

Capital Reporting Company
Public Hearing on Notice of Proposed Rulemaking 02-17-2016

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR UNITED STATES
TRUSTEE PROGRAM
PUBLIC HEARING ON
NOTICE OF PROPOSED RULEMAKING
UNIFORM PERIODIC REPORTS IN CHAPTER 11
NON-SMALL BUSINESS CASES

Wednesday,
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441 G Street, N.W.
Washington, D.C.

Reported by: Christine Allen,
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1 A P P E A R A N C E S

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ON BEHALF OF U.S. TRUSTEE PROGRAM:

3

Nan Roberts Eitel, Associate General Counsel

4

Tracy Hope Davis,

5

United States Trustee, Region 17

6

William K. Harrington,

United States Trustee, Regions 1 and 2

7

Andrew R. Vara,

8

Acting United States Trustee, Region 3

9

WITNESSES:

10

Albert Togut

11

Togut, Segal & Segal

Trustee in the Southern District of New York

12

Daniel Press

13

National Association of Consumer Bankruptcy

Attorneys

14

Karen Cordry

15

States Association of Bankruptcy Attorneys

and National Association of Attorneys General

16

Stephen Darr and James Lukenda

17

Association of Insolvency & Restructuring

Advisors

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1 P R O C E E D I N G S

2 (9:59 a.m.)

3 MS. EITEL: Well, it's 9:59, and by the
4 standards of the Executive Office for the United
5 States Trustees that means we are four minutes
6 late.

7 (Laughter.)

8 MS. EITEL: Given that all of our
9 witnesses and our panel are assembled, I thought
10 we would go ahead and get started, if that's okay
11 with all of you.

12 Good morning and welcome to the
13 Executive Office for the United States Trustees.
14 I thank all of you for participating in this
15 public hearing to discuss our Notice of Proposed
16 Rulemaking for procedures for completing uniform
17 periodic reports in non- small business cases
18 filed under Chapter 11 of Title 11. That is a
19 mouthful that I will not repeat for the rest of
20 the day.

21 I am Nan Eitel, Associate General
22 Counsel for our Chapter 11 practice.

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1 Our purpose this morning to hear the
2 views of interested persons on the proposed rule
3 and forms, and to explore issues that were raised
4 previously in submitted written comments to the
5 proposed rule and forms.

6 Congress authorized the Attorney General
7 to promulgate uniform forms for periodic reports
8 by debtors-in-possession or trustees in cases
9 under Chapter 11. Congress required that the
10 uniform forms should strike the best achievable
11 practical balance among the reasonable needs of
12 the public for information, economy, simplicity,
13 and undue burden to the person with a duty to file
14 the report, and appropriate privacy concerns and
15 safeguards.

16 The proposed rule and forms will apply
17 to all non-small business Chapter 11 cases,
18 spanning multibillion dollar corporate debtors and
19 individual Chapter 11 debtors alike.

20 Congress mandated that certain data
21 elements be included within the new uniform
22 reports, and granted the Attorney General the

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1 discretion to include additional data elements.

2 The Attorney General in turn delegated this

3 authority to the Director of EOUST.

4 In response to the congressional

5 mandate, in November 2014, EOUST published a rule

6 proposing to require debtors-in-possession and

7 Chapter 11 trustees in non-small business cases to

8 use the uniform periodic reports as proposed

9 rather than local reports that are currently in

10 our regions and districts.

11 The new uniform reports promulgated will

12 facilitate the review of a debtor-in- possession

13 or trustee's case administration, which will

14 assist in maintaining the public's trust in the

15 bankruptcy system.

16 The information to be collected by these

17 forms will be used by the court, by the creditors,

18 by the United States Trustee, and other parties in

19 interests to evaluate a Chapter 11 debtor's

20 progress through the bankruptcy system, including

21 the likelihood of a plan of reorganization being

22 confirmed, and whether the case is being

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1 prosecuted in good faith, and in the case of
2 debtors with confirmed plans where the Chapter 11
3 debtor is performing as anticipated and expected
4 under the confirmed plan.

5 The uniform reports will include all the
6 types of information required to be collected
7 under the statute. Much of that information is
8 already collected in the current forms, but they
9 vary in format, and sometimes in content from
10 jurisdiction to jurisdiction, and they do not
11 facilitate the national compilation of data.

12 Because the new reports will be uniform,
13 they may be data enabled to facilitate the
14 compilation of data as specified in the statute.
15 This is unlike the uniform form now in use for the
16 small business cases promulgated by the courts,
17 which is not currently data enabled.

18 These will be the first periodic reports
19 to have that function. This will facilitate an
20 evaluation of the efficiency and effectiveness of
21 the bankruptcy system, and may assist policymakers
22 and academics without imposing significant

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1 additional burdens upon trustees and debtors-in-
2 possession.

3 Moreover, the reports will include
4 information to inform creditors and parties of the
5 debtor's financial affairs but will remain
6 sufficiently concise to provide ready, meaningful
7 access to information.

8 The public comment period closed on
9 January 9, 2015, and the EOUST received eight
10 public comments. Many of the commenters,
11 including those here today, requested follow up
12 meetings with the USTP to further discuss the
13 proposed rule, forms, and comments.

14 We determined, therefore, that we could
15 best meet those requests by reopening the comment
16 period and by conducting this public hearing
17 today. The public comment period was reopened and
18 we received no additional public comments so far.

19 We are very grateful to those who
20 submitted public comments and to those who appear
21 today to further engage on these issues.

22 As you all know, the public comments

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1 reflect a wide divergence of views, many of which
2 we expect will be presented today. The viewpoints
3 range from very specific, for instance, those
4 dealing only with reporting of professional fees
5 or specific accounting issues, all important in
6 their own right, to those who seek uniformly
7 imposed comprehensive financial reporting, to
8 those who find the forms as currently proposed
9 really burdensome for smaller business Chapter 11
10 debtors and individual Chapter 11 debtors.

11 We also received various suggestions
12 regarding how the forms and their instructions may
13 be streamlined or made more user friendly.

14 Thus, given the diverse types of debtors
15 meant to use these forms, it is important that the
16 forms ultimately promulgated by the USTP are
17 adaptable to the circumstances of both individual
18 debtors and large corporate enterprises alike.
19 That is a daunting task.

20 We are hopeful that today's hearing will
21 provide workable solutions to the question of how
22 to propose an uniform form that works well for

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1 this wide variety of Chapter 11 debtors.

2 With respect to today's proceeding, our
3 commenters have requested time to make a
4 statement, and we will accommodate each of those
5 requests.

6 Those scheduled to speak today are
7 Albert Togut, a trustee in the Southern District
8 of New York and a prominent Chapter 11
9 practitioner. Daniel Press of the National
10 Association of Consumer Bankruptcy Attorneys.
11 Karen Cordry of the States Association of
12 Bankruptcy Attorneys and National Association of
13 Attorneys General, and Stephen Darr and James
14 Lukenda from the AIRA.

15 We will call on each of you in turn who
16 have requested time to speak, and your oral
17 statement should be limited to a summary of your
18 written comments previously submitted, and if
19 possible, limited to 5 minutes in duration. Given
20 our small group, we won't be too tight with the
21 time if you need additional time.

22 Thereafter, the panel today will ask

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1 questions of each witness. Joining me today in
2 conducting the hearing are Andrew Vara, the Acting
3 Trustee for Region 3. Bill Harrington, the
4 Trustee for Regions 1 and 2, and Tracy Davis, the
5 United States Trustee for Region 17.

6 We will try to be concise in our
7 questions, and we ask that the responses be
8 concise. The ground rules is we will take each
9 witness in turn and we will exhaust the
10 questioning of that witness before we turn to the
11 next witness rather than have a free for all.
12 That will perhaps facilitate a clear discussion,
13 and one that our Court Reporter can maintain.

14 Our proceedings are being transcribed,
15 and a transcript of the proceedings will be posted
16 on our website as soon as available.

17 With that in mind and one final rule
18 about nomenclature, when we say "smaller Chapter
19 11 business cases," we are not talking about the
20 small Chapter 11 cases that are currently the
21 subject of the forms by the court, so when we use
22 the word "smaller" we will make an unnatural

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1 emphasis on the "er" part of that, so that the
2 record is clear and reflects what we are exactly
3 talking about.

4 Mr. Togut, would you please open the
5 proceedings for us today?

6 MR. TOGUT: I'll be pleased to, and I
7 want to thank you for allowing me to be here
8 today. I'm going to be talking about this
9 important effort to monitor legal fees in Chapter
10 11 cases.

11 You should know that for more than 35
12 years now, I've had a keen interest in legal fees
13 and the costs in Chapter 11 cases, and for the
14 past 10 years, I've actually been involved in
15 studying this subject.

16 In 2004, I asked the American Bankruptcy
17 Institute to form a commission to study Chapter 11
18 fees in corporate cases, and ABI agreed. I served
19 on the board of that commission which on November
20 1, 2007, issued a nearly 100 page report, which is
21 formerly known as the ABI Chapter 11 Professional
22 Fee Study.

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1 As all of you know, I co-chaired ABI's
2 commission that studied Chapter 11 reform. They
3 issued a 400 page report in December of 2014, a
4 little more than a year ago. That work took three
5 years of my time and took me to every Federal
6 district in the country, and earned me Diamond
7 status on Delta Airlines.

8 (Laughter.)

9 MR. TOGUT: From my work on both ABI
10 commissions, I have learned a great deal about
11 fees, and I appeared before you on June 4, 2012
12 and gave testimony at that time. I refer to my
13 prior testimony so that I don't have to repeat it,
14 but I would like that as part of the record, if
15 you would.

16 I spoke about the fee guidelines and the
17 utility of efficiency counsel. What I urged was
18 also recommended by the reporter for the ABI fee
19 study, Professor Stephen Lubben, and it was also
20 urged by the National Bankruptcy Conference and
21 the American Bar Association.

22 You accepted our comments, and the fee

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1 guidelines now encourage the use of efficiency
2 counsel in large cases. With that, you have taken
3 the first step to lowering fees in cases, and are
4 to be applauded.

5 You have also issued guidelines for
6 reviewing fee applications that require a showing
7 that efficiency counsel rates must be less than
8 the rates of main counsel. That's a condition of
9 efficiency counsel's retention.

10 We can stipulate that whatever work goes
11 to efficiency counsel will be done at a lower
12 rate, and that means lower costs in the case.
13 That's just simple math.

14 As I testified last time, the cost of
15 legal fees contains two components, the hourly
16 billing rate, and the number of timekeepers, and
17 both are essential to evaluating what the overall
18 fees will be.

19 The Am Law 100 firms tend to use larger
20 teams than does efficiency counsel. It is a
21 difference in philosophy. The big firms bring
22 whatever resources they have to the task, and they

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1 have enormous resources. They want to do the best
2 job possible, and they tend to use teams of
3 people. It's their culture. It's in their DNA.

4 I should add that such main counsel
5 truly believe that for any given task, they can do
6 it the best. They genuinely believe that. They
7 strive for perfection and they take tremendous
8 pride in what they do.

9 Efficiency counsel comes from small
10 firms with a very different culture, not that we
11 don't want to do the best job we can, but smaller
12 firms can only survive if they are efficient.
13 They also have lower overhead, and that's one
14 reason they can charge lower hourly rates.

15 Even if they wanted to use a large team,
16 they don't have the horses. They don't have
17 enough people for a large team. So, you get the
18 double benefit from using efficiency counsel.
19 It's a lower hourly rate and less people on the
20 task, and that has a significant effect, it lowers
21 overall fees in a case.

22 When I formed my firm in 1980, the

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1 Southern District of New York was getting the
2 lion's share of the mega cases, back in 1980. The
3 surge in Delaware came later, and today, it is
4 Delaware that is getting most of the mega cases.
5 The Delaware firms and firms like mine have a
6 business model that is the same. Everything we do
7 is at a lower cost to the estate.

8 You should note that most conflicts
9 counsel will seek efficiency counsel work so that
10 rather than shadowing main counsel, they have an
11 independent reason to be at a meeting and in
12 court, and that way, both counsel don't duplicate
13 each other's work. What efficiency counsel does,
14 main counsel does not, and vice versa.

15 I am here today to suggest a way for you
16 to be better able to monitor that tasks can be
17 handled by efficiency counsel, the tasks that can
18 be handled by efficiency counsel are in fact being
19 assigned to them.

20 The proposed report form that you have
21 put out for comment contains line items for the
22 debtor's bankruptcy counsel, non-bankruptcy

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1 counsel, and then the third line is for all
2 professional fees and expenses, debtor and
3 committee.

4 There should be a separate line item for
5 efficiency counsel. In this regard, I should note
6 that the American Bar Association also urges
7 separate reporting for efficiency counsel. So,
8 why does this matter?

9 Co-counsel is often retained at the
10 beginning of the case, and there is the
11 expectation that it will be tasked with duties it
12 can perform more economically, but being retained
13 and being utilized during a case can be two
14 entirely different things. For efficiency counsel
15 to have the desired effect of lowering overall
16 fees, it needs to be used throughout the case,
17 wherever efficiencies can be achieved.

18 By requiring regular reporting, the
19 debtor and main counsel have to continue thinking
20 about how best to utilize efficiency counsel. If
21 there's a separate line item for how they are
22 using efficiency counsel, filling it in with a

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1 zero would show that no effort is being made to
2 move work at a lower cost.

3 When I last testified, Director White
4 asked me what I thought about budgeting, and I
5 said that budgeting is a very useful exercise
6 because it focuses parties' attention on who
7 should be doing what in the case. The same is
8 true for these reporting forms. By requiring
9 separate reporting on the use of efficiency
10 counsel, it will focus attention on what should be
11 done at a lower cost to the estate. It will
12 highlight an affirmative duty upon the main
13 counsel and its co-counsel for there to be a true
14 division of duties between them to take advantage
15 of lower costs wherever possible.

16 This is consistent with the position of
17 the National Bankruptcy Conference. The National
18 Bankruptcy Conference urges thinking about
19 assignment of tasks and how to effect savings.

20 What I'm talking about is exactly the
21 same thing, requiring disclosure about the split
22 of work between main and efficiency counsel also

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1 meets four of the United States Trustee Program
2 goals in reviewing Chapter 11 fees. You have put
3 out a statement that contains seven or eight
4 criteria, and four of them are met by what I am
5 talking about.

6 First, to increase disclosure and
7 transparency in the billing practices of the
8 professionals who are seeking compensation from
9 the estate. Second, to increase client and
10 constituent account accountability. Client and
11 constituent, the debtor and the committee, to
12 increase their accountability for overseeing the
13 fees of their own professionals who are being paid
14 by the estate.

15 Third, to encourage the adoption of
16 budgets and staffing plans. This is your words,
17 not mine. To encourage the adoption of budgets
18 and staffing plans developed between the client
19 and the applicant to bring discipline,
20 predictability, and client involvement and
21 accountability to the compensation process, and
22 fourth, again your words, to decrease the

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1 administrative burden and increase the efficiency
2 of your ability to review the applications.

3 Now, I'd like to address some of the
4 criticisms that have been made about these forms.
5 One critic described them as "onerous." There are
6 several responses to that criticism. First, the
7 debtor in mega cases can and do get enormous debt
8 relief. That's the whole point of filing for
9 Chapter 11. Often it's millions of dollars.
10 Sometimes it is billions of dollars.

11 Everything that is done in a Chapter 11
12 case is done in a fish bowl for everyone to see.
13 Why should fees be any different?

14 One might argue and convincingly that
15 disclosure statements are onerous. Anybody who
16 has prepared one could say that. Anyone who has
17 read one could say that. Such statements are a
18 price a corporate debtor must pay for debt relief.
19 It's a requirement of the bankruptcy law.

20 Two separate line items for efficiency
21 and main counsel are not onerous. Everything you
22 ask for in your proposed form in the context of

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1 the debt relief that is available through Chapter
2 11 is not onerous. Just to emphasize the point,
3 no one complains about the procedure in place for
4 ordinary course professionals.

5 Current reporting requirements, and I
6 think this is true nationwide, require a monthly
7 report to the court with a separate line item for
8 each of the law firms that are retained as
9 ordinary course professionals, each law firm, not
10 categories like your proposed form has, but each
11 and every law firm. The ordinary course
12 professionals are for relatively small dollars.

13 If that can be reported separately, why
14 should efficiency counsel be any different.

15 Filling out a few forms should not be
16 too burdensome or even burdensome at all.

17 I hope my testimony is helpful to what
18 you are doing, and I'm happy to answer any
19 questions, and I hope you ask them because I tried
20 to stay in your time limit, and there's more I'd
21 like to say.

22 MR. VARA: Thank you, Mr. Togut. We

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1 very much appreciate your comments on the forms
2 that you provided to us in writing and then also
3 the comments you have offered here this morning.

4 My first question for you is in the way
5 of definitional. In your comments, you spoke
6 frequently of "efficiency counsel." You mentioned
7 a couple of times "conflict counsel." If you could
8 describe the differences between efficiency
9 counsel and conflict counsel, and then what you
10 see as a proper definition for "efficiency
11 counsel."

12 MR. TOGUT: Sure, it's easy. Let me
13 explain to you as well why there is a connection
14 between the two. Most of the Am Law 100 firms
15 that want to file a case in your jurisdiction have
16 all kinds of conflicts because they have such a
17 huge client base. They can't satisfy 327(a). They
18 can't show they are disinterested. They have to
19 bring in another law firm to work with them to
20 handle the conflicts. In your jurisdiction, they
21 tend to use the local counsel that they are also
22 required to have by local rule. You need another

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1 firm to be able to handle that.

2 Conflict work, almost by definition, is
3 contentious work; right? When you need Young
4 Conway, for example, to litigate with somebody
5 because Skadden can't or Jones Day can't, that
6 task usually requires litigation, it has reached
7 the point of being contentious, and it usually
8 requires more senior people.

9 For the conflicts counsel to be
10 effective in the case, that counsel needs to
11 understand what's going on in the case. There are
12 two ways to do that. You just show up with main
13 counsel at all the hearings and you sit there and
14 you observe, and you go to all the committee
15 meetings and you sit there and observe, but that's
16 no good because that's just shadowing main
17 counsel, and that's duplication of effort. That's
18 the one thing you don't want to see, for this
19 program especially.

20 The way to deal with that, and I think I
21 pioneered this concept going back to 1980, is to
22 task that firm with things it can do more

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1 efficiently and economically and less expensively,
2 and then that firm has an independent reason to be
3 at a court hearing. The client is getting service
4 that it is not seeking from main counsel.

5 The distinction is that efficiency
6 counsel work is not conflict work, and work that
7 can be done by the second law firm more
8 economically and efficiently. Preparation of
9 schedules. If the efficiency counsel could be
10 hired before the filing, almost all the first day
11 orders, that doesn't require an Am Law 100 firm to
12 prepare. Claim objections, preference actions,
13 dealing with utilities, rejection of contracts,
14 all that stuff, which is not central to
15 formulating a plan can be handled by efficiency
16 counsel.

17 The result is you have work moving to a
18 less expensive, more efficient firm, so it's not
19 being done by main counsel. When you put the
20 package of the fees together, they are less. You
21 don't have to take my word for it. This has been
22 found to be by the ABI fee study, and it's known

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1 by all the people who urged you to do what you did
2 a few years ago in encouraging the use of
3 efficiency counsel.

4 MR. VARA: You mentioned the issues that
5 efficiency counsel would be equipped both in terms
6 of their abilities and their staffing to
7 accomplish. Would those tasks be identified in
8 the retention application as part of a work plan?

9 MR. TOGUT: I have two answers, one of
10 which you didn't embrace when I gave it to you a
11 couple of years ago. I truly believe that -- I
12 talked about this when I last testified. Most of
13 the big firms that file these mega cases create a
14 task list. They are updated like every month.
15 They have a list of things that need to be done,
16 and they actually assign which lawyers in their
17 team is going to handle it.

18 It's soup to nuts in a case, preparation
19 of schedules, filing first days, handling adequate
20 protection, bla, bla, bla, and these lists can be
21 20 pages long.

22 In the cases that work the best, the two

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1 counsel sit down with that list and the client,
2 maybe with the U.S. Trustee, and they figure out
3 at the outset who is going to do what. They
4 assign the tasks. The client knows, main counsel
5 knows, and the efficiency counsel knows who is
6 doing what, so the two counsel don't trip over
7 each other doing the same thing. It's a clear
8 delineation.

9 During the case, tasks arise that are
10 not necessary, not central to formulating a plan,
11 and those should be able to freely move to the
12 efficiency counsel because under your own
13 guidelines, the billing rates have to be less.

14 MR. VARA: Thank you. Looking at the
15 form, as you mentioned, there are in Part 5 three
16 categories of professional fees and expenses to be
17 disclosed. In your comments you recommended
18 adding efficiency counsel. Are there other types
19 of professional fees, categories, that you think
20 would be helpful to have delineated under Part 5?

21 MR. TOGUT: I think the more you slice
22 and dice this, the better it is. I would

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1 advocate, if I were going to put this form
2 together, you have main counsel, I would have them
3 have to report separately what is straight
4 corporate work and what is bankruptcy
5 restructuring work. I would break that into two
6 pieces.

7 You usually have lots of special counsel
8 in the case, 327 counsel, not ordinary course
9 professionals. I'd list them. What's the
10 hardship?

11 I think in terms of your harvesting the
12 data and analyzing the data, it would be far more
13 meaningful than to lump together all the debtor
14 counsel as one line item.

15 MR. HARRINGTON: This is a follow up
16 question on that, Mr. Togut. When you talk about
17 slicing and dicing, having more categories, one of
18 the things we're trying to capture is the
19 bankruptcy versus the non- bankruptcy work here.
20 How would you delineate or recognize the
21 differences in the various categories if you have
22 it all delineated out, how would you note which is

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1 bankruptcy and which is non-bankruptcy?

2 MR. TOGUT: Mr. Harrington, we're
3 already doing it. That's what billing codes are
4 all about. Every time we file a fee application
5 in one of the cases that we're talking about, you
6 have to give a list of different categories of
7 work, claim objections, contract renegotiations,
8 litigation, whatever it is. The data is already
9 segregated. All somebody has to do is sit with an
10 adding machine and add up what's, for example,
11 straight corporate and what's restructuring. It's
12 not hard at all.

13 MR. HARRINGTON: Thank you.

14 MS. DAVIS: How do you deal with
15 arguments from some that breaking it down and
16 slicing and dicing is not unduly burdensome?

17 MR. TOGUT: Because it's not. As a
18 matter of fact, it's not. It's better for people
19 to have everything lumped together because you
20 can't understand what it means. It doesn't
21 highlight -- that's what my comments are all
22 about. It should be abundantly clear to anybody

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1 looking at these forms what's going on, and when
2 you lump millions and millions and millions of
3 dollars into one line item, you can't figure it
4 out. You just can't figure it out.

5 It's not onerous for ordinary course
6 professionals to file a monthly report showing who
7 is getting paid what. How hard could this be?
8 I'm just not buying it. Also, sorry to rain on
9 your parade, but there is some criticism about
10 individual cases and these forms are not
11 appropriate for the individual case.

12 As I understand your mandate, what
13 you're seeking to do is have one unified form that
14 could be used in all the different cases. Not
15 hard. You break out a section that applies only
16 to individual cases. That's a simplified
17 reporting form. That's not filled out by the
18 corporate Chapter 11 debtors. It's only filled
19 out by the individual Chapter 11 debtors. Then
20 you have the corporate section. That's not filled
21 out by the individual debtors, and that's how you
22 achieve that goal.

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1 MR. VARA: Still in one form, Mr. Togut,
2 correct? It would be part of the one form?

3 MR. TOGUT: Why not.

4 MS. EITEL: If you looked at Part 8,
5 that is a section right now that only individual
6 debtors would fill out. Do you have any
7 suggestions of what should be included in that
8 Part 8 only for individual debtors?

9 MR. TOGUT: I did not focus on that for
10 today's remarks. I'd be happy to do that and get
11 back to you.

12 MS. EITEL: Thank you. More broadly,
13 just generally from your perspective, I know you
14 have a broad perspective, both with your work as a
15 trustee and also the Chapter 11 work.

