COMMERCIAL FINANCE ASSOCIATION

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February 15, 2010 **09-BK-144**

VIA EMAIL AND FEDEX

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendment of Federal Rule of Bankruptcy Procedure 2019

Dear Mr. McCabe,

The Commercial Finance Association ("CFA") appreciates the opportunity to comment on the proposed amendment to Federal Rule of Bankruptcy Procedure 2019 ("Proposed Rule 2019") and submits the following comments and suggestions for consideration by the Committee.

The CFA is a national trade association for financial institutions that provide asset-based financing and factoring services to commercial borrowers. The nearly 300 member lenders of CFA include substantially all of the money-center banks, regional banks and other large and small commercial lenders engaged in asset-based lending. Additional information about CFA may be found at www.cfa.com.

While other organizations have commented on the scope of the disclosures that might be required under Proposed Rule 2019 and the impact of such disclosures on the trading of claims, our focus on behalf of the CFA is more narrow. The purpose of our comments is simply to point out that, as revised, the Rule may technically apply to certain situations that we do not believe were intended to be covered.

The financing to corporate borrowers provided by members of the CFA covers a wide range of businesses, in all industries, of all sizes and credit quality. A significant segment of the loan market that CFA members serve consists of syndicated revolving and term loan credit facilities provided to a corporation or group of affiliated corporations where one lending institution is selected as the agent for all of the lenders in the syndicate, solely for administrative ease to manage certain aspects of the credit facility on behalf of the entire syndicate. Having a single institution act as agent is, of course, common for various types of loan facilities, but the need is particularly acute for asset-based credit facilities of the type provided by CFA members, due to the special requirements relating to the monitoring of the collateral that are essential to asset-based credit facilities.

The objectives behind Proposed Rule 2019 do not seem intended to place additional burdens of disclosure upon the agent for a group of lenders in a typical syndicated credit facility. However, as proposed, the Proposed Rule 2019 might be read to both (i) require the agent in a syndicated credit facility to disclose the "disclosable economic interest" of each and every individual debt holder in the lending facility and (ii) include the agent, regardless of its authority under the loan documents, as an "entity" that "represents more that one creditor" (namely, every lender in the lending syndicate), thereby requiring the agent to disclose the individual position of every lender in the syndicate.

The customary authority of agents in syndicated loan facilities under the terms of their agency (as set forth in the loan documents) does not include the right to compel disclosure by the lenders of their individual economic positions. For the most part, the agent acts at the direction of the lenders. Consequently, the agent would only

disclose information about the lenders to the extent directed by the lenders. It is inconsistent with this basic paradigm to require the agent to direct the lenders to disclose information about their debt. More generally, the agent should not be the means for the disclosure by the individual lenders of their position. This is beyond the role that agents play in such facilities. Such disclosures should be made directly by the individual lenders.

In terms of being an entity that represents more than one creditor, there is a significant distinction between the roles an institution plays in a syndicated facility when it is both a lender and an agent. In its capacity as an agent, an institution does not hold any debt. The debt is held by that institution in its capacity as a lender. Therefore, Proposed Rule 2019 should not suggest that the agent should disclose its position.

Without further clarification, Proposed Rule 2019 could be read to require the agent to disclose its individual position. To only disclose a single institution's position because it also happens to be the agent does not seem consistent with the objectives of the Proposed Rule. There does not seem to be a basis for singling out the agent for such disclosure as contrasted with other members of the lending syndicate. At the same time, to describe the position of just the institution that is the agent might be misleading and confusing to other parties in interest.

Of course, to the extent that the institution acting as agent in a given credit facility is also a lender in that facility, as is commonly the case, it would be subject to the same requirements of disclosure under Proposed Rule 2019 (to the extent the Rule is otherwise applicable). Based on the foregoing, it is the position of the CFA that to require public disclosure of the holdings of every lender in a syndicated credit facility simply because it is an agented facility is not required by the rationale behind Proposed Rule 2019. Given that the agent does not actually "represent" the lenders for disclosure purposes Proposed Rule 2019 should be clarified to eliminate this ambiguity.

To avoid potential misinterpretation of the scope of the revised Rule, the CFA would recommend that the first sentence of clause (b) of Proposed Rule 2019 be modified to expressly exclude agents acting in such capacity as part of a syndicated credit facility, in a manner consistent with the position of certain of the other organizations that have provided comments.
We would propose that the first sentence of clause (b) of the Proposed Rule 2019 read as follows:

> "In a chapter 9 or 11 case, every entity, group or committee that consists of or represents more than one creditor or equity security holder other than (i) any party in its capacity as an agent under any loan or credit agreement, factoring, securitization or receivables purchase agreement, security agreement or other agreement to provide credit, whether in the form of loans, letters of credit or other financial accommodations, (ii) one or more funds represented by the same or an affiliated investment manager, and (iii) two or more affiliated creditors and, unless the court directs otherwise, every indenture trustee, shall file a verified statement setting forth the information specified in subdivision (c) of this rule."

The proposed changes from the Proposed Rule are marked in the text above.

The addition of clauses (ii) and (iii) are simply to clarify that, merely because affiliated entities are involved, it is not a "group" within the contemplation of Proposed Rule 2019 so as to trigger disclosure.
The CFA respectfully requests that Proposed Rule 2019 be revised as set forth herein.

Respectfully submitted,
The Commercial Finance Association

By: