordinary course transactions, and no restriction on the payment of pre-petition debt, etc. Further, unlike a prepackaged chapter 11 case, the new proceeding would not pose various risks to the debtor's value that can accompany the filing of a case under current chapter 11 of the Bankruptcy Code. Those avoided risks include: (i) the operation of ipso facto clauses in "safe harbored" commercial transactions (because such "safe harbors" would not apply in the new summary proceeding); and (ii) the inability to assume certain types of contracts such as certain non-exclusive intellectual property licenses (because the filing of the new proceeding would not constitute an enforceable default under any such contract, and all contracts that are not the basis for debt in the modified class would "ride through" without having to resort to a contested assumption process).

B. At the other end of the spectrum, concern was expressed that even with the requirement of Bankruptcy Court review and approval, there was insufficient protection for the minority because of the failure to include tests such as the "best interests" test in the new summary proceeding. This concern has been addressed by including a requirement that the "best interests" test be satisfied as to (i) any dissenting creditor in an impaired unsecured creditor class; and (ii) where rights as to collateral are modified in a manner that could not be accomplished outside of bankruptcy by the same majority of secured creditors in the class as voted to accept the plan, any dissenting holder of claims in a secured creditor class. Concern was also expressed that a dominant holder of the class of debt being modified (such as a single holder or commonly controlled group of holders) could vote for a plan that gave them control of the reorganized debtor and the minority little voice in its affairs. However, this concern could be addressed, at least in part, by providing that if a commonly controlled group of holders holds some large percentage of the debt in the class (for example, over 50%), a "numerosity" requirement would apply in addition to the requirement of an affirmative vote by the holders of the requisite majority in amount of claims. This requirement would apply only where a party objected to the approval of the modification on the grounds that a commonly controlled group of class members held more than 50% of the debt in the class. If that predicate was established, the burden would shift to the debtor to demonstrate that the requisite majority in number of claims had accepted the modification.

**PROPOSAL FOR A NEW CHAPTER 16 OF
THE BANKRUPTCY CODE FOR THE
RESTRUCTURING OF BOND AND
CREDIT AGREEMENT DEBT**

**Prepared by the National Bankruptcy Conference
December 18, 2015**

**PROPOSAL FOR A NEW CHAPTER 16 OF THE BANKRUPTCY CODE FOR THE
RESTRUCTURING OF BOND AND CREDIT AGREEMENT DEBT**

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SEC. 1. Amend section 103 of title 11 to add the following new 103(l):

“(l) Chapters 1 and 16 of this title and those sections identified in section 1601 of this title apply in a case under chapter 16 of this title. Chapter 16 of this title applies only in a case under such chapter.”

SEC. 2. Amend section 109 of title 11 to add the following new 109(i):

“(i) Only a person, other than an individual, that may be a debtor under chapter 11 of this title and owes, on the date of the filing of the petition, a debt for borrowed money under a loan agreement may be a debtor under chapter 16 of this title.”

SEC. 3. Amend section 524(a)(1) of title 11 to replace “1228, or 1328” with “1228, 1328, or 1650.”

SEC. 4. Amend section 1511 of title 11 to add the following new 1511(c):

“(c) If a foreign representative commences a case under chapter 16 of this title—
(1) sections 1520, 1521(a), and 1521(e) of this title do not apply in the debtor’s case under chapter 15 of this title, unless such chapter 16 case is dismissed; and
(2) the foreign representative may not initiate in the chapter 16 case an action under section 1523 of this title.”

SEC. 5. Amend section 1930(a)(3) of title 28 to replace “title 11, \$1,167” with “title 11, or under chapter 16 of title 11, \$1,167.”

SEC. 6. Add the following new chapter at the end of title 11:

CHAPTER 16. ADJUSTMENT OF DEBTS FOR BORROWED MONEY

SUBCHAPTER I—GENERAL PROVISIONS

§ 1601. Applicability of other sections of this title

(a) Sections 301, 305, 306, 342, 349(a), 502(a), 502(b)(1), 502(b)(9), 502(e), 502(j), 509, 510(a), 524(a), 524(e), 525, 553(a)(1), 1109(a), 1125, 1126(a), 1126(b), 1126(e), 1142, 1143, 1144, 1145, and 1146 of this title apply in a case under this chapter.

