

Overview and Analysis of Select Provisions of the ABI Chapter 11 Reform Commission Final Report and Recommendations

By Orrick Restructuring Group



Table of Contents



In December, the American Bankruptcy Institute issued its Final Report and Recommendations of the Commission to Study the Reform of Chapter 11. The Report is almost 400 pages long and contains more than 200 recommendations. Twenty-two Commissioners, including attorneys, academics, financial advisors and a former bankruptcy judge spent more than two years taking testimony from over 90 additional restructuring experts and considering the reports provided by 13 advisory committees, each comprised of 10-12 members from the bankruptcy bench, the bankruptcy bar, the financial community and academia. The Commission developed the report with goals including: reducing barriers to entry for debtors, facilitating more efficient resolution of disputed matters, enhancing debtors’ restructuring options and creating an alternative restructuring scheme for smaller businesses.

The recommendations do not constitute proposed legislation. Rather, the Report represents the opinion of the Commissioners and will spur debate. It ultimately could help lead to comprehensive overhaul of the almost 40-year old Bankruptcy Code. Recognizing that major bankruptcy reform generally takes years to wind its way through Congress, the Report implicitly acknowledges that 2018 is an appropriate target date for reform.

That does not mean the Report should be taken lightly, as it represents the consensus view of many well-regarded bankruptcy practitioners, academics and judges. At minimum, the Report will mark the commencement of a conversation about what the Commissioners view as much-needed reforms to the Bankruptcy Code. We also expect the report to receive the attention of judges and litigants in upcoming matters. Parties may look to the Commission’s interpretations of open legal questions as support for their assertions that certain interpretations represent the “better” argument or the “intended” result.

The Report covers nearly every aspect of the chapter 11 process with a multitude of suggested modifications to the Bankruptcy Code and bankruptcy jurisprudence. Below is our analysis of a number of the Commission’s most critical recommendations and of the potential impact of the proposed recommendations on the bankruptcy process. We will publish our analysis in three parts. This first part focuses on issues related to confirmation, valuation, financing and asset sales. The second part focuses on modifications to the Bankruptcy Code’s “safe harbors” for derivatives and other complex financial transactions. The final part focuses on professional compensation, treatment of executory contracts and other interesting topics.

Issues Related to Confirmation of a Plan:	
Modifications to the Absolute Priority Rule	1
Prohibition on Nonconsensual Gifting	3
Eliminating “Cram-down” Requirement that a Plan be Approved by an Impaired Class of Claims	4
Basing Cram-down Interest Rate On Market-Based Approach	5
Financing Issues:	
Select Issues in Post-petition Financing: Roll-Up Post-Petition Financing and Milestones	6
Calculating Collateral Value for Adequate Protection	8
Asset Sales:	
60 Day Moratorium on Sales of Substantially All Assets and Elimination of Potential Chilling Effect as “Cause” to Limit Credit Bidding	9

Issues Related to Confirmation of a Plan

Modifications to the Absolute Priority Rule

Current State of the Law

Under section 1129(a) of the Bankruptcy Code, a plan may be confirmed if under the plan, all classes either get paid in full or consent to the plan. If neither of these criteria are satisfied, a debtor may still confirm a plan under section 1129(b) of the Bankruptcy Code if, among other things, at least one impaired class votes to accept the plan. Even if an impaired class votes in favor of the plan, the plan must, among other things, be fair and equitable and satisfy the “absolute priority” rule. Under section 1129(b)(2), a court cannot confirm a plan unless, with respect to dissenting secured creditors, such creditors retain their liens and receive deferred cash payments totaling the allowed amount of their secured claim or receive the indubitable equivalent of the value of the secured claim. With respect to unsecured claims, no junior class of creditors may recover unless the claims of any dissenting senior class have been paid in full.

Commission Recommendation

The Commission’s recommendation would alter the absolute priority rule so that the class immediately junior to an impaired senior class may receive distributions, even if such senior class has not been paid in full. This recommendation, which applies to both chapter 11 plans and 363 sales of all or substantially all of the debtor’s assets in large-scale cases, is based on the Commission’s view that the “reallocation of the reorganized firm’s future value in favor of senior stakeholders and away from junior stakeholders” under current law is “subjectively unfair.” Report at 207. Specifically, the Commission is concerned that valuations for plan confirmation may not take into account potential upside that occurs soon after exit from bankruptcy, resulting in a potential windfall for senior creditors.

