MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

October 7, 2013

**Via Electronic Mail**

Clifford J. White III
Director
Executive Office of the United States Trustees
United States Trustee Program
441 G Street, NW, Suite 6150
Washington, DC 20530

Re: Rules for Chapter 11 Periodic Reports

Dear Director White:

Managed Funds Association ("**MFA**")[1] respectfully writes to urge the U.S. Trustee Program ("**USTP**")[2] to consider promulgating rules, as directed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("**BAPCPA**"),[3] requiring debtors in possession and trustees to file periodic reports on uniform forms in chapter 11 cases under the Bankruptcy Code,[4] other than small business debtor cases.[5] We believe that the public would benefit from improved financial disclosure in chapter 11 cases.

[1] Managed Funds Association represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.

[2] We understand that the USTP of the Department of Justice has been delegated the authority to oversee rulemaking with regard to chapter 11 periodic reports pursuant to 28 U.S.C. § 510. Individual United States trustees and assistant trustees or employees in any particular case are referred to herein as a "**U.S. Trustee**."

[3] Pub. L. No. 109-8 (2005) § 119 Stat. 23 (effective in cases commenced on or after October 17, 2005); 28 U.S.C. § 589b.

[4] 11 U.S.C. § 101 (2010), et seq. (the "**Bankruptcy Code**").

[5] For purposes of this letter, we do not consider or address the requirements for a "small business debtor" (as such term is defined in the Bankruptcy Code) or for an individual chapter 11 debtor. We note that official forms for certain periodic reports have been adopted for those cases.

MFA believes that efficient, well-functioning capital markets play an important role in the bankruptcy process, just as they do in our overall financial system.[6] In our view, the proper functioning of the U.S. bankruptcy process is important to the broader U.S. economy; a bankruptcy system that has both certainty and transparency gives confidence to investors as to how their investments will be treated in the most difficult circumstances, which is in turn essential for the development of robust capital markets. The certainty and transparency that the U.S. bankruptcy system offers has led to greater participation by financial participants and growth in the secondary market for debt and trade claims.[7] The secondary market allows existing creditors to adjust their own risk profiles and, should they choose, sell their bank debt, bonds or other claims to employ their capital in the most advantageous way.[8] These markets thrive, to the benefit of all stakeholders, when information is both meaningful to stakeholders and readily available. While the U.S. bankruptcy system has been quite successful, we believe that improving the financial disclosure process would enhance the efficacy of chapter 11 cases.

## I. Introduction/Background

Disclosure of reliable financial information is the cornerstone of the modern Bankruptcy Code.[9] A chapter 11 debtor operates in a fish bowl; in exchange for protections of chapter 11, the debtor is obligated to take on the burdens of disclosure and is subject to broad rights of examination by creditors and other parties in interest.[10] A

---

[6] Edward I. Altman, Max I. Heine Professor of Finance, NYU Stern School of Business, Field Hearing at 17th Annual LSTA Conference, ABI Chapter 11 Reform Commission, (Oct. 17, 2012), 6-7, http://commission.abi.org/sites/default/files/statements/17oct2012/LSTA_field_hearing_transcript.docx.

[7] *Cf.* Ziad Raymond Azar, *Bankruptcy Policy: A Review and Critique of Bankruptcy Statutes and Practices in Fifty Countries Worldwide*, 16 Cardozo J. Int'l & Comp. L. 279, 373 (2008) (identifying predictability and transparency, among other things, as factors that encourage creditor participation in the bankruptcy process).

[8] *See*, Thomas Moers Mayer, *Liquidity, Disclosure and their Enemies: Securities Issues and Trading Freezes in Chapter 11*, Am. Coll. of Bankr. Comm. on Best Practices in Connection with the Disclosure of Information in Chapter 11, 2 (June 2004), http://www.kramerlevin.com/media/PublicationDetail.aspx?publication=587 (asserting that liquidity of securities and other claims provides fairness to the reorganization process); *see also* Testimony of Edward I Altman, *supra*, at p. 4 (defaulted and distressed debt market have "totaled close to $1 trillion (face amount) each year since 2000 and more than that figure since 2008.").

[9] *In re Coastal Plains*, 179 F.3d at 208 (1999) (citing generally *Oneida Motor Freight*, 848 F.2d 414 (1988), cert. denied, 488 U.S. 967 (1988) (stating that "Viewed against the backdrop of the bankruptcy system and the ends it seeks to achieve, the importance of this disclosure duty cannot be overemphasized.").