(b) A term used in a section of this title made applicable in a case under this chapter by subsection (a) of this section or section 103(l) of this title has the meaning defined for such

term for the purpose of such applicable section, unless such term is otherwise defined in section 1602 of this title.

(c) Any reference to a claim filed under section 501 in a section made applicable in a case under this chapter by subsection (a) of this section or section 103(l) includes a claim filed or deemed filed under section 1622 of this title.

§ 1602. Definitions for this chapter

In this chapter, the following definitions shall apply—

(1) “exit financing” means a loan or any other financing to or for the benefit of the debtor, or the purchase of debt or equity securities issued by the debtor, provided for by the plan;

(2) “loan agreement” means an agreement under which a claim against the debtor for borrowed money or reimbursement obligations in respect of letters of credit arises, or which evidences such a claim, including a credit agreement, a security constituting or evidencing a claim against the debtor for borrowed money, a trust or other indenture under which such a security is outstanding, and any security agreement or arrangement or other credit enhancement related to any of the foregoing, including any guarantee by the debtor of any of the foregoing;

(3) “professional fees” means compensation and reimbursement of expenses paid or to be paid to an attorney or other professional person;

(4) “property of the estate”, when used in a section that is made applicable in a case under this chapter by section 103(l) or 1601 of this title, means property of the debtor;

(5) “qualified holder” means a person who is qualified under applicable nonbankruptcy law to participate in the exit financing provided for by the plan; and

(6) “trustee”, when used in section 959(b) of title 28 or a section that is made applicable in a case under this chapter by section 103(l) or 1601 of this title, means debtor.

§ 1603. Right to be heard

A party in interest, including the debtor, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in the case.

SUBCHAPTER II—CASE ADMINISTRATION

§ 1621. List of creditors

The debtor shall file with the petition a list of creditors holding claims arising under or relating to a loan agreement in each class that is impaired under the plan.

§ 1622. Claims

(a) A holder of a claim in a class that is impaired under the plan or an indenture trustee under an indenture under which such claim arises may file a proof of claim.

(b) A proof of claim is deemed filed under subsection (a) of this section for any claim that appears in the list filed under section 1621 of this title, except a claim that is listed as disputed, contingent, or unliquidated.

(c) If a creditor of the kind described in subsection (a) of this section does not timely file a proof of such creditor's claim, the debtor, an entity that is liable to such creditor with the debtor, or an entity that has secured the creditor, may file a proof of such claim.

(d) The rights of the holder of a claim that is not in a class of claims that is impaired under the plan shall not, with respect to such claim, be affected, modified, or limited by the failure of such holder to file a proof of such claim in a case under this chapter. Notwithstanding section 502(a) of this title, a proof of claim filed by a creditor with respect to a claim that is not in a class that is impaired under the plan shall be of no force or effect, and any rights, objections, defenses, offsets, or counterclaims that the debtor has respecting such claim shall not be affected, modified, or limited by the filing of any such proof of claim or the failure to object to any such proof of claim.

§ 1623. Tolling of time periods

All time periods specified in sections 547, 548, 549, 550(c), and 553, and all time periods in applicable nonbankruptcy law referred to in sections 544(b) and 546(b), are tolled during the pendency of a case under this chapter.

§ 1624. Rights of the debtor

The debtor may operate the debtor's business; use, sell, or lease the debtor's property; or incur debt, without notice or a hearing, whether or not in the ordinary course of business.

§ 1625. Termination or modification of rights and obligations

Notwithstanding a provision in a contract or applicable nonbankruptcy law—

(1) a contract to which the debtor or an affiliate of the debtor is a party may not be terminated or modified, and any right or obligation under such contract may not be terminated or modified, at any time after the commencement of a case under this chapter solely because of a provision in such contract or applicable nonbankruptcy law that is conditioned on—

(A) only with respect to creditors whose claims are in a class that is impaired under the plan, the insolvency or financial condition of the debtor at any time before the closing of the case, except that this paragraph shall not apply if the case is dismissed;

(B) the commencement of a case under this title; or

(C) a change in control of the debtor provided for in the plan, which change in control occurs at any time on or before the effective date of the plan; and

(2) a governmental unit may not deny, revoke, suspend, or refuse to renew a person's eligibility to participate in a governmental program, including a program that

provides funding, solely because such person or another person with whom such person has been associated is or has been a debtor in a case under this chapter.