16 MR. TOGUT: Once upon a time, I was a
17 Chapter 13 trustee.

18 MS. EITEL: You have even a broader
19 perspective than I realized. What do you see as
20 the utility of the monthly operating reports to
21 the bankruptcy system in general? Does it differ
22 depending on which seat you occupy in the system?

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1 MR. TOGUT: No, I think they are very
2 useful. I think they are useful in two respects.
3 One, as I said in my prepared remarks, having to
4 fill these things out is thought provoking. I
5 would require the debtor or the committee be
6 involved, not just the professionals prepare these
7 things and they get filed. I think there should
8 be meetings, staffing meetings, like a real client
9 does, as opposed to a Chapter 11 client, where
10 sometimes that whole function is taken over by the
11 professionals.

12 The client should be involved in
13 figuring out how to staff a case. There should be
14 a regular discussion about that, and I think the
15 forms are exceedingly useful to force that
16 discussion to have to happen.

17 The other place is what I said. We see
18 in the press criticism about big fees in
19 bankruptcy. I was co-counsel with Weill,
20 Gottschall in the Enron case. The fees were
21 enormous.

22 When we had to analyze the fees to be

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1 able to respond to the criticism, something came
2 out of that discussion which really surprised us,
3 and that was probably 60 or 70 percent of what we
4 did was in the nature of straight corporate work
5 that would have had to be done had Enron not been
6 in Chapter 11, and this really blew our minds,
7 despite all the extra work that comes with
8 liquidating an enormous company like that, when we
9 compared the fees post-petition against the fees
10 Enron was paying before the filing for its army of
11 lawyers, there was hardly any difference. Really
12 blew our minds.

13 Just to close the point, the more
14 reporting that you require to explain what is
15 uniquely bankruptcy, I think the better it is for
16 your purposes to understand and for the public to
17 understand, and for the creditors, too, who are
18 getting not what they want on a return to
19 understand.

20 MS. EITEL: Thank you. You talked about
21 debtor engagement in preparing the forms.
22 Currently the forms anticipate the debtor or the

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1 debtor's representative will sign the form. Is
2 that enough to get the debtor engaged? What more
3 could the U.S. Trustee Program do with the forms
4 to promoting better engagement with the reporting
5 duty?

6 MR. TOGUT: That's not enough. The
7 debtor is very preoccupied trying to save a
8 business, and the last thing I think a debtor will
9 worry about is what will be viewed as compliance
10 with a government regulation. They will say to
11 their financial people and lawyers prepare this
12 for me. I don't think they will be engaged in the
13 process. I think it's useful to engage them in
14 the process.

15 I have said before at the time of
16 retention, when the professionals are most
17 flexible because they want you to approve the
18 retention, there could be a conference held at the
19 U.S. Trustee's Office with a discussion with
20 proposed counsel about who's doing what.

21 MS. EITEL: Currently we do individual
22 debtor interviews, but it's sort of outside on

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1 reporting obligations. Your recommendation would
2 be to continue that and make sure there is a clear
3 understanding of the debtor's responsibilities for
4 this particular report, which I think happens
5 currently with the reports that we have now. You
6 say perhaps some debtors are more engaged than
7 others.

8 MR. TOGUT: Yes. Look, with a fee
9 application, we're required to file a statement by
10 the client that says I've talked to my counsel,
11 I've reviewed the fee application, and effectively
12 I'm signing off on it. It's more than just the
13 signature line. It's a statement you require.
14 You could do the same here.

15 MR. HARRINGTON: Here, if we had a
16 certification that the debtor would make a
17 declaration under penalty of perjury to the
18 accuracy of the information contained in the
19 report?

20 MR. TOGUT: More, Mr. Harrington. Not
21 the accuracy. That will be delegated to the
22 professionals to prepare. That the debtor

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1 actually sat with the professionals to review
2 staffing decisions and the assignment of tasks to
3 ensure that things were being done in the most
4 responsible, efficient, and economical way.

5 MR. VARA: Mr. Togut, when we talk about
6 the debtor signing off on that, who is the proper
7 party at the debtor, the proper individual to make
8 that declaration?

9 MR. TOGUT: I would imagine the CFO,
10 chief financial officer.

11 MR. VARA: Would it need to be someone,
12 an officer of the debtor, or would a chief
13 restructuring officer be able to fulfill that as
14 an outside party?

15 MR. TOGUT: You might want a couple of
16 people to sign off on it. That might even be
17 better. You're right, the CRO is brought in from
18 outside. Maybe corporate treasurer or CFO and
19 then the outside CRO. Maybe general counsel.
20 People who are going to actually pay attention to
21 this.

22 MS. EITEL: Obviously, with individual

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1 debtors, it would be the individual debtor;
2 correct?

3 MR. TOGUT: I'm pretty sure that they
4 are pretty good at watching what their counsel are
5 doing.

6 MS. DAVIS: Mr. Togut, these forms would
7 also apply to Chapter 11 trustees, and you have
8 been a Chapter 11 trustee in many cases. Do any
9 of your answers change as to Chapter 11 trustees?

10 MR. TOGUT: No.

11 MS. DAVIS: Why?

12 MR. TOGUT: Well, a Chapter 11 trustee
13 is even more responsible for how the fees are
14 being allocated and spent. I think the Chapter 11
15 trustee should be very on top of what the
16 professionals are doing.

17 I'm representing a Chapter 11 trustee
18 now in New York in a \$100 million case. Every
19 single Wednesday, today, this afternoon, have a
20 coordination conference with all the professionals
21 going through who is doing what and who should not
22 be doing what. I have no problem with that.

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1 MS. EITEL: Any further questions?

2 (No response.)

3 MS. EITEL: Mr. Press, we will turn to
4 you from the National Association of Consumer
5 Bankruptcy Attorneys.

6 MR. PRESS: Thank you. I'm here on
7 behalf of the National Association of Consumer
8 Bankruptcy Attorneys which I assume everyone is at
9 least somewhat familiar with. We represent about
10 3,000 consumer bankruptcy attorneys nationwide.
11 Of course, advocate on behalf of both consumer
12 bankruptcy attorneys and consumer debtors.

13 My first point is simply that we have, I
14 think, a very big difference here between the two
15 groups who are not small, without "er," business
16 debtors. We have large corporate debtors, and I
17 suppose I could lump the "smaller" business
18 debtors in with them, because they are at least
19 big enough not to be small business debtors, and
20 you have individuals.

21 Most of the individual Chapter 11
22 debtors, not all but most individual Chapter 11

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1 debtors are simply in Chapter 11 because they
2 exceed the debt limits for Chapter 13. They are
3 not in Chapter 11 typically to get any of the
4 other supposed advantages that Chapter 11 offers.

5 They are there because either their
6 mortgage debt exceeds the debt limits because they
7 are living in an expensive area or their unsecured
8 debt exceeds the debt limits because the value of
9 their house has fallen or because they have a tort
10 judgment against them, so it's over \$300,000 or
11 whatever. They can't do a Chapter 13.

12 We're not talking about people who -- we
13 are all efficiency counsel in individual cases.

14 (Laughter.)

15 MR. PRESS: We're not talking about
16 people that have general counsel and can assign
17 tasks. How the fees are reported is really not
18 particularly significant in the individual cases.
19 We commented that it's probably better not to
20 break out those fees.

21 I have no problem on the fee issue with
22 breaking out bankruptcy counsel's fees from other

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1 counsel's fees to the extent there are other
2 counsel involved. I think trying to break out
3 whether what I do as the debtor's counsel is
4 bankruptcy work or something else for an
5 individual probably is getting a little too
6 detailed on the month by month basis, particularly
7 since it has been submitted in a fee application
8 and then the debtor may be paying that in
9 installments, so what's being paid. I don't know.
10 I have a \$5,000 bill, they're paying me \$1,000 a
11 month. How much of that is bankruptcy work and
12 how much of that is non-bankruptcy work, I don't
13 know.

14 We're talking about people who certainly
15 are not accountants. They are not professionals
16 at all. Most of them, many of them are not even
17 college educated. They have a hard time in many
18 cases figuring out the simple forms that exist
19 right now, the schedules are a challenge for them,
20 trying to figure out how to do Schedule I and J.

21 Many of them are in trouble because they
22 haven't been budgeting themselves. Not all of

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1 them but many of our clients don't understand
2 budgeting. They certainly don't understand
3 accounting.

4 A tax form is incredibly complicated for
5 them and they are using usually some kind of tax
6 preparer to do it, like H&R Block or they have
7 some software, but there is no software to help
8 them do these forms.

9 If you make them too complicated, they
10 are going to have to hire a professional to do the
11 forms, which greatly increases the cost. People
12 come to my office thinking they're going to get a
13 bankruptcy for 2,000 to \$3,000, and then oh, I'm
14 over the Chapter 13 debt limit, so what's this
15 going to cost me.

16 Well, you know, I'm going to need
17 \$10,000 up front, and that is an incomprehensible
18 number for these people. Then you tell them oh,
19 that's just what I need up front, you know, this
20 case is going to cost you 20,000 to \$25,000. We
21 usually want to put some kind of pad on the table
22 so when their jaw hits, it doesn't break.

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1 To add to that another layer of
2 professionals for accountants to do these monthly
3 reports is too burdensome.

4 Our clients, there is no question about
5 debtor engagement with preparing these forms. Our
6 clients prepare these forms themselves. I will
7 sit with them and help them prepare the first one.
8 If they have an accountant, we may have the
9 accountant help them prepare the first one.
10 Usually, there is no accountant. Usually, it's
11 me. We hope they get it the first time and they
12 can do it after that.

13 The idea that the rule requires GAAP
14 accounting, I don't know what GAAP accounting is
15 for an individual Chapter 11 debtor. I'm not an
16 accountant. If you're going to require GAAP
17 accounting, you're going to have to pay an
18 accountant. That is going to cost cases to fail
19 because people won't be able to afford the
20 professional fees. It's going to cause unsecured
21 creditors to get less money because the
22 accountants will be getting the money.

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1 To make matters worse, you are then
2 saying it must comply with GAAP and specifically
3 Statement of Position 90-7, that doesn't even
4 apply to individuals. I never heard of it. I
5 looked it up. It doesn't apply to individuals. I
6 can't even piece together what that statement
7 means. My clients certainly couldn't.

8 The level of detail that the form
9 requires is just too burdensome for individuals.
10 I have detailed that in my comments. I don't want
11 to waste your time going over it again.

12 Let me say I've heard that one of the
13 concerns of the USTP is that Congress has said
14 uniform forms. Well, the Constitution says
15 uniform law. We theoretically have uniform forms
16 for the petition and schedule forms, but yet now
17 we have a completely separate set of petition and
18 schedule forms for individual debtors versus
19 entity debtors.

20 I don't think it violates the uniformity
21 requirement that Congress has mandated to have an
22 uniform form for individual debtors and a separate

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1 uniform form for corporate debtors.

2 If the program decides "uniform" means
3 one single form, Mr. Togut suggested that you
4 could do it with a section that would be filled in
5 by corporate debtors and a section to be filled in
6 by individual debtors, and of course, we have the
7 provision in the forms rules that says well, you
8 can just collapse and delete those lines if you're
9 not using them, essentially achieving the same
10 result.

11 We do that with the means test form.
12 There is a Form 22, but then you have to fill in
13 Form 22.1 if you are over the median. Perhaps you
14 have a cover sheet identifying the case, debtor
15 name, case number, district, the very basic
16 identifying information, and then Part A is if you
17 are a corporation, or Part B if you're an
18 individual. You really could do a separate form
19 for individuals.

20 I would encourage you all to look at
21 some of the forms that are out there being used
22 right now for individuals. Nobody has told me

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1 ever there is a problem -- the only people that
2 tell me there is a problem with these forms are my
3 clients who think they are too difficult. Once
4 they understand the obligations to disclose and
5 the fact these things do need to be tracked, the
6 forms are manageable.

7 I would suggest the one we use in the
8 Eastern District of Virginia, which has now also
9 been adopted in both divisions in Maryland -- that
10 form is actually a pretty good one. It is
11 manageable. If you use that as your individual
12 form, I think you're going to get the information
13 you need without unduly burdening the debtors.

14 MS. EITEL: Thank you, Mr. Press. I
15 appreciate your remarks. As we mentioned at the
16 beginning, one of the most challenging aspects of
17 the rulemaking is the uniform requirement and the
18 vast expansive cases that it covers, both the
19 individual cases and the larger Chapter 11 cases.