[10] *See, e.g., In re Alterra Healthcare Corp.*, 353 B.R. 66, 73 (Bankr. D. Del. 2006) (in context of request to file information under seal; "There is a strong presumption in favor of public access to bankruptcy proceedings and records. During a chapter 11 reorganization, a debtor's affairs are an open book and the debtor operates in a fish bowl.") (citations omitted); *see also In re Barney's Inc.*, 201 B.R. 703, 707 (Bankr. S.D.N.Y. 1996) (discussing standard to be applied in request to seal certain information under section 107(b) of the Bankruptcy Code; "To some extent, § 107(a)'s directive for open access flows from the

debtor's duty to provide information to creditors and other parties in interest is well recognized in all aspects of a chapter 11 case—from the continuing duty to provide accurate schedules[11] and other information[12] to section 1125 of the Bankruptcy Code's requirement to provide adequate information in a disclosure statement.[13] A debtor's obligation to provide monthly operating reports ("**MOR**") is no different than other chapter 11 requirements; the importance of the MOR to the chapter 11 process cannot be overstated. As held by bankruptcy courts, "Timely and accurate financial disclosure is the life blood of the Chapter 11 process. Monthly operating reports . . . are the means by which creditors can monitor a debtor's post-petition operations."[14] Failure to file periodic reports, alone, can be deemed a sufficient basis to dismiss or convert a chapter 11 case.[15] The U.S. Trustee in a chapter 11 case is charged with the responsibility to oversee the debtor's compliance with the reporting requirements, and authorized to take "such action as the United States trustee deems to be appropriate to ensure that all reports, schedules, and fees required to be filed under title 11 and this title by the debtor are **properly and timely** filed."[16]

The Bankruptcy Code and Bankruptcy Rules set forth a general framework with respect to information that a debtor or trustee must disclose in a chapter 11 bankruptcy to creditors, investors and other parties in interest (together, **"Interested Parties"**), as further discussed below. As discussed more fully below, in 2005, Congress enacted BAPCPA, which, among other things, directs the Attorney General to promulgate rules

---

nature of the bankruptcy process – which is heavily dependent upon creditor participation, and which requires full financial disclosure of debtor's affairs.") (internal quotations and citations omitted).

[11] *See* Fed. R. Bankr. P. 1007; *see also Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 208 (5th Cir. 1999) ("The duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action").

[12] *See* 11 U.S.C. §§ 704, 1006, and 1107; *see also In re Coastal Plains*, 179 F.3d at 208 (1999); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3rd Cir. 1988).

[13] 11 U.S.C. § 1125. Section 1125(b) requires that postpetition solicitation of acceptances or rejections of a plan must be accompanied by a disclosure statement approved by the court as containing adequate information, which is defined in subsection (a)(1) as "information of a kind, and in sufficient detail, as far as reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, . . . that would enable . . . a hypothetical investor [typical of the holders of claims or interests in the case] of the relevant class to make an informed judgment about the plan."

[14] *In re Berryhill*, 127 B.R. 427, 433 (Bankr. N.D. Ind. 1991); *see also Kevin A. McKenna v. Official Comm. of Unsec'd. Creditors (In re McKenna)* , 2011 WL 2214763 at *7 (D.R.I. May 31, 2011) (affirming appointment of chapter 11 trustee for failure to file adequate disclosure statement); *In re Franco*, 2012 Bankr. LEXIS 3524 at *14 (Bankr. D.P.R. July 27, 2012) (collecting cases; "Refusal or inability to provide financial disclosure sounds the death knell of a Chapter 11 case. The failure to file monthly operating statements ... 'whether based on inability to do so or otherwise, undermines the Chapter 11 process and constitutes cause for dismissal or conversion of the Chapter 11 proceedings.'" Citing *In re Tornheim*, 181 B.R. 161, 164 (Bankr. S.D.N.Y. 1995)).

[15] Bankruptcy Code at § 1112(b)(4)(F) (defining "cause" for conversion or dismissal of a chapter 11 case as including unexcused failure to satisfy reporting requirements). *See also In re Franco, supra*, 2012 Bankr. LEXIS 3524 at *14.

[16] 28 U.S.C. § 586(a)(3)(D) (emphasis added).

requiring debtors in possession or trustees ("**Chapter 11 Debtors")** to file periodic reports through uniform forms in chapter 11 cases.[17]

However, the Attorney General or USTP has not promulgated rules for uniform MORs. In the absence of such rules, we are concerned that Chapter 11 Debtors do not provide Interested Parties with adequate financial information. We believe that greater, uniform disclosures by Chapter 11 Debtors will further enhance the effectiveness of the bankruptcy process and maximize value for the benefit of all stakeholders, including creditors, shareholders and employees. We respectfully urge the USTP to promulgate rules requiring Chapter 11 Debtors to file uniform monthly operating reports.

## II. The Bankruptcy Code Establishes a Disclosure Framework, But Additional Rulemaking is Needed to Effectuate the Objectives of the Code.

The Bankruptcy Code sets forth the general Chapter 11 Debtor disclosure requirements. Rulemaking in connection with the Bankruptcy Code is done either by the United States Supreme Court, acting through the Judicial Conference of the United States ("**Judicial Conference**"),[18] or the attorney general to implement rules and prescribe forms to carry out statutory provisions. In general, the Bankruptcy Code and Bankruptcy Rules[19] require a Chapter 11 Debtor to provide certain specific information to Interested Parties, as well as allow Interested Parties to request more information on the debtor's estate and the administration of the estate.[20] In addition, the Attorney General, acting through the USTP has, from time to time, promulgated rules[21] and forms to implement those rules.[22]

More recently, Congress recognized the need for Chapter 11 Debtors to provide additional financial reporting to Interested Parties. Accordingly, as part of BAPCPA, Congress enacted section 602 of BAPCPA ("**Section 602**") directing the Attorney

---

[17] 28 U.S.C. § 589b (section 602 of BAPCPA).

[18] 28 U.S.C. § 2075.

[19] Fed. R. Bankr. P. 1001, *et seq*., and the Official Forms related thereto ("**Bankruptcy Rules**" and "**Official Forms**") are those promulgated by the Judicial Conference. In addition, the Director of the Office of Court Administration may issue procedural forms. Bankruptcy Rule 9009. (*See* United States Courts, Bankruptcy Forms (Aug. 26, 2013), http://www.uscourts.gov/bkforms.)

[20] *See, e.g.*, Bankruptcy Code at § 704(a)(7). Section 704(a)(7), incorporated into chapter 11 through sections 1106 and 1107, provides that the trustee (or by operation of section 1107, the debtor in possession) shall "unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest."

[21] 28 C.F.R. 58.

[22] United States Department of Justice, Forms (Aug. 26, 2013), http://www.justice.gov/forms/dojform.php.

General to promulgate rules and prescribe forms requiring Chapter 11 Debtors to file periodic reports through uniform forms in chapter 11 cases.[23]

The Attorney General or USTP has not yet promulgated rules or forms pursuant to Section 602 for MORs for business Chapter 11 Debtors.[24] We respectfully urge the USTP to act pursuant to Section 602. We are concerned that without a standard or uniform form for MORs for business chapter 11 cases, the quality and level of information Chapter 11 Debtors (other than small business debtors) provide varies from region to region.[25] This disparity and lack of disclosure provides a great deal of uncertainty to Interested Parties, especially financial participants in the bankruptcy process, as they do not always receive comparable or adequate information (with respect to similarly situated Chapter 11 Debtors). Further, frequently the debtor and the applicable U.S. Trustee establish the format for an MOR early in a chapter 11 case, precluding meaningful input from creditors on the details or types of information that the debtor or U.S. Trustee will provide in such report to Interested Parties. We also believe that a uniform form pursuant to Section 602 will make the bankruptcy process more efficient and effective by providing greater certainty and transparency to Interested Parties. Below, we provide examples of other provisions under the Bankruptcy Code where rulemaking would be, or has been, helpful in facilitating disclosures by debtors or trustees.

Sections 1106 and 1107 of the Bankruptcy Code ("**Section 1106**" and "**Section 1107**" respectively) require a trustee (Section 1106) or a debtor in possession (Section 1107) to perform the duties of a trustee as specified under section 704 of the Bankruptcy Code ("**Section 704**"). Section 704(a)(8) of the Bankruptcy Code requires a chapter 7 trustee to file "periodic reports and summaries of the operations of such business, including a statement of receipts and disbursements, **and such other information as the**

---

[23] *See* 28 U.S.C. § 589b (section 602 of BAPCPA). "The information required to be filed in the reports . . . shall be that which is in the best interests of debtors and creditors, and in the public interest in reasonable and adequate information to evaluate the efficiency and practicality of the Federal bankruptcy system." H.R. Rep. No. 109-31, pt. 1 at 82 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 2005 WL 832198. Forms for final reports other than in chapter 11 have been promulgated. *See*, Procedures for Completing Uniform Forms of Trustee Final Reports in Cases Filed Under Chapters 7, 12, and 13 of the Bankruptcy Code, 28 C.F.R. § 58.7 (2008) (final rule governing uniform forms of trustee final reports issued by the Department of Justice through its component the Executive Office of the United States Trustee). In addition there are Official Forms governing the periodic monthly operating reports by Chapter 11 Debtors who are individuals (Official Form 22B) and small business debtors (Official Form 25C).

[24] Official Forms have been promulgated for MORs for small business debtors only. Official Form 25C.

[25] In many Regions there are uniform guidelines and form operating reports available from the Office of the United States Trustee in that region. *See, e.g.*, Department of Justice – Office of the United States Trustee Region 2, Operating Guidelines and Reporting Requirements for Debtors in Possession and Trustees (Feb. 18, 2011), http://www.justice.gov/ust/r02/docs/chapter11/r2_operating_guidelines.pdf. However, other regions do not have uniform guidelines or forms.

**United States trustee or the court requires**."[26] The specific information enumerated in Section 704 is limited and the Judicial Conference has adopted few applicable rules.[27] Section 704, as incorporated through Section 1106 and Section 1107 of the Bankruptcy Code provide great discretion to the U.S. Trustee in any particular case to request financial information disclosure from the Chapter 11 Debtor. From our members' experiences, absent a uniform, periodic reporting requirement for Chapter 11 Debtors, the quality and types of information Interested Parties receive from Chapter 11 Debtors vary significantly and the requirements imposed differ among U.S. Trustee offices.[28]

BAPCPA includes other authorization for additional disclosures by Chapter 11 Debtors, beyond the directive to the Attorney General in Section 602. Section 419 of BAPCPA directs the Judicial Conference to amend the Bankruptcy Rules and to prescribe Official Forms for a debtor to use to provide information on entities, which the debtor estate holds a substantial or controlling interest ("**non-debtor investments**").[29] The Judicial Conference promulgated Bankruptcy Rule 2015.3 and Official Form 26, which requires periodic reporting on the "value, operations and profitability" of non-debtor investments.[30] A debtor must file Official Form 26 with the bankruptcy court seven days

---

[26] Bankruptcy Code at § 704(a)(8) (emphasis added). This requirement is implemented, in part, by Fed. R. Bankr. P. 2015(a)(3) which requires a debtor in possession to file "the reports and statements required by § 704(a)(8), of the Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited."

[27] The Judicial Conference has specified under Bankruptcy Rule 2015(a) that a Chapter 11 Debtor must report a statement of taxes withheld or paid for employees and a statement of disbursements and quarterly fees paid. Debtors in chapter 11 are required to pay quarterly fees to the Office of the United States Trustee. 28 U.S.C. § 1930(a)(6). Bankruptcy Rule 2015(a)(5) provides a mechanism for calculation of quarterly fees due to Office of United States Trustee under 28 U.S.C. § 1930(a)(6), by requiring a quarterly report of disbursements made by a chapter 11 estate: "a statement of any disbursements made during that quarter and of the fees payable under 28 U.S.C. § 1930(a)(6) for that quarter." Debtors generally incorporate this information into the MOR.

[28] Operating guidelines for chapter 11 debtors and instructions and/or forms of MORs have been issued by the applicable office of the U.S. Trustee for some, but not all, Regions. The formats and content of these instructions and forms vary. For example, some Regions do not have uniform instructions or reports on a Region-wide basis, while others do. *Compare*, Department of Justice – Office of the United States Trustee Region 2, Operating Guidelines and Reporting Requirements for Debtors in Possession and Trustees (Feb. 18, 2011), http://www.justice.gov/ust/r02/docs/chapter11/r2_operating_guidelines.pdf; and Region 1. Some forms expressly require disclosure of payments made to statutory insiders during the reporting period, others are silent. Some forms require a narrative regarding "significant business and legal actions" by the debtor, creditors or the court during the reporting period (*see, e.g.*, Department of Justice – Office of the United States Trustee Region 5, Chapter 11 Operating Guidelines and Reporting Requirements of the U.S. Trustee, Region 5, Judicial Districts of Louisiana and Mississippi, 34 (March 15, 2011), http://www.justice.gov/ust/r05/docs/general/guidelines/ogrr11.pdf), while most have no narrative required.

[29] 28 U.S.C. § 2073 (section 419 of BAPCPA).

[30] Official Form 26 requires that a debtor provide the following information for entities in which it holds a substantial or controlling interest: (1) valuation, including valuation methodology; (2) financial statements; (3) balance sheet; (4) statement of income/loss; (5) statement of cash flows; (6) statement of changes in shareholders'/partners' equity/deficit; and (7) description of operations.

before the initial U.S. Trustee and creditors' meeting,[31] and every six months thereafter. Bankruptcy Rule 2015.3(d) expressly permits modification of the disclosure for cause, or if requested information is publicly available. We believe Bankruptcy Rule 2015.3 and Official Form 26 require debtors to provide meaningful financial information on non-debtor investments to creditors without placing undue burdens on debtors. We are not aware of any cases where a debtor was unable to meet the reporting requirements of Bankruptcy Rule 2015.3; nor of litigation over this rule.[32] We believe the rulemaking and forms pursuant to section 419 of BAPCPA have been instrumental in enhancing transparency and standardizing the financial information that debtors must disclose with respect to non-debtor investments and provide useful guidance for additional rulemaking with respect to MORs.