§ 1626. Rights of creditors under nonbankruptcy law

The rights of a creditor to enforce any claim and to exercise any rights or remedies of such creditor with respect to such claim under applicable nonbankruptcy law shall not be stayed, avoided, modified, or otherwise limited by operation of any provision of this title or by any order, process, or judgment of a court enforcing or carrying out any provision of this title, except—

- (a) as provided in section 1625;
- (b) to the extent that the rights of holders of claims in a class that is impaired under the plan as confirmed under this chapter are stayed, avoided, modified, or otherwise limited under such plan; or
- (c) in a case commenced under section 1627 of this title.

§ 1627. Commencement of a case under chapter 7 or chapter 11

(a) A petition under chapter 7 or chapter 11 may be filed by or against the debtor under section 301 or 303 of this title at any time during the pendency of a case under this chapter if the debtor may be a debtor under the chapter under which the petition is filed.

(b) Unless the court orders otherwise for cause, if an involuntary petition is filed against the debtor under section 303 of this title during the pendency of a case under this chapter by a holder of a claim in a class that is impaired under the plan or by an indenture trustee under an indenture under which such claim arises, all proceedings in the involuntary case shall be suspended.

(c) If an involuntary petition is filed against the debtor under section 303 of this title during the pendency of a case under this chapter, the failure to pay any debt owed on account of a claim that is impaired under the plan shall not be considered in determining whether the requirements of section 303(h)(1) of this title have been satisfied.

(d) Subsections (b) and (c) of this section shall not apply in a case under this chapter after—

- (1) a plan is confirmed under this chapter;
- (2) the case under this chapter is dismissed; or
- (3) 90 days after the filing of the petition under this chapter, or such later date as the court, on request of a party in interest made before the expiration of such 90-day period, may fix for cause.

§ 1628. Dismissal and conversion

(a) On request of the debtor at any time, the court shall dismiss a case under this chapter.

(b) A case under this chapter shall be dismissed if—

- (1) the debtor fails to file a plan or a required disclosure statement timely under section 1641 of this title;
 - (2) a plan is not confirmed within 90 days after the filing of the petition under this chapter, or by such later date as the court, on request of a party in interest made before the expiration of such 90-day period, may fix for cause; or
 - (3) the court enters an order denying confirmation of a plan because an impaired class of claims has not accepted the plan.
- (c) A case under this chapter may not be converted to a case under another chapter.

SUBCHAPTER III—THE PLAN

§ 1641. Filing of plan and disclosure statement

- (a) Only a debtor may file a plan in a case under this chapter.
- (b) The debtor shall file the plan with the petition.
- (c) If the debtor intends to solicit acceptances of the plan after the commencement of the case, and a disclosure statement approved by the court is required under section 1125 of this title for such solicitation, the debtor shall file a disclosure statement with the petition.

§ 1642. Classification of claims

A plan may place a claim in a particular class only if such claim is substantially similar to the other claims of such class. A claim secured by a lien on property in which the debtor has an interest shall not be placed in the same class as a claim that is not secured by a lien on property in which the debtor has an interest, regardless of the value of the property securing such lien.

§ 1643. Contents of plan

- (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall—
 - (1) designate, subject to section 1642 of this title, classes of claims arising under or relating to a loan agreement that are impaired under the plan;
 - (2) specify the treatment of any class of claims arising under or relating to a loan agreement that is impaired under the plan;
 - (3) provide that, with respect to each claim and interest, other than claims in an impaired class of claims arising under or relating to a loan agreement, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest;
 - (4) provide the same treatment for each claim of a particular impaired class, except to the extent that—
 - (A) the holder of a particular claim agrees to a less favorable treatment of such claim; or
 - (B) all holders of claims in such class that had a material role in the negotiation and documentation of the plan are reimbursed for professional fees under paragraph (b) of this section.

(b) A plan may provide for the reimbursement of professional fees incurred by a creditor in connection with the creditor's material role in the negotiation and documentation of the plan.

§ 1644. Impairment of classes of claims

A class of claims is impaired under a plan unless, with respect to each claim of such class, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim entitles the holder of such claim.

§ 1645. Acceptance of plan

(a) A class of claims has accepted a plan if such plan has been accepted by creditors that hold at least two-thirds in amount of the allowed claims of such class, determined without including the claim of, or the acceptance or rejection of the plan by—

(1) a holder that is the issuer, or any affiliate or insider of the issuer, of the debt on which the claim is based;

(2) a holder that has, by reason of any direct or indirect claim against the debtor or an affiliate of the debtor, an interest that is adverse to the interest of such class and that is of greater importance and economic value to such holder than its claim in such class; and

(3) a holder whose claim is designated under section 1126(e) of this title.

(b) Notwithstanding any other section of this title or any provision in a contract or applicable nonbankruptcy law, any waiver or transfer by a creditor to another creditor of the right to accept or reject a plan under this chapter shall be void, except as provided in subsection (c) of this section.

(c) A provision of a contract that waives or transfers to another creditor the right to accept or reject a plan shall be effective if—

(1) the claim of such creditor does not arise from debt securities that are registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f), and all holders of allowed claims in the class have agreed to waive or transfer the right to accept or reject a plan; or

(2) all holders of allowed claims in the class transferred to an insurer of such claim the right to accept or reject a plan, and such insurer holds the economic interest in such claims.

§ 1646. Modification of plan

(a) The debtor may modify a plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1642 and 1643 of this title. After the debtor files a modification of such plan, the plan as modified becomes the plan.

(b) The debtor shall comply with section 1125 of this title with respect to the plan as modified.

(c) Any holder of a claim that has accepted or rejected a plan is deemed to have accepted or rejected, as the case may be, such plan as modified, unless, within the time fixed by the court, such holder changes such holder's previous acceptance or rejection.

§ 1647. Disclosure statement hearing

(a) If the debtor intends to solicit acceptances of the plan after the commencement of the case, and a disclosure statement approved by the court is required under section 1125 of this title for such solicitation, the court, after notice and a hearing, may approve the disclosure statement.

(b) A party in interest may object to the approval of the disclosure statement.

§ 1648. Confirmation hearing

(a) The court, after notice and a hearing, may confirm the plan.

(b) A party in interest may object to confirmation of the plan.

§ 1649. Confirmation of plan

The court shall confirm a plan only if all the following requirements are met:

(1) The plan complies with the provisions of this title made applicable by sections 103(l) and 1601 of this title and with the provisions of this chapter.

(2) The debtor complies with the provisions of this title made applicable by sections 103(l) and 1601 of this title and with the provisions of this chapter.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the debtor to any holder of a claim in a class of claims impaired under the plan, or to a professional employed by such creditor, for services or for costs and expenses or otherwise in connection with the case, or in connection with the plan and incident to the case, has been disclosed.

(5) With respect to each class of claims—

(A) such class has accepted the plan, and

(B) except as provided in paragraph (3) of this subsection, each holder of a claim of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is no less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.

(3) Subparagraph (B)(ii) of this paragraph shall not apply to a holder of a claim in an impaired class if—

(i) the claims in such class are secured by a lien on property in which the debtor has an interest, unless such lien is of inconsequential value; and

(ii) the plan modifies the rights of the holders of such claims with respect to such liens only in a manner that could be accomplished under the applicable agreement with the consent of such holders that have accepted the plan.

(4) Any consent fee or other payment made or to be made, under the plan or otherwise, to any holder of a claim in such impaired class of claims in connection with the solicitation of acceptances or rejections of a plan, or otherwise in relation to the plan, has been offered to all holders of claims in such class whether or not such holders have accepted the plan, except for professional fees paid or to be paid by the debtor to a creditor in connection with the creditor's material role in the negotiation and documentation of the plan.

(5) No fee or other remuneration shall be paid to any holder of a claim in such impaired class in connection with any exit financing, unless the plan provides that every qualified holder of claims in such class has an opportunity to participate in such exit financing and to receive such fee or other remuneration, whether or not such holder has accepted the plan, on a basis proportionate to its allowed claim relative to the allowed claims of all qualified holders in such class.

(6) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

§ 1650. Effect of Confirmation

(a) The provisions of a confirmed plan bind the debtor and all holders of claims in classes impaired by the plan.

(b) Except as provided in the plan or the order confirming the plan, the confirmation of the plan discharges the debtor from any liability on a claim in a class that is impaired by the plan, whether or not—

(1) a proof of such claim is filed or deemed filed under section 1622 of this title;

(2) such claim is allowed under section 502 of this title; or

(3) the holder of such claim has accepted the plan.

§ 1651. Closing and reopening cases

(a) After the effective date of the plan, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to accord relief to the debtor or for other cause.

**REPORT OF THE NATIONAL BANKRUPTCY
CONFERENCE**

Adopted at the 2015 Annual Meeting

**STATUTORY DRAFT OF PROPOSAL FOR A
NEW CHAPTER FOR RESTRUCTURING
BOND AND CREDIT AGREEMENT DEBT
(CHAPTER 16)**

REPORT OF THE NATIONAL BANKRUPTCY CONFERENCE
Adopted at the 2015 Annual Meeting

**STATUTORY DRAFT OF PROPOSAL FOR A NEW CHAPTER FOR
RESTRUCTURING BOND AND CREDIT AGREEMENT DEBT (CHAPTER 16)**

At the 2014 Annual Meeting, the Conference approved a proposal of the Committee to Rethink Chapter 11 to address the problem of “holdouts” in bond restructurings.

Section 316(b) of the Trust Indenture Act (TIA) generally provides that the rights of any bondholder to payment “shall not be impaired or affected without the consent of such holder.”¹ While protecting minority bondholder rights, the TIA’s unanimity requirement also may prevent reasonable and necessary restructuring proposals that are supported by a substantial majority of holders from being implemented other than through a chapter 11 filing. Minority holders (including purchasers on the secondary market) may be incentivized to withhold consent in the hopes of being “bought off” or to achieve other objectives (such as enhancing the holdout’s other positions in the debtor’s capital structure), particularly where a chapter 11 filing would have negative economic consequences for the debtor.

In response to the holdout problem, the Committee to Rethink Chapter 11 proposed that a new chapter be added to the Bankruptcy Code – to be designated either chapter 10 or 16. The new chapter would provide a streamlined, judicial procedure for restructuring TIA-governed indentures and other “loan agreement” obligations that

¹ TIA section 316(b) (15 U.S.C. § 77ppp(b)) provides:

b) Prohibition of impairment of holder’s right to payment:

Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder, except as to a postponement of an interest payment consented to as provided in paragraph (2) of subsection (a), and except that such indenture may contain provisions limiting or denying the right of any such holder to institute any such suit, if and to the extent that the institution or prosecution thereof or the entry of judgment therein would, under applicable law, result in the surrender, impairment, waiver, or loss of the lien of such indenture upon any property subject to such lien.

require unanimous or super-majority consent that could not be obtained through an out-of-court restructuring. Only loan agreement creditors would be impaired, although the debtor would be protected from the exercise of “ipso facto” rights based upon the bankruptcy filing by other creditors (including contractual counterparties).

The Committee to Rethink Chapter 11’s “holdout” proposal was presented at the Conference’s “Rethinking Chapter 11” conference in Washington, D.C. on May 28-29, 2015. A copy of the Memorandum distributed at the conference is included with this Report.