To remedy this perceived unfairness, the Commission proposes that junior creditors receive a value distribution based on a “redemption option.” The redemption option is a three year option (starting on the petition date) to “purchase” the debtor’s enterprise, with a strike price equal to the full amount of the senior creditor’s claim. The redemption option addresses “the possibility that

... an immediately junior class might have been in the money or received a greater recovery if the firm had been valued at a later date.” Report at 208. Therefore, the redemption option allows junior creditors to benefit from an increase the debtor’s value that takes place after plan confirmation or a section 363 sale. The Report notes that possible methods of paying the redemption option value include “pursuant to the plan or section 363 sale order in the form of cash, debt, stock warrants or other consideration.” Report at 210. In the context of 363 sales, this recommendation will require senior creditors to set aside a form of compensation for the immediately junior class in the event the debtor’s enterprise value surpasses the allowed amount of senior claims during the three year option period. It need not actually be in the form of an option, but merely need reflect that option value.

While the Commission notes that the principles set forth in this recommendation “provide a conceptual framework for an adjustment to the current absolute priority rule,” it believes that sections 1129(b) and 363 of the Bankruptcy Code should be amended accordingly. Specifically, the Commission recommends that section 1129(b) of the Bankruptcy Code should be amended to provide, among other things, that (i) a “chapter 11 plan may be confirmed over the non-acceptance of the immediately junior class if and only if such immediate junior class receives not less than the redemption option value, if any, attributable to such class”; and (ii) a “chapter 11 plan may be confirmed over the non-acceptance of a senior class of creditors, even if the senior class is not paid in full within the meaning of the absolute priority rule, if the plan’s deviation from the absolute priority rule treatment of the senior class is solely for the distribution to an immediately junior class of the redemption option value, if any, attributable to such class.” Report at 208-09.

The Commission recommends that Congress amend section 363 of the Bankruptcy Code to provide, among other things, that “if members of an immediately junior class do not object to the sale, the immediately junior class should be entitled to receive from the reorganization value attributable to such sale not less

than the redemption option value, if any, attributable to such immediately junior class.” Report at 209. If the immediately junior class objects to the sale, they will not be entitled to the redemption option value.

The Commission’s recommendation fundamentally alters the Bankruptcy Code’s existing priority scheme and the expectations of senior creditors. Senior creditors typically receive less return on their investment because they have bargained for greater certainty that the principal amount of their loan will be repaid in full. In contrast, junior creditors typically receive greater return on their investment but, at the same time, experience greater risk that their principal will not be repaid in full if the borrower defaults or enters bankruptcy. If Congress codifies this recommendation, senior creditors will be deprived, to some extent, of the benefit of their bargain. Moreover, the redemption option will especially divert value away from senior creditors who receive equity in a reorganized debtor – as opposed to cash or replacement notes – on account of their claims. In such “loan to own” bankruptcy cases, senior lenders agree to receive equity in the reorganized debtor in hopes that the reorganized debtor’s enterprise value will increase post-bankruptcy.

Practically, we would expect parties to negotiate away from a long-term option and instead exchange value at the time of confirmation, a likelihood acknowledged in the Report. In essence, the option merely represents a negotiating chip for junior creditors to extract value, and possibly a significant windfall for junior creditors.

This proposal, if enacted, could alter significantly the economics of the various classes of debt, and could alter fundamentally the plan negotiation process. The redemption option could create a significant hurdle to confirmation as the parties attempt to address the proper redistribution of value. Moreover, it could cause significant uncertainty in the pricing of distressed debt in the secondary market, which could affect strategy employed by secondary buyers seeking equity-like interests.

The current assumption, that investors looking for equity returns would move to the fulcrum security based on current valuations, could be undermined. Rather, the out of the money security may hold equity-upside through the redemption value option. As a result, investors may look further down the capital structure.