The Bankruptcy Code sets forth a disclosure framework and with Section 602 provides the Attorney General/USTP with ample authority to promulgate rules and prescribe forms for periodic reporting by Chapter 11 Debtors. Accordingly, we respectfully urge the USTP to exercise the discretion given to the Attorney General by Congress to promulgate uniform rules and forms for monthly and quarterly operating reports for chapter 11 cases.

## III. Recommendations for Enhancing Financial Reporting

Section 602 directs the Attorney General to promulgate uniform MORs, which include certain specific types of information regarding the debtor and the progress of the chapter 11 case,[33] in addition to "**other matters as are required by law or as the**

[31]Section 341(a) of the Bankruptcy Code, 11 U.S.C. § 341(a), requires that the U.S. Trustee convene a meeting of creditors within a reasonable time after the entry of the order for relief with respect to a debtor. This section applies in all cases under chapters 7, 11, 12, and 13 of the Bankruptcy Code. Generally speaking, the debtor is required to attend the meeting and be examined by the U.S. Trustee and creditors.

[32] There have been some cases where orders have been entered establishing agreed forms of disclosure. *See, e.g., In re Newpage Corp., et al.,* Case No. 11-12804-KG (Bankr. D. Del. Sept. 20, 2011) [Docket No. 163] ("Debtors' Motion Pursuant to Bankruptcy Code Section 105(a) and Bankruptcy Rule 2015.3(d) for an Order Authorizing the Waiver of Certain Reporting Requirements Under Bankruptcy Rule 2015.3(a) for Non-Debtor Entities"); [Docket No. 298] ("Interim Order (I) Approving the Debtors' Motion Pursuant to Bankruptcy Code Section 105(a) and Bankruptcy Rule 2015.3(d) for an Order Authorizing the Waiver of Certain Reporting Requirements for Non-Debtor Entities and (II) Scheduling a Final Hearing"); and [Docket No. 516] ("Agreed Final Order Modifying Reporting Requirements of Bankruptcy Rule 2015.3(a) Pursuant to Bankruptcy Rule 2015.3(d) for Nondebtor Entities").

[33] The categories of information are as follows: (i) industry classification of the debtor; (ii) length of time case has been pending; (iii) number of full time employees as of order for relief and end of each reporting period; (iv) cash receipts and disbursements and profitability, including cumulatively from order for relief; (v) compliance with title 11, including whether tax returns and payments have been timely filed and made since the commencement of the case; (vi) professional fees approved, including separating out information re professional fees that would have been incurred absence a bankruptcy case; and (vii) plans of reorganization filed and confirmed, including information as to recovery by class of creditors, expressed both in aggregate dollars and as a percentage of claims, *see* 28 U.S.C §589b(e).

**Attorney General in the discretion of the Attorney General shall propose**."[34] In promulgating a uniform form for chapter 11 MORs and other periodic reports, we make the following recommendations.

### A. Standardization and Uniformity

We recommend that the USTP adopt rules requiring that Chapter 11 Debtors file uniform forms. In the absence of rules and forms from the USTP, currently, the practices greatly differ among U.S. Trustee regions. Some U.S. Trustee offices have adopted guidelines with respect to the form and content of the periodic reports required pursuant to Section 602, while others have not. We believe it is important for the USTP to standardize the type of information that Chapter 11 Debtors report. We believe it is appropriate though for a rule or form under Section 602 to allow for some flexibility or differences in reporting due to the size and complexity of a chapter 11 case or the circumstances of a particular debtor.[35] We submit, however, that the burden for obtaining relief from the USTP's rules or form requirements should rest with the Chapter 11 Debtor.

### B. Securities Law as a Source for Guidance

We believe the Federal securities laws present useful guidance for the types of information that would be meaningful to Interested Parties in chapter 11 cases. We believe that the USTP should consider incorporating reporting requirements, similar to regulations under the Securities Exchange Act of 1934 for an issuer with a security registered with the Securities and Exchange Commission ("**SEC**") (an "**SEC reporting company**"), in a uniform MOR for Chapter 11 Debtors.

The Federal securities laws and regulations provide a well-developed body of law concerning reporting requirements for SEC reporting companies.[36] Many chapter 11 debtors are SEC reporting companies prior to entering into chapter 11 bankruptcy. We believe many of the required disclosures that an SEC reporting company must make would be extremely useful in helping Interested Parties evaluate a Chapter 11 Debtor's operating performance. In particular, we outline the following three elements.

First, we believe the USTP should require Chapter 11 Debtors to provide in an MOR an analysis of the information presented or the applicable risk factors affecting the reporting entity. Currently, Chapter 11 Debtors do not provide a management's

---

[34] 28 U.S.C. § 589b(e) (emphasis supplied).