There have been significant judicial developments since the 2014 Annual Meeting that have heightened interest in TIA § 316 and highlighted the need for a process like that envisioned in proposed new chapter. In a pair of decisions, Judge Failla of the Southern District of New York held that TIA § 316 protects more than the legal right to payment; it also protects the practical right to be paid. Thus, a restructuring that left the debtor unable to satisfy its obligations to bondholders could violate the TIA as to nonconsenting holders, even if the restructuring did not alter the dissenters’ legal right to payment of principal and interest. See *Marblegate Asset Mgmt. v. Educ. Mgmt. Corp.*, 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014), and *Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp.*, 2015 WL 3867643 (S.D.N.Y. June 23, 2015). Judge Scheindlin of the Southern District of New York reached essentially the same conclusion in *Caesars Entm’t Operating Co. v. BOKF, N.A. (In re. Caesars Entm’t Operating Co.)*, 2015 U.S. Dist. LEXIS 137235 (S.D.N.Y. Oct. 6, 2015).

In light of the growing interest in the TIA requirements for bond restructurings, Conferee Resnick was asked to take the lead in drafting a comprehensive amendment to the Bankruptcy Code that would implement the Committee to Rethink’s proposal. The Business Debtor Committee discussed Conferee Resnick’s proposed legislation and formed a drafting group consisting of Conferees Resnick, Pachulski, Levinson, and Shaffer. After the exchange of various drafts and further discussion, the Business Debtor Committee approved the proposed amendment for submission to the Conference, which also has been reviewed and edited by the Drafting Committee.

A copy of the proposed legislation to create a new chapter is enclosed with this Report. In summary, the new chapter will be a streamlined version of chapter 11. However, no estate will be created, and there will be no automatic stay. The avoiding powers will not apply, although the period for creditors to bring avoiding power actions under state law will be tolled during the pendency of the case. With limited exceptions for ipso facto clauses, no creditors’ rights may be affected except those of holders of debt arising under loan agreements whose claims are impaired.

Only the debtor may file a plan, which must be filed with the petition and confirmed within 90 days (unless extended for cause). Confirmation will require a vote of 2/3 in dollar amount in each impaired class, and compliance with a version of the best interests test. There will be no cram down.

The Drafting Committee discussed the placement of the new chapter, “Adjustment of Debts for Borrowed Money,” and whether it should be designated as “chapter 16” or “chapter 10.” Arguments for designating it chapter 10 include (1) it is similar in a number of respects to chapter 11 (kind of a “Chapter 11 Light”), so it makes sense to place it next to chapter 11, and (2) all three business rehabilitation chapters (chapters 10, 11, and 12) would be together. It has also been noted that 36 years has passed since we had a Chapter X, so it should not confuse the bar to now have a new chapter 10. An argument for designating it chapter 16 is that it would signify the new chapter’s more limited scope (as is chapter 15). After considering these arguments, as between chapter 10 and chapter 16, the Drafting Committee voted (3-2) that it should be designated as chapter 10, but no member thought that this was an important issue. One member suggested that we consider designating it as “chapter 10.5,” but others did not indicate support for that suggestion (an argument against it is that a chapter 10.5 designation would complicate the designation of section numbers). Each member indicated that his or her vote was based on only a mild preference between chapter 10 and chapter 16. Because the Conference approved the proposal as “chapter 16” at its 2014 Annual Meeting, and the closeness of the vote of the Drafting Committee, we continued the chapter 16 designation in the version of the new chapter. However, the Drafting Committee wants to raise this issue so that the Conference may consider the most appropriate placement of this new chapter.

The following is a brief, section-by-section summary of the proposal. The section numbers are based upon a chapter 16 designation, but could easily be adapted to be in a new chapter 10.

- Section 1: Only chapters 1 and 16 apply in a chapter 16 case (chapters 3, 5, and 11 do not apply, except as expressly provided in section 1601(a)).
- Section 2: Eligibility for chapter 16 is the same as for chapter 11, except (i) an individual cannot be a debtor, and (ii) the debtor must have debt for borrowed money under a “loan agreement” (defined in proposed section 1602 as including a credit agreement or indenture).
- Section 3: Adds reference to chapter 16 in section 524(a)(1) effect-of-discharge provision.