Prohibition on Nonconsensual Gifting

Current State of the Law

As noted in the prior section *Modifications to the Absolute Priority Rule*, the “absolute priority rule” governs distributions in non-consensual plan confirmation. Despite the absolute priority rule, some courts have permitted senior or secured creditors to voluntarily “gift” a portion of their recovery to junior or unsecured creditors to obtain such creditors’ support for the plan. These courts take the view that gifting facilitates consensual confirmation and promotes efficient resolution of the bankruptcy case. Such courts hold that once the amount of senior creditors’ allowed claims has been determined, this value belongs to the secured creditors to distribute as they wish.

Other courts prohibit gifting, viewing it as circumventing the absolute priority rule, and expressing concern that creditors with disproportionate bargaining power – particularly insiders – will collude to unduly influence the plan process and extract more than their share of value from the estate. Some of these courts have invalidated the votes of creditors who attempt to distribute a portion of their recovery to junior classes.

Commission Recommendation

The Commission recommends that gifting be prohibited in the nonconsensual context. The Commission determined that “the potential abuses of gifting” such as “senior creditors imposing their will or unduly influencing plan negotiations” outweigh the benefits, such as “lowering barriers to confirmation of feasible plans” and providing distributions to more creditors. Report at 239.



An absolute prohibition on gifting is inconsistent with the Commission’s emphasis on efficiency. Granted, the prohibition works in tandem with the Commission’s proposed elimination of the requirement that a plan be approved by at least one impaired class of claims, as gifting would then be unnecessary to win the class’s support for the plan. (See section titled *Eliminating “Cram-down” Requirement that a Plan be Approved by an Impaired Class of Claims*.) However, even if Congress does not eliminate the impaired consenting class requirement, gifting would still serve as a carrot to persuade holdup creditors not to object to confirmation.

In addition to undermining efficient resolution of the case, a prohibition on nonconsensual gifting is also inconsistent with the Commission’s emphasis on distributing value further down the capital structure, as embodied in their recommendation to provide a “redemption option” to junior classes (see section titled *Modifications to the Absolute Priority Rule*) and use of the foreclosure value for adequate protection purposes (see section titled *Calculating Collateral Value for Adequate Protection*).

Eliminating “Cram-down” Requirement that a Plan be Approved by an Impaired Class of Claims

Current State of the Law

Under section 1129(a)(10) of the Bankruptcy Code, if a class of claims is impaired under the plan, the court can only confirm a plan, if “at least one class of claims that is impaired under the plan has accepted the plan” As noted in the prior section *Modifications to the Absolute Priority Rule*, in the absence of an impaired accepting class of claims, the debtor or plan proponent cannot confirm a “cram-down” plan under section 1129(b) of the Bankruptcy Code. The logical interpretation of the intent of this provision is that a court cannot confirm a plan that lacks any creditor support.

Commission Recommendation

The Commission has recommended eliminating section 1129(a)(10) in its entirety so that confirmation of a chapter 11 plan will no longer require acceptance of the plan by an impaired class of claims. Contrary to the assertions of some courts and commentators, the Commission notes that there is no support – in legislative history or otherwise – for the view that section 1129(a)(10) was intended to ensure that a plan must have some creditor support. Rather, the Commission believes that “the potential delay, cost, gamesmanship, and value destruction attendant to section 1129(a)(10) in all cases significantly outweigh[s]” any potential benefit derived from having a plan supported by impaired creditors. Report at 261.

Creditors holding large blocks of claims will likely be impacted if the Commission’s recommendations are enacted. Such creditors often hold a “blocking position” (meaning greater than one-third the amount of all allowed claims in a particular class so they can effectively control the class vote) which gives them leverage in the plan negotiation process. Under the recommendation, creditors holding a blocking position would lose the ability to block a plan, shifting bargaining power to the debtor. This recommendation could also depress the market for bankruptcy claims trading because investment funds and other large creditors will have less incentive to acquire claims in an attempt to obtain a blocking position.

This could also lead to more aggressive gerrymandering of classes as courts will not need to be wary of an effort to create an impaired accepting class. Finally, if implemented, this recommendation will have a profound impact in cases with only one creditor class – such as a single asset or special purpose entity. Single asset debtors often struggle to reorganize non-consensually because it is difficult for them to obtain an impaired consenting class. Thus, creditors of such debtors hold overwhelming leverage, which could be reduced under this proposed change.

Basing Cram-down Interest Rate On Market-Based Approach

Current State of the Law

As noted above, under section 1129(b)(2)(A)(i) of the Bankruptcy Code, a plan proponent can cram-down a plan if the secured creditor retains its liens and is provided with deferred cash payments having a present value equal to the allowed amount of the secured creditor's allowed secured claim. These deferred cash payments are often paid under newly issued post-plan notes. In many contested confirmation hearings, debtors and secured creditors argue over what is the appropriate discount rate (i.e., the cram-down interest rate) to ensure that the requirements of section 1129(b)(2)(A)(i) are met.

In the context of a chapter 11 case, courts are divided as to whether the cram-down interest rate should be set based on a market rate, or some other formula-based approach. While the U.S. Supreme Court squarely rejected a market-based approach in chapter 13 cases in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), it has yet to opine on this issue in the context of chapter 11 cases. In *Till*, the Supreme Court endorsed the "prime plus" formula which calculates the cram-down interest rate by taking the sum of a "risk free" base rate (such as the prime rate) and a debtor specific risk premium (which typically ranges from 1-3%). Based on *dicta* in *Till* suggesting that the analysis may be different in the context of a chapter 11 case, some lower courts have first looked to market-based evidence such as rates offered for similar post-restructuring financing in other cases – to establish a market-based cram-down interest rate.

Interestingly, this Report comes just a few months after Judge Robert Drain issued a controversial ruling in the *Momentive* bankruptcy. Judge Drain imported the *Till* "prime plus" formulaic standard into a chapter 11 in the Southern District of New York. There, Judge Drain supported his decision on the grounds that, among other things, the language and fundamental purpose of the cram-down provisions of chapters 11 and 13 were similar. See *In re MPM Silicones, LLC*, no. 14-22505-rdd, 2014 Bankr. LEXIS 3926 (Bankr. S.D.N.Y. Sept. 9, 2014). This stands in contrast to a number of other chapter 11 decisions that endorse a market-based determination

of the cram-down interest rate. *Momentive* is not binding outside Judge Drain's courtroom and has not been followed by other courts to date. Arguably, the Commissioners believe that Judge Drain ruled incorrectly in *Momentive*.

Commission Recommendation

The Commission's recommendation rejects applying the *Till* formula to chapter 11 cases and adopts a general market-based approach. The Commission believes this approach best satisfies the purpose of section 1129(b)(2)(A)(i). Specifically, the Commission concluded that a bankruptcy court should set the cram-down interest rate based on the cost of capital for similar debt issued to companies comparable to the debtor as a reorganized entity. If, however, a market rate cannot be determined for a particular debtor, the court should use a risk-adjusted rate that reflects the actual risk posed in the case of the reorganized debtor, considering factors such as the debtor's industry, projections, leverage, revised capital structure, and plan obligations.

The Commission's recommendation is beneficial to secured creditors who, as a general matter, have suggested that the application of the "prime plus" formula to chapter 11 cases could negatively impact distressed debt markets. If this recommendation is implemented, the plan negotiation process should become more efficient because the expectations of debtors and secured creditors will be informed by the Bankruptcy Code as opposed to non-uniform judge made law.

In addition, if Congress codified this recommendation, it might increase the willingness of financial institutions to lend to distressed (or stressed) entities. Interest rates on loans made to distressed entities could potentially decrease because lenders would have greater certainty (and thus less risk) that a bankruptcy court will not confirm a chapter 11 plan containing replacement notes that bear interest at a below-market rate. This recommendation would provide much needed clarity to the market – especially in light of the recent *Momentive* decision.

Financing Issues

Select Issues in Post-Petition Financing: Roll-Up Post-Petition Financing and Milestones

Current State of the Law

A “roll-up” is a form of post-petition or debtor-in-possession financing where lenders (including pre-petition lenders) provide DIP financing that first pays off all or part their existing debt before “new credit” is extended to a debtor. A roll-up has the effect of elevating the debt of pre-petition lenders who will have their debt paid in full and ahead of other creditors. For this reason, among others, courts are generally reluctant to approve roll-ups absent circumstances where the debtor has no other reasonable prospects for DIP financing or a lender is oversecured and the roll-up would be beneficial to the estate.

DIP lenders also often make the effectiveness of their DIP facility contingent on the debtor achieving certain bankruptcy case “milestones” by specific dates, such as the date when the debtor must file a plan or have the bankruptcy court confirm the plan. A debtor’s failure to achieve these milestones is often tied to events of default in the DIP facility which can have various consequences. For example, a debtor’s failure to file a plan by a particular date may obligate the debtor to abandon reorganization efforts and commence a sale process. Moreover, as a condition to providing DIP financing, DIP lenders typically require the debtor to stipulate to certain conditions or events, such as the extent of the lender’s liens on property of the estate.

Commission Recommendation

The Commission recommends amending the Bankruptcy Code to specify that a court may approve a DIP facility that rolls-up pre-petition debt, but only to the extent that (1) the DIP facility is either provided by lenders who do not directly or indirectly through their affiliates hold pre-petition debt affected by the DIP facility or such facility repays the pre-petition facility in cash, extends substantial new credit to the debtor, and provides additional financing on better terms than alternative facilities offered to the debtor; and (2) the bankruptcy court finds that the DIP financing is in the best interests of the estate.

The Commission also recommends that a court should not approve DIP financing that (1) is subject

to “milestones, benchmarks, or other provisions that require the trustee (e.g., the debtor) to perform certain tasks or satisfy certain conditions” within 60 days after the petition date or the date of the order for relief (whichever is later), or (2) otherwise conflicts with another section of the Bankruptcy Code. This proposed modification is intended to relate to “tasks or conditions that relate in a material or significant way to the debtor’s operations during the chapter 11 case or to the resolution of the case, including deadlines by which the debtor must conduct an auction, close a sale, or file a disclosure statement and a chapter 11 plan.” Report at 80.

Furthermore, the Commission recommends that a court should not approve “permissible extraordinary financing provisions” in connection with any proposed DIP financing in any interim order approving such financing. This recommendation is intended to principally cover (1) milestones, benchmarks, or other provisions that require the debtor to perform certain tasks or satisfy certain conditions, (2) representations regarding the validity or extent of the lender’s liens, and (3) roll-ups.

If these recommendations are codified by Congress, we do not believe they will radically alter the landscape of DIP financing. Most courts already apply a heightened standard before they approve roll-ups, and as a result, they are generally permitted only in limited circumstances.

While courts tend to approve DIP financing containing milestones and other extraordinary financing provisions, such relief is initially granted only on an interim basis and a subsequent hearing is necessary before DIP financing is approved on a final basis. A hearing on a debtor’s request to approve DIP financing on a final basis usually takes place after a statutory committee of unsecured creditors has been appointed and has had an opportunity to review and respond to such request. Therefore, mechanisms are currently in place to provide stakeholder constituencies with the ability to object to the terms of the DIP facility before they become effective on a final basis.

Calculating Collateral Value for Adequate Protection

Current State of the Law

Secured creditors are entitled to “adequate protection” against diminution in the value of their collateral – including cash collateral. For example, if a debtor depletes collateral during the pendency of the bankruptcy, secured lenders are entitled to compensation. Under section 361 of the Bankruptcy Code, secured lenders can receive cash payments or replacement liens, or otherwise receive the “indubitable equivalent” of the value of the collateral (which is generally interpreted to include an equity cushion). Under current law and practice, when determining entitlement to adequate protection, a secured creditor values its collateral at a going concern value or fair market value, especially in a chapter 11 case with high prospects for a successful reorganization. Placing a higher value on the collateral at the outset of the case could result in creditors receiving greater adequate protection if they can demonstrate the case will cause depletion of that value.

Commission Recommendation

Under the Commission’s recommendation, at least at the beginning of a chapter 11 case, the rights of a secured creditor with respect to its collateral would be limited to the hypothetical “foreclosure value” of the collateral. That foreclosure value is the dollar amount that would result from the commercially reasonable foreclosure of the collateral outside of bankruptcy, presumably net of foreclosure fees, costs and expenses. This foreclosure value is different from, and likely much lower than, going concern value or reorganization value. It follows that the debtor’s adequate protection obligations with respect to diminution in value would likely be lower or even eliminated in many cases.

This recommendation appears to be based on the Commission’s belief that secured creditors currently have too much leverage and control in the beginning stages of chapter 11 cases and that the Bankruptcy Code should be revised to tilt the scales more in favor of the chapter 11 debtor and its unsecured creditors. The Commission



determined that utilizing foreclosure value as the baseline for adequate protection would facilitate post-petition financing for a debtor, enhance the prospects for the debtor succeeding in non-consensual motions to use cash collateral, ease the debtor’s burden of making adequate protection payments and make it more difficult for secured creditors to obtain relief from stay.

However, the Report also recommends that a secured creditor should ultimately receive the “reorganization value” of its collateral in any plan of reorganization or section 363 asset sale. If the value of collateral over and above the foreclosure value has been consumed in post-petition financing or in the debtor’s operations during the chapter 11 case, the Commission provides no explanation as to how the secured creditor would realize the full reorganization value of its collateral.

Secured creditors may well ask whether using foreclosure value could result in seemingly over-secured creditors (based upon a going concern valuation) losing the right to post-petition interest and professional fees (because under-secured creditors are not entitled to the same). **This could result in expensive and time-consuming valuation fights at the outset of chapter 11 cases to determine foreclosure value, a valuation metric that is not currently part of the valuation landscape of valuation experts. While there is logic in applying different valuations at different times in the case, the use of “foreclosure value” could create significant uncertainty** as bankruptcy professionals typically do not rely on this valuation today and the debtor could deplete collateral during the pendency of the case more easily.

Asset Sales

60 Day Moratorium on Sales of Substantially All Assets and Elimination of Potential Chilling Effect as “Cause” to Limit Credit Bidding

Current State of the Law

Bankruptcy Code Section 363 permits a debtor to sell substantially all of its assets outside the ordinary course of business upon approval of the court. There are two points at issue. In recent years, parties have resolved a number of cases through a quick asset sale at the case’s outset rather than pursuant to a plan of reorganization voted on by creditors and shareholders. Critics have argued that such a significant event will determine the final outcome of the bankruptcy outside the scope of a plan and thus hasten resolution of the case without the protections and time built into the confirmation process.

Second, where the debtor seeks to sell assets that are subject to a secured lien or interest under section 363, the Bankruptcy Code permits the lien-holder to “credit bid” the amount of such claim to purchase the property. The claim-holder may offset such claim against the purchase price and need not use cash to make a bid, up to the allowed amount of its claim.

The Bankruptcy Code provides that the court may restrict the ability to credit bid for “cause,” but does not specify when cause exists. Courts have restricted credit bidding in certain circumstances, purportedly because there is uncertainty over the validity or value of the allowed claim, but seemingly primarily to reduce the chilling effect of a large credit bid on the willingness of others to participate in the auction.

Commission Recommendation

The Commission refers to a sale of all or substantially all of a debtor’s assets as a “363x sale.” The Commission proposes the prohibition of 363x sales during the first 60 days of the bankruptcy case, unless the debtor can show “by clear and convincing evidence that there is a high likelihood that the value of debtors’ assets will decrease significantly during the 60-day period.” Report at 83. This recommendation is based, in part, on the view that the increasingly rapid sale processes of recent years provide insufficient time to market the assets thoroughly so that interested bidders can participate and maximize value. This can depress purchase price. Under the proposal, there must be a *bona fide* post-petition auction process in nearly all chapter 11 cases, regardless of the prepetition effort.

The report also posits that “the potential chilling effect of a credit bid alone should not constitute cause” to limit a secured creditor’s credit bid. Report at 146. This view is based, in part, on the fact that all credit bidding discourages outside purchase offers to some extent; it also serves to protect secured creditors. Instead, the Commission recommends that courts address the potential chilling effect of credit bidding in the sale procedures (*e.g.*, by withholding approval of procedures with short marketing periods and/or withholding approval of marketing materials that emphasize the secured creditor’s right to credit bid).

The Commission’s recommendations may have unintended effects. In 2013, the mean and median number of days between the bankruptcy filing and sale order were 82 and 74 days, respectively. Given this statistic, the 60-day moratorium may not have a significant effect on the outcome of most cases. In fact, the moratorium could shorten the sale period, if it pushes parties toward a sale on the 61st day.