[35] *See, e.g.*, Bankruptcy Rule 2015.3(d) (providing that a court may, after notice and a hearing, vary the reporting requirement established [by the rule] for cause….).

[36] *See, e.g.*, U.S. Securities and Exchange Commission – Division of Corporate Finance, http://www.sec.gov/divisions/corpfin.shtml (last visited May 30, 2013). There are three main types of periodic reports: 10K, which are filed annually, 10Q, which are filed quarterly, and 8K, which are filed following the occurrence of a material event or entry into material transaction.

discussion and analysis section ("**MD&A**") or other analysis—at best there may be a statement regarding the basis of the presentation.

The SEC has issued extensive guidance on the contents of periodic reports, including the requirements for an MD&A.[37] The purpose of the MD&A is to explain the company's performance and enhance shareholder understanding of the company's overall financial disclosure. Generally, an MD&A includes discussion of a company's: key indicators for its financial condition; liquidity and capital resources; anticipated capital expenditures; and financial performance. An MD&A may also include discussion of a company's off-balance sheet arrangements, related party transactions, and accounting practices.[38] Such information and guidance would be instrumental for assisting Interested Parties in evaluating a debtor's operating performance in a chapter 11 case.[39]

Second, the SEC regulations make it clear that a company's transactions and contracts with insiders (officers, directors, and affiliates) should be disclosed.[40] The securities regulations also require a reporting company to disclose changes in directors or executive officers, non-reliance on previously issued financials, changes in auditors, and changes in director and officer compensation.[41] We believe the USTP should adopt similar requirements in a Chapter 11 Debtor MOR.

Third, the SEC regulations take into account the size of a reporting company and reduce certain reporting requirements for small reporting companies.[42] We believe the USTP's rules and forms pursuant to Section 602 should recognize the need for differences in reporting due to the size and complexity of a chapter 11 case or other circumstance of a chapter 11 debtor.

We recommend that the USTP adopt rules and prescribe forms pursuant to Section 602 that incorporate reporting requirements similar to those for SEC reporting companies. Specifically, such rules or MOR forms should require a Chapter 11 Debtor to include an MD&A discussion; require a Chapter 11 Debtor to disclose a Chapter 11

---

[37] *See, e.g.*, Division of Corporate Finance, Disclosure Guidance, U.S. Securities and Exchange Commission, http://www.sec.gov/divisions/corpfin/cfdisclosure.shtml (last visited May 30, 2013).

[38] The MD&A and discussion of risk factors required for a quarterly Form 10-Q is less detailed than that required in the annual Form 10-K.

[39] It would not be necessary to have full MD&As in every MOR. Just as reports regarding disbursements under 28 U.S.C. § 586(a)(3)(D) are only required on a quarterly basis, the requirement for an MD&A could be so limited.

[40] *See, e.g.*, 17 C.F.R. 240.10b5-1 (2000); 17 CFR 240.10b5-2 (2000); 17 C.F.R. 243.100-103 (2011).

[41] *See also,* SEC Form 10-K and 10-Q (requiring that a reporting company provide: an analysis of risk factors affecting the company, including an explanation of how it may affect the company; information on management compensation; changes in officers and directors; and related party transactions.

[42] *See, e.g.*, 17 C.F.R. 229.10(f) (2012) (setting out reporting requirements for entities that qualify as a "smaller reporting company" that are different from those applicable to other companies under Regulation S-K).

Debtor's transactions and contracts with insiders, changes in directors or executive officers, non-reliance on issued financials, changes in auditors, and changes in director and officer compensation; and provide a mechanism that addresses the need for differences in reporting due to the size and complexity of a chapter 11 case or other circumstance of a Chapter 11 Debtor.[43]

### C. Presumption In Favor of Continued SEC Reporting Postpetition

We believe the USTP rules should reinforce the notion with respect to a debtor that is an SEC reporting company that the commencement of a chapter 11 case does not relieve a debtor of its pre-existing SEC reporting obligations. A debtor that is an SEC reporting company prior to entering into chapter 11 bankruptcy should not be permitted to cease reporting without leave of the court for cause, after notice and a hearing. We believe the USTP should require a debtor to continue meeting its SEC-reporting obligations, or modified-reporting obligations, and only allow a bankruptcy court to vacate a debtor's reporting obligations in circumstances where, essentially, a debtor is no longer operating.[44]

The mere filing of a petition for relief under the Bankruptcy Code does not relieve a company from its SEC reporting obligations. SEC regulations require an SEC reporting company to continue meeting its SEC reporting obligations until it deregisters its security or the required information is unknown or not reasonably available to the SEC reporting company.[45] An SEC reporting company may also seek SEC no-action letter relief from its SEC reporting obligations during its chapter 11 bankruptcy.[46] However, the SEC grants limited relief in such circumstances.[47] The SEC has provided guidance citing the no-action letter granted to Evolve Software, Inc.[48] as the paradigm for when the SEC staff

---

[43] We note that these requirements should not be limited to Chapter 11 Debtors that are prepetition date reporting companies, but rather should apply to all Chapter 11 Debtors (or groups of related debtors) that are sufficiently large enough measured by assets or number of creditors, to require the more formal disclosure requirements.

[44] Federal securities law provides a company with relief from reporting, either by delisting, *see* 17 C.F.R. § 240.12h-3, or if the required information is unknown and would require unreasonable effort or expense, *see* 17 C.F.R. § 240.12b-21.

[45] *Id*.

[46] *See* Application of the Reporting Provisions of the Securities Exchange Act of 1934 to Issuers Which Have Ceased or Severely Curtailed Their Operations, Exchange Act Release No. 9,660, 1972 LEXIS SEC 449 (June 30, 1972); and Staff Legal Bulletin No. 2, 1997 SEC No-Act. LEXIS 538 (Apr. 15, 1997); *see also* Evolve Software, SEC No-Action Letter, 2003 SEC No-Act. LEXIS 630 (Jul. 16, 2003).

[47] "[T]he Commission will consider the following: (1) how difficult it is for the issuer to obtain the information necessary to complete those reports; (2) the issuer's financial condition; (3) the issuer's efforts to advise its security holders and the public of its financial condition and activities; and (4) the nature and extent of the trading in the issuer's securities." *See* Staff Legal Bulletin No. 2, 1997 SEC No-Act. LEXIS 53, at *3 (Apr. 15, 1997).

[48] Evolve Software, 2003 SEC No-Act. LEXIS 630.

will grant an SEC reporting company in bankruptcy relief from SEC-reporting obligations.[49]

In the *Evolve Software* case, the debtor made its request to be relieved from reporting obligations under the securities laws only after it had completed a sale of substantially all of its assets, had filed a liquidating plan of reorganization, had a confirmation hearing scheduled for the following month, and its remaining activities consisted solely of administrative activities required to obtain approval of a chapter 11 plan of liquidation and to subsequently liquidate any remaining assets. Evolve further predicted that there would be no distribution to the holders of its common stock, the only securities it had registered, and that trading in that stock had effectively ceased. In these circumstances, the SEC staff approved limiting Evolve's reporting obligations while it remained in chapter 11 bankruptcy—requiring it only to file Form 8-Ks, to file all financial reports required by the bankruptcy court, and to provide "disclosure regarding material events relating to the liquidation, the likelihood of any liquidation payments being made to security holders, and the amounts of any liquidation payments and expenses."[50]

While the standard enunciated in the Evolve Software SEC no-action letter is uncontroversial, we are concerned with the mechanism by which a debtor seeks such relief. The decision to seek reporting relief from the SEC lies with the debtor. The SEC no-action process does not provide a bankruptcy court or Interested Parties with an opportunity to comment or object.

MFA submits that there should be a rebuttable presumption for a chapter 11 debtor that is an SEC reporting company to continue meeting its SEC-reporting obligations during bankruptcy. MFA recommends that the USTP require a Chapter 11 Debtor to seek bankruptcy court approval after notice and a hearing before seeking relief from its SEC-reporting obligations. We believe such a rule would promote the general policy that a debtor needs to disclose material information concerning its operations and assets, while also providing a debtor with a mechanism to seek relief, as necessary.

---

[49] "With respect to the nature and extent of trading in the issuer's securities, the Division has indicated that it will not issue a favorable response to a request for modified reporting if there is an active market for the issuer's securities. Specifically, the Division has required issuers to demonstrate that their securities are not traded on a national securities exchange and that there is otherwise minimal trading in the securities. The staff believes that the nature and extent of trading of the issuer's securities as described in the Evolve Software, Inc. no-action letter (Jul. 16, 2003) is representative of 'minimal' trading for purposes of determining whether modified Exchange Act reporting is consistent with the protection of investors. [September 30, 2008]" Division of Corporate Finance, SEC Compliance and Disclosure Interpretations, Section 130. Section 13(a), Question 130.01, U.S. Securities and Exchange Commission, (December 4, 2012), http://www.sec.gov/divisions/corpfin/guidance/exchangeactsections-interps.htm.

[50] Evolve Software, SEC No-Action Letter, 2003 SEC No-Act. LEXIS 630 (Jul. 16, 2003).

### D. Consolidating vs. Consolidated Reporting

We believe the USTP's rules and forms under Section 602 should provide guidance as to when multiple affiliated debtors may, if at all, consolidate financial reporting. In cases where affiliated debtors have each filed petitions for relief under chapter 11 and their cases have not been consolidated other than for administrative purposes, we believe it is important that the USTP rules recognize the differing interests that may exist among the various estates and their separate creditors.

Although each chapter 11 debtor is the subject of its own chapter 11 case and has independent chapter 11 reporting obligations, in practice when affiliated companies are each subject to chapter 11 bankruptcy, generally, the affiliated companies will consolidate their financial reporting. Unfortunately, in such cases, only certain information is provided on a debtor-entity by debtor-entity basis. We are concerned that such limited, "consolidated" disclosure reports do not provide Interested Parties with adequate information concerning in areas that may give rise to the conflicts among the affiliated debtors' estates and creditors. We believe such concern would be best addressed by requiring affiliated debtors to provide periodic reports for each debtor-entity of certain material information, including full financials for each operating entity or entity with material levels of assets or separate debt (*i.e.*, debt not guaranteed or otherwise the obligation of the other affiliated debtors), and information regarding intercompany claims and obligations. Therefore, MFA recommends that the USTP adopt rules and forms under Section 602 that require affiliated debtors to provide periodic reports, consolidating information that each debtor-entity needs to individually report.

### E. Accountability/Periodic Review of Reporting Obligations

Finally, in recognition that chapter 11 cases evolve over time, we believe that the USTP should establish: (a) a mechanism for periodic review of the reporting requirements within a particular chapter 11 case or group of related cases, particularly in larger cases; or (b) require that the debtor file a request for approval of disclosure on a regular basis (*e.g.*, every six months prior to confirmation of a plan of reorganization). We believe such recommendation would establish a formal mechanism for reviewing reporting requirements to accommodate changes in a debtor's circumstances, and, equally important, provide notice to Interested Parties and an opportunity to raise comments or concerns.

Currently, the Bankruptcy Code, Bankruptcy Rules, and related rules provide parties with flexibility to negotiate and agree on the information and format for disclosure. We are aware of very few cases where parties actually make use of such flexibility, except in the most general of terms. In a typical case, the debtor in possession and the applicable U.S. Trustee may agree to some variations from the standard form that is in use in the relevant district, but once they agree upon the scope of information and format, they rarely change it over the course of a chapter 11 case, regardless of changes in the debtor's circumstances or developments in the chapter 11 case. A notable

exception is found in the recent case *In re Lehman Bros. Holding Inc., et al*.[51] In that case, the debtors revised the type and format of information provided as a part of the monthly operating reports, to include among other things quarterly updates on hedging transactions, in response to and after negotiation with an *ad hoc* committee of certain creditors and the official committee appointed in those cases.[52] The modified form of periodic reports added detailed sources and uses of cash, including whether cash was derived from live or terminated derivative transactions, or hedging, principal or interest on loans for various types of transaction, payments on derivatives, and preservation of assets, intercompany receipts and disbursements, and foreign exchange fluctuation, and a quarterly summary of the results of hedging transactions. In light of the posture of the *Lehman* case as an orderly liquidation following the sale of substantially all of its on-going business operations early in the case, the revised MOR gave Interested Parties more meaningful insight into the progress of that liquidation.

MFA recommends that the USTP establish a formal mechanism to reassess a Chapter 11 Debtor's reporting requirements in light of any changed circumstances, while also providing Interested Parties an opportunity to provide feedback or contest changes.

***  *  *  *  ***

[51] *In re Lehman Bros. Holding Inc., et al.,* Case No. 08-13555 (Bankr. S.D.N.Y.).

[52] *Compare In re Lehman Bros. Holding Inc., et al.*, Case No. 08-13555 (Bankr. S.D.N.Y.), [Docket No. 10745] ("Monthly Operating Report: July 2010") and [Docket No. 10745] ("Monthly Operating Report: September 2011").

## IV. Conclusion

Currently, the U.S. Trustee guidelines and forms for chapter 11 disclosures vary from region to region. As a result, there isn't a national or standard level of disclosure by Chapter 11 Debtors, and it can be difficult for Interested Parties to obtain information to evaluate a Chapter 11 Debtor's progress or effectively monitor the developments in a chapter 11 case. We believe that establishing uniform monthly, and to the extent applicable, quarterly, operating report for chapter 11 cases would enhance the efficiency and effectiveness of the bankruptcy process. Accordingly, MFA recommends that the USTP promulgate rules and prescribe uniform forms pursuant to Section 602 for monthly and quarterly operating reports for chapter 11 cases (other than small business cases) as discussed in this letter. MFA stands ready to provide additional assistance with respect to rules, forms or guidance pursuant to Section 602. We welcome the opportunity to discuss our letter with the USTP and answer any questions or comments. Please do not hesitate to contact the undersigned or Jennifer Han, Associate General Counsel, at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director, General Counsel