- Section 4: Amends section 1511 to change the effects of recognition of a foreign proceeding when the foreign representative invokes chapter 16; ensures that recognition does not cause the application of various Code provisions that are excluded from chapter 16.
- Section 5: Imposes filing fee for chapter 16 case equal to fee for chapter 11 case.
- Section 6: Adds chapter 16.
- 1601 Incorporates various provisions of chapters 3, 5, and 11, but *excludes* among others: (i) involuntary cases (§ 303), (ii) trustees and examiners (§§ 321-326, 1104-1105), (iii) official committees (§ 1103), (iv) retention and compensation of professionals (§§ 327-331), (v) adequate protection and the automatic stay (§§ 361-362), (vi) court approval for sales (§ 363), (vii) court approval for financing (§ 364), (viii) treatment of executory contracts and leases (§ 365), (ix) creation of an estate (§ 541), and (x) the avoiding powers (§§ 544-551).
- 1602: Additional or modified definitions for chapter 16.
- 1603: Right to be heard – similar to section 1109.
- 1621: Debtor shall file list of creditors.
- 1622: Proofs of claim are only filed by creditors in impaired class and do not need to be filed if on the debtor’s list (other than listed as disputed, contingent, or unliquidated).
- 1623: Tolls avoiding power limitation periods during chapter 16 case.
- 1624: Debtor may operate business, whether or not in ordinary course.
- 1625: Overrides application of ipso facto clauses (without “safe harbor” exceptions or exceptions for non-assignable contracts) vis-à-vis debtor and its affiliates (i) as to all parties, if based upon the filing of the chapter 16 case, and also (ii) as to impaired creditors, if based upon the debtor’s insolvency or financial condition. Prohibits governmental revocation or suspension based upon chapter 16 filing.
- 1626: Unimpaired creditors’ rights are not affected, except as provided in section 1625, or if a chapter 7 or 11 case is commenced for the debtor.

- 1627: Chapter 16 does not preclude the filing of a chapter 7 or 11 case (including an involuntary case). However, an involuntary case commenced by impaired creditors is suspended, unless the court orders otherwise (this suspension will end if a chapter 16 plan is confirmed, the chapter 16 case is dismissed, or it is more than 90 days after the commencement of the chapter 16 case, unless the court extends the time for cause).
- 1628: Debtor has right to dismiss case. Case shall be dismissed if plan is not confirmed within 90 days (unless extended for cause), or if confirmation is denied because an impaired class has rejected the plan. Case cannot be converted.
- 1641: Only debtor can file plan, which must be filed with the petition.
- 1642: Claims must be classified with similar claims. Cannot classify an undersecured creditor's deficiency claim with unsecured creditors.
- 1643: Plan shall (i) designate impaired classes (which can only be claims arising under or relating to a loan agreement), (ii) specify treatment of impaired classes, (iii) leave unimpaired all other creditors, and (iv) provide for the same treatment for all creditors in each impaired class (except those creditors who participated in plan process may receive reimbursement of fees).
- 1644: Claim is impaired unless the plan leaves unaltered the legal, equitable, and contractual rights to which such claim entitles the holder of such claim.
- 1645: Plan must be accepted by creditors holding at least 2/3 in amount of claims in each impaired class, including claims that are not voted (no numerosity requirement, and 2/3 requirement excludes votes of insiders and affiliates, and of parties that have "an interest that is adverse to the interest of such class and that is of greater importance and economic value to such holder than its claim in such class"). Limits waivers and transfers of right to vote.
- 1646: Debtor may modify a plan at any time before confirmation, but may not if the plan as modified fails to meet the requirements of sections 1642 and 1643.
- 1647: If the debtor solicits acceptances postpetition, court may approve disclosure statement.

- 1648: Court may confirm plan after notice and hearing. Parties in interest may object.
- 1649: Court shall confirm plan only if (i) the debtor and plan comply with the applicable Code requirements, (ii) plan is proposed in good faith and not be any means forbidden by law, (iii) payments made to holders of impaired claims and their professionals are disclosed, (iv) each impaired class has accepted the plan (no cram down), and (v) the best interests test is satisfied as to each holder of a claim in an impaired class (except with respect to value given up with respect to lien rights that also could have been given up outside of the chapter 16 case). Consent fees and exit financing fees must be offered to all creditors in class.
- 1650: Plan binds the debtor and holders of impaired claims. Impaired claims are discharged except as provided in the plan.
- 1651: Court shall close case after effective date. Case may be reopened.