In addition, while the Commission points to pressure from secured creditors and DIP financiers as a driving force behind the truncated sale processes of recent



years, increasingly rapid 363 sale processes may also be the result of more extensive pre-petition negotiations. The moratorium may discourage such marketing. However, it may give the court time to resolve valuation and other disputes regarding the validity or amount of an allowed claim, obviating the need to limit credit bidding for those reasons.

Moreover, to the extent the Commission’s 60-day moratorium regarding 363x sales is intended to relieve debtors from pressure from lenders for quick sales of all assets, it will have limited impact. In its recommendations regarding 363x sales, the only activities that the Commission has stated would be prohibited are “an auction” or “final approval of a sale transaction.” Report at 83. By contrast, one of the Commission’s recommendations with respect to DIP financing is that “milestones upon which extension of

post-petition financing is conditioned should not be permitted to take effect until at least 60 days after the petition date.” Report at 82. Among these prohibited milestones is “a provision stating that it is an event of default if the court does not enter an order approving bidding procedures for a sale of all or substantially all of a debtor’s assets by a certain date.” Report at 82, n. 311.

The Commission’s recommendation to prohibit the limitation of credit bidding solely for its chilling effect adds needed clarity after recent decisions such as *Fisker Automotive Holdings* and *Free Lance-Star Publishing* have implied that promoting a competitive auction may be sufficient cause to limit credit bidding. *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 61 (Bankr. D. Del. 2014); *In re Free Lance-Star Publ’g Co.*, 512 B.R. 798, 807-808 (Bankr. E.D. Va. 2014).

Contact Us

Orrick's restructuring lawyers deliver winning results, client-focused service and efficient strategies to clients involved in restructurings and insolvencies. We routinely work on complex restructurings and financing transactions and offer clients value-added legal advice, from negotiation and mediation to litigation and counseling. We have successfully represented many different constituencies in virtually every aspect of corporate reorganizations, out-of-court restructurings, insolvency and liquidation matters.

Our lawyers—who have a track record of leadership and creativity—draw on the experience of other Orrick practitioners, including those in the corporate, finance, securities, litigation, tax, pension and real estate groups, to deliver a full range of restructuring-related legal services to major financial, commercial and industrial institutions worldwide.



Peter Amend

Managing Associate
New York

(212) 506-3608
pamend@orrick.com

Raniero D'Aversa

Partner
New York

(212) 506-3715
rdaversa@orrick.com

John Farmer

Contract Associate
Los Angeles

(213) 612-2482
jfarmer@orrick.com

Matthew Fechik

Career Associate
Wheeling

(304) 231-2860
mfechik@orrick.com

Debra Felder

Senior Associate
Washington, D.C.

(202) 339-8567
dfelder@orrick.com

Jonathan Guy

Partner
Washington, D.C.

(202) 339-8516
jguy@orrick.com

Jeffery Hermann

Of Counsel
Los Angeles

(213) 612-2413
jhermann@orrick.com

Frederick Holden Jr.

Partner
San Francisco

(415) 773-5985
fholden@orrick.com

Suzy Kim

Contract Attorney
Wheeling | New York

(212) 506-5059
suzykim@orrick.com

Nicholas Laveris

Of Counsel
New York

(212) 506-5147
nlaveris@orrick.com

Marc Levinson

Partner
Sacramento

(916) 329-4910
malevinson@orrick.com

Joanna McDonald

Associate
New York

(212) 506-3787
joanna.mcdonald@orrick.com

Lorraine McGowen

Partner
New York

(212) 506-5114
lmcgowen@orrick.com

Laura Metzger

Partner
New York

(212) 506-5149
lmetzger@orrick.com

Douglas Mintz

Of Counsel
Washington, D.C.

(202) 339-8518
dmintz@orrick.com

Thomas Mitchell

Partner
San Francisco

(415) 773-5732
tcmitchell@orrick.com

Scott Morrison

Of Counsel
London

+44 20 7862 4747
smorrison@orrick.com

Amy Pasacreta

Senior Associate
New York

(212) 506-5159
apasacreta@orrick.com

Stephen Phillips

Partner
London

+44 20 7862 4704
stephen.phillips@orrick.com