20 My first question for you, and I think
21 you have answered it in some way, it is a broad
22 one and I'm going to drill down on it, which is

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1 reconciling your request that the uniform forms as
2 proposed do not apply to individual Chapter 11
3 debtors with the congressional mandate that there
4 be an uniform periodic report for all Chapter 11
5 debtors with only small businesses carved out, if
6 I understood your remarks correctly, you would
7 believe it would be a reasonable solution even if
8 we don't have separate forms to have a separate
9 part of a form that applies only to 11 debtors.
10 Would that be a workable solution?

11 MR. PRESS: It would essentially if the
12 two forms were basically exclusive but part of the
13 same form. I think you could do that particularly
14 because then you can say okay, fine, you don't
15 need to include Part A if you're an individual.
16 You don't need to include Part B if you're a
17 consumer -- corporation or individual.
18 Essentially have separate forms but all in the
19 same overarching package.

20 MS. EITEL: Right. So, right now Part 8
21 is for individual debtors only. It doesn't apply
22 to corporations, but it's additional information

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1 rather than exclusive information. Your proposal
2 would be to make Part 8 exclusively for individual
3 debtors.

4 Would you add -- I guess two questions.
5 Is there anything in Part 8 as it is written now
6 that you find problematic, and the reverse of
7 that, what would you add to Part 8? If you don't
8 have a copy --

9 MR. PRESS: I do have a copy. So, I
10 think what you have in Part 8 here is fine. I
11 might if I were rewriting it not do it precisely
12 this way. I might do it the way the Maryland and
13 Virginia form has it. I think something like this
14 would be appropriate.

15 I think you can then not count Parts 1,
16 2, 3, 4, 5, 6, and 7 for individuals, and add for
17 the parts in there that are appropriate for
18 individuals to Part A in a simplified manner.

19 MR. HARRINGTON: Can I ask a question?
20 Some of the questions definitively apply to
21 individuals, like are you current on your post-
22 petition tax return filings. That's not a

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1 question that would be unduly burdensome for a
2 debtor.

3 MR. PRESS: No, not at all.

4 MR. HARRINGTON: Have you sold any
5 assets outside of the ordinary course of business,
6 that's probably not a question that's unduly
7 burdensome for an individual.

8 MR. PRESS: No.

9 MR. HARRINGTON: There are questions
10 provided in Parts 1 through 7 that certainly are
11 applicable to individual debtors.

12 MR. PRESS: Of course. My point is just
13 take those questions -- you could do a Part 1 that
14 includes the questions that are applicable to
15 everyone, that are not really detailed accounting
16 type questions, you know, the transactions outside
17 the ordinary course, the total professional fees,
18 although I think you want a more detailed
19 statement of professional fees for the bigger
20 cases. Taxes. You could put those in a common
21 section, and then put the individual questions in
22 an individual section.

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1 I think the budget questions with the
2 income and expense type questions really need to
3 be simplified for the individual debtors. If all
4 they need to do on that is what you have listed
5 for Part 8 on this form, that's fine. As long as
6 it also doesn't require GAAP accounting and
7 Statement 90-7 or whatever it is, reduce the level
8 of detail that's required in the other parts of
9 the form.

10 MR. HARRINGTON: Taking a step back and
11 looking at the 10,000 foot level, as Mr. Togut
12 said earlier, there is enormous benefit provided
13 by bankruptcy for these individual debtors, like
14 the corporate debtors Mr. Togut was talking about,
15 and you agree with that; right?

16 MR. PRESS: Yes, in general.

17 MR. HARRINGTON: As Mr. Togut said, part
18 of the tradeoff for that benefit is accuracy and
19 transparency in reporting requirements. Again,
20 you --

21 MR. PRESS: I have no problem with
22 accuracy and transparency.

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1 MR. VARA: You talk about the burdensome
2 nature maybe of the form. Isn't there also a
3 benefit that goes along with it, and Mr. Togut
4 spoke about this at the large corporate level, the
5 benefit of financial reporting and financial
6 discipline, and I think that same benefit is
7 conferred upon an individual or d/b/a individual,
8 someone as you mentioned may not be used to
9 regular budgeting, regular accounting, regular
10 financial reporting to now be required to do that,
11 but it also confers a great benefit, not only
12 while in bankruptcy but can have lasting benefit
13 outside.

14 MR. PRESS: I agree as long as it's
15 manageable and understandable. It is not going to
16 confer a benefit on them or anyone if the
17 complexity of what's required means you're getting
18 garbage because the debtor doesn't understand it.

19 MS. EITEL: To follow up, I have a two
20 part question. Eight standing alone is not
21 enough, and I think you and Mr. Harrington agreed
22 there are additional matters that would have to be

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1 included in there to make the individual form
2 meaningful, as well as the statutory elements.

3 One of the comments of NACBA was that
4 individual debtors should not have to break out
5 the bankruptcy professional fees from non-
6 bankruptcy professional fees, but the difficulty
7 with that comment is that's where the mandated
8 elements by Congress -- if I heard correctly, as
9 you were making your remarks, you thought that
10 individual debtors might be able to live with that
11 mandated element, that they could actually break
12 out bankruptcy from non- bankruptcy, not ideal in
13 your world, from your perspective, but it was
14 perhaps doable.

15 MR. PRESS: Is it doable? Sure. It's
16 doable. Is it doable -- I certainly think you can
17 break out bankruptcy counsel from non- bankruptcy
18 counsel. In other words, if my client has me
19 representing them in the Chapter 11 case and
20 somebody else representing them in their DWI case
21 or in their divorce case or their personal injury
22 case, I think that's perfectly appropriate.

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1 MS. EITEL: I think that's what is being
2 asked by the statute, it says separately reported
3 for fees incurred by the debtor between those
4 incurred absent a bankruptcy and those not. I
5 think the DWI counsel and the divorce counsel is
6 in one category.

7 MR. PRESS: Absolutely. The problem is
8 where you draw that line. If bankruptcy counsel
9 is providing -- a lot of what we do in helping
10 these people is also helping get their lives back
11 on track, get their business, if they have a
12 business, get that back on track. Is it bankruptcy
13 work to be helping them with a loan mod. Is it
14 bankruptcy work to be litigating against a
15 mortgage company for consumer law violations.

16 We do those. It's a separate task on
17 the fee application, we try to break out the tasks
18 in individual cases just like in corporate cases.
19 Generally, it's the same counsel.

20 MS. EITEL: But isn't the distinction
21 that you could be doing those things regardless of
22 whether a client was in bankruptcy or not, and

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1 that's really what the statute is getting at, if
2 you're in bankruptcy versus not bankruptcy.

3 You could be litigating with your
4 mortgage company outside of bankruptcy, so it's
5 not a bankruptcy mandated fee that's incurred.

6 MR. PRESS: Right, but is it under a
7 claim, in the context of a claim objection. How do
8 we break that out? My point is I think if it's
9 bankruptcy counsel, in other words, it should
10 really be by the lawyer who is doing the work, by
11 the firm who is doing the work rather than try to
12 separate out that level of detail.

13 MR. HARRINGTON: Just a quick question.
14 If the burden is not in breaking it out, because
15 as you said, you break it out in your fee
16 application anyway into different categories, the
17 burden is in making a determination as to what the
18 professional believes is bankruptcy work versus
19 non- bankruptcy work? You've said you break it up
20 for your fee application, so it can't be the
21 separation.

22 MR. PRESS: Well, right, and how you

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1 apply the payment. I think you are -- what the
2 form is calling for is the payment. Of course, I
3 think the forms are based on maybe accrual
4 accounting. I don't know. It seemed to be based
5 on the payments rather than on the accrued
6 amounts.

7 MS. EITEL: Approved, that is statutory,
8 and there is a lot of comments about that, whether
9 it should be based on accrued, but the statute
10 says "approved," so that's one of the issues of
11 discussion on the forms.

12 MR. PRESS: If it's just based on
13 approved amounts, then it should be relatively
14 easy to break it out. If it's only approved
15 amounts, I wouldn't have a problem with it.

16 MS. EITEL: It is, at least under the
17 statute. It would also be dealt within a
18 clarifying instruction as well. I think you're
19 saying there is some confusion, but as long as
20 there is a clarifying instruction about how you
21 account for it, then it's doable.

22 MR. PRESS: I mean, that's going to be

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1 done by counsel anyway. I think that's probably
2 manageable.

3 MS. EITEL: Okay. One of the comments
4 you made was the concern about the GAAP
5 instructions, applying to individuals who are not
6 necessarily doing GAAP accounting. If the UST's
7 exercise or discretion on a regional basis says
8 individual debtors do not have to follow GAAP
9 accounting unless in some rare instance they may
10 have done that pre- bankruptcy, would that solve
11 your concern about the GAAP accounting
12 instructions?

13 MR. PRESS: I'm not sure I would want a
14 form or a rule that says unless otherwise
15 determined. I think a lot of U.S. Trustees are
16 reluctant to "otherwise determine" when there's a
17 form or a rule that says do it this way. You
18 don't want to create exceptions. I think it would
19 be better to create the exception up front.

20 I suppose there may be some very
21 sophisticated sole proprietor types out there that
22 actually are using GAAP accounting, and I suppose

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1 you could say if the debtor is using GAAP
2 accounting pre-petition, then it should be used
3 post-petition, although the Statement of Position
4 90-7 expressly does not apply to individuals.

5 I would rather have it excluded up front
6 unless it is mandated on a case by case basis
7 based on existing accounting methods that the
8 debtor uses.

9 MS. EITEL: Right. I understand the
10 preference, but would it work if there were an
11 uniform statement by the U.S. Trustee that
12 individuals do not need to do GAAP accounting but
13 in the discretion of or on a regional basis, would
14 that solve the concern? I know you're concerned
15 about it being uniform, but if it were in fact an
16 uniform discretionary decision that individuals
17 unless using GAAP accounting pre-petition do not
18 have to do it post-petition.

19 MR. PRESS: I think it should be in the
20 rule. Is it in the rule, is it in the
21 instructions. The instructions, I think, are
22 being adopted or supposed to be adopted as part of

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1 the rule, and the form is adopted as part of the
2 rule. If it's in the instructions or in the form
3 or in the rule, I don't think that makes much
4 difference, but I think it needs to say unless
5 certain circumstances exist or unless the U.S.
6 Trustee specifies otherwise based on the fact that
7 you're using GAAP accounting pre-petition, that it
8 should not apply to individual debtors.

9 MS. EITEL: There are other
10 circumstances in the forms and the rules where
11 there are going to be exceptions for opting in and
12 opting out based on the UST's discretion, and not
13 all of that is going to be in the rule.

14 I'm curious how you would reconcile --
15 is it your position there should be no discretion
16 exercised once the rule is promulgated by the U.S.
17 Trustee or the discretion should be cabined to
18 very specific things?

19 MR. PRESS: I think the discretion to
20 require it should be limited to those specific
21 circumstances. You can put a catchall in there,
22 but I think the general rule should be that it's

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1 not required for individuals, GAAP accounting
2 should not be required for individuals.

3 These are people who do checkbook
4 accounting, and checkbook accounting should be
5 allowed. That does provide sufficient
6 transparency in these cases.

7 The forms in use now for individual
8 debtors generally require essentially a check
9 ledger and bank statements. You're getting
10 complete transparency there right now. They have
11 all that information provided. Everything has to
12 go into a DIP account, and the DIP account bank
13 statement is attached to the form. There is no
14 more transparency than that. Everything is shown.

15 MS. EITEL: Would there be utility in
16 having the instructions broken out separately for
17 individual debtors as well?

18 MR. PRESS: Absolutely.

19 MS. EITEL: Any more questions for Mr.
20 Press?

21 (No response.)

22 MS. EITEL: We don't have it on the

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1 agenda, but if you would like to take a quick 7
2 minute break for people to refresh their water
3 glasses and use the facilities, we will show you
4 where they are. We'll make it a 7 minute break.
5 One of my favorite judges used to do this to us.
6 We will reconvene at 11:10.

7 (Recess.)

8 MS. EITEL: All right. Thank you. Thank
9 you, Mr. Press, for your engaging us in questions
10 and comments.

11 Ms. Cordry, we will now turn the floor
12 to you for your statement.

13 MS. CORDRY: Thank you. I am appearing
14 here on behalf of the States Association of
15 Bankruptcy Attorneys, which is really a staff
16 level group -- this is not an official position of
17 the National Association of Attorneys General,
18 it's just -- not more of a formality, but the
19 staff people, the ones who work with this day in
20 and day out.

21 MS. EITEL: Thank you for the
22 clarification.

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1 MS. CORDRY: I think our position really
2 boils down to a very simple point which is
3 anything you have here under supporting
4 documentation needs to be furnished. Not as a
5 request, not as an option, not as a discretion.
6 That might be an occasional circumstance where as
7 a matter of discretion, some of it might be waived
8 for smaller debtors in Chapter 11, but as a
9 general principle, it needs to be furnished.

10 In terms of this document as a monthly
11 operating report, as a Smart form that can be used
12 for data gathering, serve some of the purposes of
13 consolidating data and coming to statistical
14 conclusions and so forth, I have no particular
15 problem, but listening to the first two speakers,
16 I think it would be fine to break out that line of
17 counsel perhaps a bit more, but if all of the
18 professional fees, schedule fees, professionals
19 are in a supporting document made available, then
20 it's less critical how much has to go on this
21 form, but I have no problem with some additional
22 points being broken out.

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1 The same thing with my distinguished
2 colleague here speaking about individuals, I think
3 if a suddenly expanded Part A was put in there,
4 but put everything for individuals, and in general
5 most Chapter 11 individuals, I agree, are probably
6 the larger consumer debtors or at least a consumer
7 debtor with a larger debt payment, but there are
8 some people that file -- individuals that file
9 Chapter 11 who are not, Mr. John Smith with his
10 checkbook, so I would want to see some kind of
11 perhaps check the box option at the beginning of
12 the case that I elect to be under Part 8, and that
13 would be sent out to the creditors and the general
14 list, and would be effective unless there was an
15 objection to it.

16 If this was a major real estate player
17 in the Baltimore/Washington area who had tens of
18 millions, I'm not sure how many, as opposed to Mr.
19 Blixeth out of Montana who right now is one of our
20 problem children out there.

21 In terms of individuals, I think it
22 would be fine to have a general process where you

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1 have a less complicated one.

2 As Mr. Press was saying, right now they
3 have to file their entire checkbook, so you see
4 everything that goes in and comes out. The process
5 that we have here, that's an optional supporting
6 documentation that would not be automatically
7 required.

8 Our basic position is these statements
9 here, the default position, the uniform default
10 position, is these should be required for
11 everyone, unless someone comes in and makes a
12 specific showing as to why in their particular
13 case some particular piece of this is too
14 burdensome.

15 I would suggest that this is not really
16 inconsistent with your position here, because if
17 you look at your instructions, it talks about the
18 cash receipts and disbursements. Statement of
19 cash receipts and disbursements is going to
20 provide the basis for this information you are
21 filling in on this form.

22 If I've already done it, why on earth

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1 shouldn't it be made available routinely and
2 automatically, and the same thing, the balance
3 sheets provide the basis for your Part 2
4 information.

5 I think you're assuming that all of
6 these documents are going to be prepared, and at
7 that point, if they're prepared, there's no reason
8 why they shouldn't be furnished.

9 I can see with the very small debtor
10 there might be some option to ask to be relieved
11 from some portion or another. I'm not sure it is
12 really necessary, but I believe that is a
13 discretionary matter.

14 With the very large debtor, there might
15 need to be some accommodation rather than trying
16 to send it to everybody, you might have a website
17 where it's posted every month and people can
18 download to the extent they want.

19 I would tell you we frequently follow
20 our debtors and often times the mid-sized debtors
21 in particular with great care. We're looking to
22 see whether they are in fact feasible, and many

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1 times they are not. We're trying to sort out with
2 great care exactly where they are at at a given
3 point. We're looking at checks. We're looking at
4 who they are paying. We're looking at whether
5 things are being hidden in the crevices of the
6 reports.

7 I did have one where a debtor -- they
8 had their profit and loss statement, and that was
9 fine, but it wasn't until I got back to page 77 of
10 a 78 page document, and they had a listing of
11 their payments to each vendor, there was a listing
12 there for a 2014 gala of \$2 million, listed in
13 their accounts payable, but it didn't show up in
14 the accounts payable listing on the profit and
15 loss statement because I think they had perhaps
16 paid that one by the end of the month.

17 It was buried in a bigger payment. Had
18 we not had these kind of very detailed
19 reporting's, we would never have found that. We
20 have gone back to them with whether a gala is a
21 proper, reasonable, ordinary and necessary expense
22 under the plan provisions.

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1 That's the kind of thing. When we do
2 review these, we do very careful analysis. The
3 post-confirmation report, again, the more detail
4 we can get, the better.

5 Another one of my cases that I spent a
6 lot of time working on, we did have these post-
7 confirmation reports coming in, and they showed
8 money that was going into a segregated account and
9 money that was going out.

10 Because some of it was going out for
11 legitimate purposes, and it was not detailed in
12 any great specification, we were not aware for a
13 few months that when his operations were failing,
14 that the disbursements he was making was he was
15 taking money out of the account and turning around
16 and putting it back in as being his next month's
17 payment.

18 This account was not getting bigger the
19 way it was supposed to be getting. It was
20 supposed to actually come out and be paid on April
21 15th, he took it all away, took it out. Things
22 collapsed very quickly after that, and we spent a

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1 great of time solving the problem of how we were
2 eventually going to get paid on that.

3 That being our point, obviously not all
4 debtors are crooked, not all of them are hiding
5 things, but they may be failing for legitimate
6 reasons. We need to know that as soon as we can,
7 the more detail we can get on this, the better,
8 and if there is chicanery going on, the more
9 detail we get, the more likely we are going to be
10 able to find that.

11 Again, since all of these things, the
12 sort of supporting documentation you have listed
13 here, are the sort of things any feasibly
14 operating debtor is going to need to be doing
15 anyway to properly maintain his scenario, be able
16 to analyze his situation, be able to report, fill
17 out his taxes and so forth.

18 We see no reason why these should not be
19 mandatorily required to be provided.

20 Just a couple of other small points.
21 One, not that it's a huge problem but I don't know
22 why we would set some have it due on the 20th and

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1 some have it on the 25th and some on the 27th.
2 Just pick a date so I'll know that the report
3 should be due on X date.

4 Coupled with that, it would be very
5 useful to have a directive both to the debtors and
6 to the trustee offices that if it is supposed to
7 be provided on the 25th, that is really a serious
8 deadline, and failing to do so is a problem, and
9 really needs to be enforced.

10 I'm not going to suggest if it gets
11 filed on the 26th, you should be immediately
12 running in there and filing a motion to dismiss,
13 but I will leave the district unnamed, but I have
14 been in one where it was said both to me off the
15 record and before the court that we don't really
16 consider the filing of those reports all that
17 important, and it's no big deal if it goes out
18 two, three, four months.

19 I think it would be just useful to
20 remind everybody that those are really important
21 that they get filed, that they go out, that it
22 should not be something that a creditor should

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1 have to come and file a motion to dismiss or start
2 pounding the table in front of the court and
3 demanding these get filed on time.

4 I think that's really all I have to say.
5 I'm happy for questions.

6 MR. HARRINGTON: Sure. I can assure you
7 that I have never said the filing of these reports
8 is not a serious thing.

9 (Laughter.)

10 MR. DARR: You may not be getting out of
11 here today until you 'fess up.

12 (Laughter.)

13 MS. CORDRY: Ever since I complained to
14 the court, that particular debtor at least has
15 been filing its reports properly.

16 MR. HARRINGTON: Excellent. We
17 appreciate that. Just to step back for a minute,
18 and you talked a little bit about this in your
19 testimony. Explain to me for your constituency, I
20 know you have multiple constituencies, but
21 specifically for the state attorney general staff
22 people that you are here on behalf of today -- the

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1 MORs.

2 MS. CORDRY: The tax people, for
3 instance, they need to know the tax income, that
4 they are getting paid. For an individual tax
5 state or we sort of look out for counties and
6 cities, they don't have anybody else here often
7 times, the amounts of data may be buried in a huge
8 Federal tax liability, so if there is no clear
9 statement of payments going out and breaking it
10 down -- sales taxes, these kinds of things, there
11 is a current requirement in the Code that they are
12 supposed to be paying administrative expense taxes
13 without notices having to be filed and so forth.

14 That doesn't always happen. We have had
15 courts say I'll put a deadline in if you don't
16 file your request for the taxes to be paid within
17 the time I'm putting in my notice, notwithstanding
18 that the Code says you don't have to file a
19 request to be paid at all. They get wiped out and
20 so forth.

21 It's been very important for them to be
22 able to keep track of what's accruing and what's

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1 being paid. The same thing with all the various
2 kinds of expenses. We do look at those. Do they
3 appear reasonable.

4 Are they changing in a reasonable way,
5 once a month, consistent with sales, so that it
6 would seem logical, are the sales going up and
7 down, the detailed expenses, are they moving in
8 particular ways or is there something funny going
9 on. Are they paying too much to an insider entity
10 for rent or to lease a piece of equipment and so
11 forth.

12 Some of that is captured in this report.
13 Not all of that is there, but doing it in the kind
14 of detail that is set out in the supporting
15 documentation gives you the full context, gives
16 you the ability to really monitor what's
17 happening.

18 MR. HARRINGTON: I know you were here
19 for the prior testimony today. You sound like
20 you're familiar with all of the comments that have
21 been made, at least generally.

22 MS. CORDRY: I've listened to these

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1 comments.

2 MR. HARRINGTON: So, you know our
3 mandate here is to balance kind of uniformity and
4 the avoidance of undue burden with getting
5 comprehensive information here.

6 MS. CORDRY: Right.

7 MR. HARRINGTON: We're struggling to
8 meet that balance. You suggested that if we
9 required the supporting documentation that's
10 indicated in our instructions, that would be one
11 way to reach that balance.

12 MS. CORDRY: Right.

13 MR. HARRINGTON: Is that correct?

14 MS. CORDRY: Right. As I say, in terms
15 of a summary of what's going on in a case, and as
16 someone who doesn't need every bit of the detail,
17 this has a lot of good information in it, and I
18 think it's not unduly burdensome to prepare this
19 document for everyone, and it is certainly
20 something that you can consolidate, and if you are
21 trying to do as you said, statistical reporting
22 and so forth, I think this is very helpful.

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1 You are obviously not going to take a
2 Smartphone that is going to be able to catch all
3 of the stuff and try to consolidate everybody's
4 line by line statement of their cash receipts, but
5 you would have a consolidation of that here.

6 I think this is fine. What I am looking
7 at is we need to have the underlying documentation
8 because we routinely get monthly operating reports
9 that are 30-40-50 pages long because they have
10 these things. They have bank statements that we
11 can go through. They have the line by line
12 customer statements.

13 In this particular case, there is a list
14 of all their customers and their accounts payable.
15 One thing by having the detailed list of customers
16 and aging and so forth, I can see that their
17 accounts payable, say they have \$20 million, but
18 of that, \$14 million has been sitting there for
19 months and it doesn't change.

20 I can take out all those customers and
21 can say really this company only has 10 customers
22 and they really only have \$6 million that goes up

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1 and down. That makes a difference in terms of
2 knowing if they really have a significant account
3 payable that is a real resource out there or if
4 it's just something that they are just carrying
5 that ought to get written off and that kind of
6 thing.

7 MR. HARRINGTON: Let me ask you a
8 question similar to the question Ms. Eitel had
9 asked Mr. Press about discretion of the U.S.
10 Trustee. If individual U.S. trustees were able to
11 utilize their discretion and require the
12 supporting documentation as mandatory, with an
13 exception, would that be something that would be
14 sufficient?

15 MS. CORDRY: I can't imagine with any
16 district as a general rule the supporting
17 documentation should not be provided. It seems to
18 me that the discretion could be, as I said, that
19 an individual debtor in any district could come in
20 and say hey, I only have -- I'm not an individual,
21 I set my business up as a corporation for
22 liability purposes or protection and so forth, but

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1 really my business is no bigger than this
2 individual guy over here, and it is just as
3 burdensome for me as this \$500,000 a year business
4 to get all this stuff, so please, could you let me
5 out of one or another of these various things, or
6 could I do it in some less burdensome fashion.

7 I think there is some potential for the
8 trustee to have discretion on a case by case basis
9 to relieve a debtor from some of these, but I
10 don't think it should be either there should be
11 discretion of the entire district not to require
12 these as a general rule or there are any of these
13 that should be -- I think the suggestion was you
14 could ask the trustee to put these in, but if you
15 don't know what's in them, what's your basis for
16 asking, what is your problem, because I can't tell
17 you if there is a problem until I see what's in
18 your documents.

19 I would flip the discretion from what I
20 think has been suggested as a rule, that the
21 discretion should be relieving somebody as opposed
22 to always having to relieve somebody.

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1 MR. HARRINGTON: I'm asking the question
2 in a different way. Would it be sufficient for
3 each individual trustee to have the discretion to
4 mandate it in a majority of the cases and allow
5 for exceptions in certain cases, depending on the
6 case mix within a particular district governed by
7 that U.S.

8 trustee?

9 MS. CORDRY: I guess I would say I don't
10 see the need for that level of decision making.
11 The cases I have been monitoring, one was in
12 Oregon, one is in the Western District of New
13 York, another one is in the Northern District of
14 North Carolina. We also have cases in Delaware
15 and so forth.

16 We pay very close attention to the small
17 or mid-level cases that are in districts all over
18 the country. I guess I'm not seeing there is any
19 district that has such a --

20 MR. HARRINGTON: Say we had a district
21 that 80 percent of our Chapter 11 filings were
22 individual Chapter 11 cases. Would it be

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1 acceptable in your mind to give that U.S.

2 trustee discretion within that district
3 to not mandate it, whereas in other districts, the
4 Southern District of New York or Delaware, you
5 could have that mandate?

6 MS. CORDRY: Remember, I think to flip
7 the discretion that way and in general those
8 people would be able to opt into a simplified Part
9 A kind of reporting, and you could decide what
10 supporting documentation is appropriate there, and
11 it may be what they have to provide at this point
12 is sufficient and so forth.

13 Even there, I think again you shouldn't
14 have to have the creditor come in in each case and
15 say oh, please, trustee, require them to put in
16 the checkbook. It should just be required.

17 To the extent there are aspects for
18 individuals that it should be less burdensome, I
19 think you can make that the structure, but I just
20 think what is the normal process. Okay, in
21 general, in 80 percent of the districts in the
22 country, but this is the one where I have to run

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1 in and request to have all this documentation. I
2 understand what you're saying.

3 MR. HARRINGTON: You would support the
4 discretion on what documents are required based on
5 whether you are a corporate debtor or an
6 individual debtor?

7 MS. CORDRY: Right. I think you can
8 have different presumptions for individual
9 debtors. I have not seen a particular format of a
10 report from like Virginia. If that's a good
11 format, that may very well be the level of
12 supporting documentation that's necessary for an
13 individual debtor.

14 The request could be to opt into just
15 Part 8 reporting and just the Part 8
16 documentation. I think that is for most small
17 individual debtors as opposed to the mega real
18 estate mogul individual debtor. Then it is
19 probably not inappropriate at that point to let
20 the discretion and presumption be in one favor and
21 the creditor can opt to oppose that option if they
22 have a problem.

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1 MR. HARRINGTON: You said it would be
2 preferable to have the supporting documentation
3 included in the majority of cases. Would you
4 suggest that information be filed with the court
5 similar to --

6 MS. CORDRY: I don't think it has to be
7 filed with the court as long as it's available in
8 some format, supplements to this report. As I
9 say, there are all kinds of ways you can do it,
10 computers. Some of these things may get to be
11 fairly voluminous and filing it in the court, you
12 could have a drop box site or to the extent they
13 are using the third party document sites and so
14 forth.

15 There are different ways you could have
16 it so it would be available. The court may not --
17 I doubt they are looking at it with the level of
18 scrutiny that we do. I don't care whether the
19 court has it or not, as long as it is available
20 without having to jump through a whole lot of
21 hoops for the creditors to be able to get it.

22 MR. HARRINGTON: How would you suggest

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1 they be made available?

2 MS. CORDRY: It could either be actually
3 through this or as I said, a website that could be
4 set up. You can get notices that the documents
5 have been updated on website X.

6 I wouldn't care about downloading the
7 professional schedules, but I might not want to
8 download their balance sheet and statement of
9 operations, et cetera.

10 MR. VARA: Ms. Cordry, how are you
11 presently getting the information?

12 MS. CORDRY: The operating reports are
13 coming in, you know, in full detailed fashion. We
14 download them in their entirety. They have all of
15 these different pieces in them.

16 MR. VARA: From the docket or are you
17 getting separately served by counsel?

18 MS. CORDRY: Sometimes one, sometimes
19 the other. Usually, I guess in most cases we also
20 get notice -- well, it gets filed in the docket
21 and I get electronic notice from that.
22 Occasionally, counsel will send it to us as well.

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1 MR. HARRINGTON: That's in jurisdictions
2 that currently require it to be filed. It would
3 be easier for you to get from the docket? There
4 are some jurisdictions that do not require --

5 MS. CORDRY: I guess I haven't had one
6 that it hasn't been filed in the court. I guess
7 they have always been ones that have been filed in
8 the dockets, so I can go there and pull it down or
9 I get electronic notice.

10 MR. HARRINGTON: Say this was to be
11 filed on the docket, I know privacy concerns are
12 near and dear to the state attorneys' hearts. How
13 should we deal with privacy issues with respect to
14 potential privacy information. There is PII.
15 There is different information that could be
16 included in there. How should we deal with the
17 privacy concerns with respect to that? Do you
18 have any suggestions?

19 MS. CORDRY: That's interesting. On the
20 corporate level, I've never seen any ones where
21 there has been any issues raised about that.
22 Certainly on an individual level, there are

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1 certain redaction rules that are in place at this
2 point.

3 Again, we don't deal a whole lot with
4 individuals. Most of ours have been corporate
5 ones. The ones where they file the checkbook, I
6 don't know.

7 MR. PRESS: Typically, the checkbook,
8 the bank statements are attached, and we redact
9 all but the last four digits of the account
10 number. Do the same thing on the checks.

11 MR. HARRINGTON: It's a sufficient
12 answer.

13 MS. CORDRY: Yes, I'm deferring to the
14 person who has more expertise in that. I think
15 the redaction rules is the place you can go.

16 MR. HARRINGTON: I'm going to ask you
17 one more question before opening it up to my
18 colleagues. What additional documents do you
19 think we didn't include on this list that we
20 should have included on this list of additional
21 supporting documentation? I know I'm putting you
22 on the spot.

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1 MS. CORDRY: Right; right. A lot of it
2 depends -- I'd love to have access, for instance,
3 to a general ledger. Again, even with these very
4 detailed ones I have here, we get a listing, for
5 instance, saying there was a payment made - - this
6 is one of my current ones, I know a payment was
7 made to a particular person, but what I don't know
8 is how they accounted for that particular payment.

9 Under my plan, I have limits on what
10 they can spend in a particular category. We're
11 fighting right now over whether or not these
12 payments should have been put in that category or
13 not put in a category. I'm not sure where they
14 have put those payments. I have suspicions. I'm
15 happy to do formal discovery to find out those
16 kinds of things, you know.

17 Obviously, a general ledger, when you
18 start getting to a bigger company, gets to be
19 fairly massive, and it is one of those kinds of
20 things that is the kind of thing that is much more
21 likely to be posted on a website that people could
22 download as necessary kind of thing.

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1 I think other than that, this really
2 covers the great bulk of everything. There may be
3 something in a particular case, but that may have
4 to be the sort of thing you do 2004 discovery on,
5 if there's something that isn't covered here.

6 MR. VARA: Ms. Cordry, I want to ask a
7 question of you that I asked of Mr. Togut. In
8 terms of the utility that your constituency
9 defines in the operating reports, who would you
10 want to see sign that?

11 MS. CORDRY: I don't know if that has a
12 lot of meaning to us one way or other, as long as
13 it is somebody far enough up that it's important.
14 If we thought they were lying, we'd like to have
15 somebody important be signing it so we could catch
16 them on that.

17 (Laughter.)

18 MS. CORDRY: In terms of the kind of
19 thing he's looking at where he is wanting people
20 to consult with people and do these sort of
21 things, I hadn't really thought about it, it's an
22 interesting thought with respect to professional

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1 fees. Our group always thinks professional fees
2 are too high.

3 I'm not sure why I haven't heard of this
4 concept of efficiency counsel before. I guess I
5 hadn't read the fee report. I think it's a great
6 idea, and the more it is used, the better.

7 To the extent there is encouragement,
8 requirement, suggestions to have that kind of
9 consultation and to make the best use of counsel
10 in a case, that is obviously something we agree
11 with. It's not something that is particular to
12 us, but I think we would strongly support that
13 concept.

14 MR. HARRINGTON: You do support the
15 person having knowledge of the information --

16 MS. CORDRY: Yes; yes.

17 MR. HARRINGTON: And signing under
18 penalty of perjury?

19 MS. CORDRY: Yes; absolutely. It's
20 useful to have somebody have a little fear of God
21 in them when they're signing; yes.

22 MR. HARRINGTON: All right.

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1 MS. EITEL: Thank you. That was very
2 helpful.

3 MR. HARRINGTON: Thank you, that was
4 excellent.

5 MS. EITEL: Mr. Darr?

6 MR. DARR: I guess I'm next. My name is
7 Stephen Darr. I'm here on behalf of the
8 Association of Insolvency & Restructuring
9 Advisors. Our group is about 3,000 strong, and
10 obviously it is restructuring and financial
11 advisors. Most of us or many of us are
12 accountants. Not too many of us are attorneys.

13 Our cases run the gamut, but they are
14 almost exclusively business cases ranging from
15 smaller cases to the very largest.

16 I'm here with my associate, Jim Lukenda.
17 We are both directors of the AIRA. First, we want
18 to thank you for allowing us to appear and express
19 our support for the effort. We've had discussions
20 in the past with the U.S. Trustee Program about
21 standardizing the monthly operating reports, and
22 we are gratified that the U.S. Trustee Program has

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1 started this.

2 We think the monthly reports are very
3 valuable. They provide, depending on the size of
4 the business, focus to the smaller businesses
5 because they know they have to report. They
6 provide discipline, and those are primarily in the
7 smaller to medium sized cases.

8 The larger cases, they have the
9 discipline, they have the focus, but what's added
10 for all of the cases is the information that's
11 needed to the various parties in interest, the
12 state taxing authorities, as Ms. Cordry points
13 out, the U.S. Trustee Program, the creditors, and
14 other parties in interest.

15 The AIRA submitted a four or five page
16 comment letter during the initial comment period,
17 and we reaffirm those comments. My compatriot
18 here, Mr. Lukenda, has four or five additional
19 comments. My position is merely to reaffirm the
20 comments that we made earlier and to offer on
21 behalf of the AIRA that if the U.S. Trustee
22 Program wants us to provide additional comments or

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1 work with you in the future, we are certainly
2 happy to do so once you refine the proposed
3 documents.

4 With that, I will turn it over to Mr.
5 Lukenda.

6 MR. LUKENDA: Good morning. Thank you
7 very much for the opportunity to speak. My name,
8 as Steve mentioned is, James Lukenda. I'm one of
9 the directors with the AIRA, and like Steve, I am
10 also a certified insolvency and restructuring
11 advisor, a designation that our organization
12 sponsors, education and testing, to help further
13 the professional qualifications of people who deal
14 in the financial area of bankruptcy and
15 reorganization.

16 We just had a couple of minor comments
17 to add to our earlier letter, which also turns out
18 are somewhat related to some of the conversation
19 we are having here so far today from the other
20 testimony.

21 The whole idea of GAAP accounting, in
22 our letter under Global Comment 1.g, we have

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1 raised the issue of compliance with GAAP and that
2 many times organizations don't report in
3 accordance with GAAP.

4 I very recently in a case that I'm
5 involved in now down in the Southern District of
6 Texas realized that in addition to GAAP, we also
7 probably need to think about things like
8 international reporting standards, IFRS.

9 I think that the standard form should
10 have some provision that the debtor would be able
11 to indicate under what method they would be
12 reporting, whether it be GAAP, IFRS, cash basis
13 accounting, or there is also under tax, modified
14 cash basis or other bases of accounting.

15 Having some ability to designate that
16 type of reporting up front, which would tie into
17 the normal type of reporting the debtor was used
18 to having, would, I think, provide for the ability
19 then within the smart forms to designate the types
20 when information is pulled, that this type of
21 information has all been put together by debtors
22 who were reporting under a cash basis, which is

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1 usually your individual parties, whereas a more
2 sophisticated party has GAAP, IFRS, and so forth.
3 We are expanding the comment we included in our
4 report there.

5 One other area, the discussion we had
6 included in our comments to a further break out on
7 professional fees, that there are other categories
8 which is there is a monitoring going on, it would
9 be important, we think, to break out, such as
10 where a debtor might be paying the professional
11 fees of a secured lender. There is obviously the
12 ordinary course professionals. Bankruptcy related,
13 non-bankruptcy related.

14 There are suggestions in some of the
15 other comments about further including in the
16 monthly operating report even greater details,
17 such as fees by individual professionals, if I
18 understood the comment letter.

19 I guess I would raise a caution there of
20 conflating the monthly operating report process
21 with the fee application process, and possibly
22 from the standpoint of those situations where you

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1 have a debtor's counsel that may be doing both
2 bankruptcy related and sort of corporate work,
3 just the way that case develops, that those types
4 of designations and statistical analysis may be
5 better left to the fee application process.

6 Within the U.S. Trustee's guidelines for
7 reporting, having the designation at that point
8 where that data is accumulated and would be able
9 to be analyzed on a more global basis.

10 On the one hand, that would then put
11 some of the burden on those parties who were
12 involved in the bankruptcy and not leave all that
13 reporting burden necessarily on the debtor,
14 because in some cases I would think you would be
15 adding a significant amount of information for the
16 debtor to be rehashing, where information also at
17 that point should be readily available in the
18 docket or through reporting on some sort of a
19 smart form basis.

20 There were some other comments that were
21 made in the comment letters related to including
22 more information and reference was made to the

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1 type of information that comes from SEC reporting.
2 Again, in that case, it's important to note
3 information from Regulations SX and SK are on a
4 quarterly and annual basis.

5 Placing a burden on a debtor,
6 particularly somebody who normally wouldn't be a
7 publicly reporting entity and used to that,
8 putting those types of burdens on them, it would
9 clearly be excessive when you consider the SEC
10 doesn't place monthly reporting burdens on
11 publicly reporting companies.

12 Again, while I think many parties would
13 think that information might be good to have for
14 their specific purposes, keeping in mind the
15 balancing of adequate information against what is
16 practical for a debtor, we think, is an important
17 point to note.

18 Tied into that, and this comes back to
19 the question of the deadline for monthly operating
20 reports, in our letter, we had mentioned --
21 alluded to the fact that the 20th of the month
22 comes into play.

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1 One of the suggestions we made was that
2 possibly the first monthly operating report,
3 rather than sort of a test that says I've been in
4 bankruptcy for a certain number of days so I have
5 to report on date or another, would be to make an
6 uniform reporting requirement that first report
7 would be due for the first full month of
8 reporting, so whatever stub from the bankruptcy
9 filing date through whatever the calendar month
10 end, if that is how a party reports, so really
11 potentially the first report would be something
12 more than a 30 day or 31 day reporting.

13 That would give the debtor the chance to
14 get the case up off the ground, look at the
15 reporting issues, and then on that first full
16 month, be able to report.

17 One area that relates to publicly filing
18 debtors is that under the SEC rules, there are
19 time lines to be followed for filing quarterly
20 reports and annual reports. In those situations,
21 the monthly operating report should be closely
22 tied into however a debtor would be filing their

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1 publicly filed reports.

2 To require someone to file a monthly
3 operating report at the end of December, which
4 would then potentially be modified when their
5 actual annual report is filed, would seem to be
6 adding to the burden of work as opposed to letting
7 the debtor fall into the line of the acceptable
8 reporting under the SEC guidelines.

9 With that, I would say that pretty much
10 summarizes the additional comments we have, other
11 than what's in the letter we currently have before
12 the group.

13 MS. DAVIS: Mr. Darr and Mr. Lukenda,
14 thank you very much for your initial comments as
15 well as your supplemental comments. Considering
16 the nature of what we are doing here, we welcome
17 your attendance today.

18 I have some questions that go to your
19 comments on both the forms as well as the
20 instructions. I imagine my colleagues will also
21 have some supplemental comments based upon your
22 supplemental comments.

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1 Let's just start with under what
2 circumstances would your organization envision a
3 debtor being permitted to file a consolidating
4 monthly operating report with an attachment, with
5 disbursement, and other information broken down by
6 debtor.

7 MR. DARR: I think that conversation,
8 that decision, should be made after a conversation
9 with the U.S. Trustee and the initial report.
10 When you consider many of the very largest debtors
11 have hundreds of subsidiaries, to get monthly
12 operating reports on an individual basis for those
13 hundreds of subsidiaries will do two things: it
14 will swamp everybody with information, and it
15 won't really provide any useful information
16 because consolidated financial statements are
17 really an indication of the company, its financial
18 condition, and its results of operations, knowing
19 full well that one of the key pieces of
20 information is the disbursements by debtor, which
21 is needed for calculation of the U.S. Trustee fee.
22 We think that is certainly a reasonable

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1 request and it is easily complied with, but many
2 of the largest corporations just don't have the
3 ability to provide individual balance sheets and
4 income statements for hundreds or possibly
5 sometimes thousands of subsidiaries.

6 We think in those instances, after
7 discussion with the U.S. Trustee for the region,
8 consolidated financial statements should be
9 allowed while providing a sufficient level of
10 detail.

11 MR. HARRINGTON: Can I ask a clarifying
12 point on that? You said "consolidated" as opposed
13 to "consolidating."

14 MR. DARR: Consolidated.

15 MR. HARRINGTON: Does consolidating
16 create sort of a balance between the two so you
17 get breakdown of information as opposed to all
18 aggregated into one?

19 MR. DARR: Yes, but let's -- I don't
20 want to get too technical here. Consolidating
21 statements and consolidated, consolidated
22 financial statements are not just the sum of the

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1 consolidating, because if you look at any publicly
2 traded company's financial reports, it says all
3 material intercompany balances and transactions
4 have been eliminated.

5 What does that mean? That means if I
6 have two subsidiaries, A and B, and A sells
7 something to B, A would have it in sales, and B
8 would have it in cost of sales, presumably.

9 When you put the two of them together,
10 they didn't sell anything to anybody, they just
11 sold it to one another. You reduce the sales or
12 you reduce the cost of sales. Similarly, when the
13 selling company makes the sale, it records a
14 receivable. When the purchasing company makes the
15 purchase, it records a payable. You have
16 receivables on the assets side and payables on the
17 liability side, but to a third party, there is no
18 real receivable or - - there is no real asset nor
19 is there a real liability, so you eliminate those.

20 You're going to have to understand, you
21 could do consolidating, but again, you're talking
22 about you're going to have another company in

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1 there that is the elimination entries that are
2 going to raise more questions. It is not going to
3 be meaningful information.

4 MS. DAVIS: Back to the original
5 question, under what circumstances might you
6 envision --

7 MR. DARR: We would envision it in very
8 large corporations after discussion with the U.S.
9 Trustee and agreement. That level of detail on an
10 individual company by company basis would be
11 overly burdensome not only on the company to
12 provide it but on the reader to understand it.

13 MS. DAVIS: That --

14 MR. LUKENDA: I was going to say I think
15 (a) Steve's point is very important, what we
16 envision would be we think meeting with the U.S.
17 Trustee's Office and the analysts there at the
18 commencement of the case is very important.

19 MS. DAVIS: The initial debtor
20 interview?

21 MR. LUKENDA: Right. It is very
22 important in determining what the debtor's

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1 capabilities are, what makes sense in terms of
2 clear financial reporting, and covering those
3 items should be something that is clearly built
4 into the requirements.

5 If I can use an example, Nortel, very
6 large international company. We had a combination
7 of both U.S. debtors, non-U.S.

8 debtors, we had non-debtors involved.
9 The debtors themselves were a very long list of
10 entities, some of which were sales companies, some
11 of which were only expenditure companies,
12 depending upon the tax structure.

13 What we ended up reporting eventually
14 was a single monthly operating report but it was
15 broken down into -- if I am recalling correctly --
16 we had three consolidated groups of debtors, and
17 information about the non-debtor transactions
18 that may have gone on between those, and the three
19 consolidated groups were debtors that their
20 operations were all closely linked on the same
21 either product line or operation of the business.

22 There was clear information of what was

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1 happening within the debtor companies and we also
2 understood what was non-debtor related.

3 MS. DAVIS: If a debtor --

4 MR. HARRINGTON: Can I go back to
5 consolidated versus consolidating? There are
6 circumstances where should you want to be looking
7 at intercompany transactions, you wouldn't want it
8 on a consolidating basis, they would not net out
9 the intercompany transactions; correct?

10 MR. DARR: We agree that intercompany
11 transactions are something that needs to be
12 reported, and intercompany balances, the balances
13 resulting from the transactions. In any company
14 that is "well run," I use that term in quotes, the
15 intercompany balances will always eliminate
16 because if they don't, you have more problems with
17 your account.

18 That doesn't mean that there can't be
19 items of interest occurring in the transactions.
20 I think our initial letter runs to reporting on
21 intercompany balances and transactions. We think
22 that can be handled separately as well.

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1 MR. VARA: Aren't there circumstances
2 where creditor constituencies really want to know
3 the different accounting for each entity and what
4 are the assets, the unique assets of one entity
5 versus the unique liabilities of another entity?

6 MR. DARR: Absolutely. That gets to the
7 question of substantive consolidation, et cetera.
8 That information can be generated on a meaningful
9 basis through discussion, and if it's not
10 meaningful at the beginning of the case, then that
11 would be part of the initial discussion.

12 Take Chrysler or take Nortel. They have
13 thousands of subsidiaries. I don't know - - just
14 because you have that information doesn't mean --
15 a creditor may or may not be able to make sense of
16 it. You are still going to have to have some
17 negotiation as to what makes sense in terms of
18 substantive consolidation versus non-substantive
19 consolidation.

20 That information can be had, but we are
21 just saying to require this of every subsidiary
22 and every case may not be the right answer.

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1 MS. DAVIS: What I'm hearing is in your
2 comments and what you are thinking about is a
3 conversation at the inception of the bankruptcy
4 case, the initial filing, versus towards the end
5 of the case.

6 MR. DARR: Right.

7 MS. DAVIS: Does your view change at all
8 when you are dealing with a conglomerate that
9 files under the specter of perhaps a fraud or an
10 issue about intercompany transactions, do you
11 think under those circumstances, more information
12 is --

13 MR. DARR: Yes, if there is a reason for
14 more information, we think it should be provided.

15 MS. DAVIS: What would those reasons be?

16 MR. DARR: That would be the negotiation
17 with the U.S. Trustee. Again, I go back to
18 Chrysler. Putting together all that information
19 on a subsidiary by subsidiary basis is a lot of
20 information, but to make sense of it would be
21 exceptionally difficult.

22 Instead, as Mr. Lukenda said, what was

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1 it, Nortel? After negotiation, there were three
2 operating groups. It made sense to provide that
3 information and it was meaningful.

4 MR. HARRINGTON: Can I ask the question
5 in another way? Where is the default, is it
6 default that you provide individual -- the
7 ordinary case that may have three debtors, you
8 provide individual information for the three
9 debtors. You're saying the non-default, there
10 should be an exception in particular cases?

11 MR. DARR: Right.

12 MR. HARRINGTON: If specific facts
13 weren't in that particular case, it would be
14 different treatment.

15 MR. DARR: If I've got a debtor with
16 three subsidiaries, I should be required to
17 provide that information. If I've got a debtor
18 with 150 subsidiaries, I need to talk with you
19 people to say what do you really want. This is
20 what we propose. We should come to you with a
21 proposal saying, you know, company by company
22 doesn't make sense.

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1 For example, here's the three reporting
2 entities that we think makes sense, and this is
3 why. Certainly, the default should be you're
4 going to report everything.

5 MS. DAVIS: That discussion is at the
6 IDI?

7 MR. DARR: Yes.

8 MR. LUKENDA: Right. I would throw a
9 question back, understanding the purpose of the
10 reporting, is it to provide an uniform set of
11 information so that parties can generally sort of
12 understand what's going on in the case or is it to
13 provide incredible levels of detail that in many
14 cases are unnecessary for the reporting, and where
15 you have a large sophisticated debtor, in all
16 likelihood you will also have a creditor's
17 committee who is very active, and while the
18 monthly operating report provides a reasonable
19 level to your day to day -- somebody who is
20 monitoring the cases of an individual creditor,
21 they do have a creditor's committee representing
22 them who does generally have access to that level

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1 of minute data that might be necessary to
2 understand if there's a fraud or some other
3 concern that's involved.

4 I guess I would raise the question,
5 making sure we're not pushing the monthly
6 operating report into a realm that really right
7 now the way the cases are run with creditor's
8 committees who have responsibility for
9 understanding greater levels of detail, we're not
10 pushing it past where it needs to be and
11 forgetting about the fact that there are other
12 forms for data to be generated on with what's
13 going on with the debtor.

14 MR. DARR: I have one more comment to
15 add to that. When you talk about the usefulness
16 of the reports, if you had individual reports for
17 each subsidiary, suppose you had 100 subsidiaries,
18 99 of them will not have any bankruptcy fees,
19 legal fees, financial advisor fees, any fees
20 recorded on it.

21 One company, whoever it is, is going to
22 report all of the bankruptcy related costs. If you

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1 put that into your system, you're going to say 99
2 percent of the cases won't have any bankruptcy
3 fees. That doesn't make sense. It only makes
4 sense to look at this stuff in a lot of cases on
5 an individual -- I'm sorry -- consolidated basis.

6 When you talk about providing
7 consolidating, that's fine if you have -- how big
8 is a spreadsheet?

9 (Laughter.)

10 MR. DARR: 200 columns? If you have a
11 spreadsheet that is 200 columns, you can provide
12 that information for 200 companies. Most of the
13 companies of any sophistication and of any size
14 today, they don't do it on a spreadsheet where it
15 all adds up, using an accounting term, down-foots
16 and cross-foots, which means it adds up, they have
17 a computer that does it. It all pops out.

18 To figure out how that all linked
19 together, you know, you have to be a genius
20 accountant, IT guy, and I don't know what is a
21 third person you would need. You have to be
22 really smart to figure that out.

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1 (Laughter.)

2 MR. DARR: To have consolidating
3 financial statements may be useful in some cases,
4 but again, the default would be you get all the
5 information, and it is the responsibility of the
6 debtor to say we don't think you need or want this
7 information, but this is what we'll give you.

8 MR. HARRINGTON: Understood.

9 MS. DAVIS: Thinking about the comment
10 that Mr. Togut made that these debtors file
11 bankruptcy and they are getting extraordinary
12 relief through the bankruptcy process. Don't you
13 think or is it your view that this request for
14 information is less burdensome, if you will, if
15 you think about the relief they are getting?

16 MR. DARR: I don't think the
17 responsibility to respond to the inquiries or to
18 provide the information is burdensome. It is the
19 old question of be careful of what you ask for,
20 you might get it. In many instances, you're going
21 to get information that is neither useful nor
22 needed.

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1 That is all we are saying, the system
2 should provide some flexibility to explain why you
3 don't need it, explain why it's not going to be
4 useful, and to provide an alternative.

5 MS. DAVIS: Thank you for that. Would
6 requiring all debtors to file supplemental
7 documentation of records with the court alleviate
8 your organization's concerns about
9 confidentiality?

10 MR. DARR: It would increase -- bigger
11 corporations with a lot of subsidiaries, first of
12 all, not all the subsidiaries have financial
13 people. They may not have a controller, they may
14 not have an accountant. They may not even have a
15 checkbook. It all goes through "shared services."

16 All the subsidiaries send all of their
17 bills to one corporation in Gaithersburg, Maryland
18 or Belmont, Massachusetts or wherever, and that
19 company makes all the payments, and then it gets
20 charged back to each of the individual companies.

21 If you're talking about a file that may
22 have hundreds of thousands of checks every month

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1 in it, that is just the listing of the checks,
2 it's not going to provide any -- you're not going
3 to know what it's for, you're not going to know
4 what debtor incurred it. It will have something
5 that will say Invoice No. 123-A to the Togut Law
6 Firm, you don't know what it's going to be for.

7 We have a sophisticated e-mail system.
8 If I send an e-mail out with somebody's Social
9 Security number on it, it automatically encrypts
10 it, it automatically sends me an e-mail saying
11 you tried to send something with a taxpayer i.d.
12 number on it and we have encrypted it.

13 Who is going to sit there and encrypt
14 all those checks to take out the account number
15 and you have hundreds of thousands of checks, or
16 strike out everybody's Social Security number for
17 payroll, or everybody's account number with the
18 State of Nebraska.

19 It's not a practical solution to provide
20 all that information. Again, I'm not saying you
21 don't have a right to ask for it. It's a question
22 of is it going to provide people with useful

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1 information. Depending on the size of the debtor,
2 it might and it might now.

3 MS. DAVIS: Well, the safeguards that
4 the Bankruptcy Code affords debtors and creditors
5 to perhaps deal with confidential information from
6 being filed publicly, those would necessarily deal
7 with the issue of --

8 MR. DARR: As I understand it, it's up
9 to the filer to redact the information.

10 MS. DAVIS: Right.

11 MR. DARR: Who is going to redact
12 100,000 checks every month? If it's useful
13 information, it makes sense to do it. I'm going
14 to go out and start my own redaction company with
15 gallons of Wite-Out.

16 Again, it's a problem. To that end, I
17 will reiterate my thought that it should be a
18 negotiation with the U.S. Trustee in the region
19 the case has been filed. My guess is mostly with
20 Mr. Harrington.

21 (Laughter.)

22 MS. DAVIS: Or Mr. Vara.

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1 MR. VARA: If it is one percent of the
2 cases that we're talking about, the presumption
3 should be it's disclosed, filed, submitted, and
4 negotiation occurs in that one percent.

5 MR. DARR: Correct.

6 MR. VARA: The uniformity part of it is
7 provide. The discussion is in that rare
8 percentage of cases where the benefit is far
9 outweighed by the burden, the utility is far
10 outweighed by the process of getting it. That
11 would be where the discussion happens.

12 MR. DARR: Right.

13 MR. VARA: Question for you, switching
14 gears here, on this stub period. Since it's
15 largely the computer that spits this stuff out
16 now, it is certainly possible for debtors to
17 report for a stub period at a month; correct?

18 The company files the 10th of March, it
19 is certainly possible to provide an operating
20 report from the 10th to the 31st of March.

21 MR. LUKENDA: Not necessarily easily.
22 Many accounting systems are set up to have a

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1 certain number of reporting periods each year, so
2 you can close the books for the end of the month,
3 but the question then is what do you need to do,
4 what sort of machinations need to take place to
5 potentially block off the first 10 days of the
6 month. What type of analysis then needs to go
7 into that closing to pull out the non-Chapter 11
8 period.

9 MR. VARA: What would those machinations
10 be? Wouldn't it just be telling the computer --

11 MR. LUKENDA: Some systems don't have
12 that ability.

13 MR. DARR: Some systems won't do it. The
14 other problem is when you think of the CFO or the
15 COO filing a statement under the penalties of
16 perjury, that's even worse than filing documents
17 with the SEC, with greater penalties.

18 In a company that files with the SEC, it
19 doesn't just close the books, it doesn't just hit
20 the button and close the books. They have a
21 closing procedure. They have to set up accounting
22 cut outs for receipts of goods, for payments, for

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1 accrual of invoices, for bank reconciliations, et
2 cetera, and that takes time.

3 To do that in the middle of the month
4 when they don't have those -- everybody is used to
5 a month end closing. The guy out in Omaha knows
6 he has to shut down receipts and he has to do
7 something special with goods received on the 30th
8 or the 31st or this year the 29th of the month.

9 Are you going to tell him he has to do
10 it on the 15th? You have just told him something
11 is really up. It's not easily doable even if you
12 tell him about it because you have to call the
13 bank and you have to get bank statements so you
14 can see how you can reconcile the accounts.

15 If I were signing it, I would want to
16 make sure that it was right, and the way you make
17 sure balance sheets are right is by reconciling
18 all of the accounts. I reconcile the bank
19 accounts to the bank statement. I reconcile my
20 accounts receivable trial balance to the general
21 ledger. I calculate out -- most companies will
22 have an automatic program that amortizes

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1 depreciation, amortizes pre-paid insurance,
2 amortizes pre-paid organizational costs.

3 To do that in the middle of the month is
4 just inviting a misstatement.

5 MR. VARA: Then I guess I didn't
6 understand your comments.

7 MR. DARR: We think it should be
8 extended to the end of the first full month so
9 that the regular closing process can occur and the
10 balance sheet and the other information will be
11 reconciled.

12 MR. VARA: Are you saying the accounting
13 shouldn't be closed as of the date of filing,
14 there shouldn't be new accounting tracked from the
15 date of filing?

16 MR. LUKENDA: No, no.

17 MR. DARR: Not at all.

18 MR. LUKENDA: What we're saying is there
19 are so many things going on immediately after a
20 filing, the same people who are responsible for
21 the external financial reporting will be
22 responsible for the monthly operating report,

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1 while also pulling together the initial monthly
2 operating report, they are doing the statements
3 and schedules, they have been involved in the
4 creditor matrix.

5 There are a whole number of financial
6 accounting things that are going on, and then to
7 add to that the burden of in some short stub
8 period between 1 to 30 days having to then also
9 put in this first monthly operating report is
10 creating sort of an undue burden and not
11 necessarily providing a lot of what we thought was
12 real necessary information.

13 Where if you give the debtor that
14 opportunity to get into the Chapter 11, basically
15 put the systems in place to get that monthly
16 operating report ready, have an opportunity to
17 meet with the U.S. Trustee's office to talk about
18 what that operating report should look like, if
19 there are some concerns about needing some
20 variation from the standard, giving the debtor
21 that opportunity to the end of the first full
22 month is a reasonable amount of time.

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1 MR. VARA: You're not saying it can't be
2 done, you're just saying it's burdensome to try to
3 do that in the initial month that they file?

4 MR. DARR: Well, it's burdensome in most
5 cases, and in some cases, depending on their
6 accounting system, you can't cut off in the middle
7 of the month, because the accounting system --
8 some accounting systems only let you have 13
9 accounting periods, one for each month, and one at
10 the end of the year to run your adjusted entries
11 to make sure everything is up to snuff.

12 That is a problem for some companies. Do
13 I think it is insurmountable for those companies?
14 No. I think the idea of filing an accurate
15 initial monthly operating report can't be done
16 without it being done at a month end.

17 MR. HARRINGTON: Can I ask that question
18 another way?

19 MR. DARR: Sure.

20 MR. HARRINGTON: Isn't it a balancing
21 act? On the one hand, you potentially have this
22 stub period where you may not see an operating

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1 report, if you file on March 2, you may not see an
2 operating report for 80 days, right, so you have
3 some companies where you would not want 80 days to
4 pass by without creditors and other individuals
5 knowing what the financial information of that
6 company is, because it may not be a feasible
7 company for 80 days.

8 MR. DARR: Yes.

9 MR. HARRINGTON: You have those cases on
10 the one hand versus the GMs on the other hand
11 where you have what you have described as this
12 convoluted and complicated closing statement.

13 Isn't the real question with the monthly
14 operating reports in general that you're
15 suggesting that there is a standard way of doing
16 it, and maybe that is --

17 MR. DARR: The standard way is your way
18 --

19 MR. HARRINGTON: With some flexibility
20 in the system.

21 MR. DARR: Right.

22 MR. VARA: Again, if a company comes in

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1 March 28 with a very complicated accounting system
2 to ask for the 28th to 31st operating report might
3 be impractical and unnecessary.

4 MR. DARR: Right.

5 MR. VARA: As Mr. Harrington has said,
6 if you have the company that comes in March 2,
7 waiting 80 days --

8 MR. LUKENDA: That being said, even if
9 somebody has filed on the 28th, they are filing
10 the quarterly statement with the U.S. Trustee -

11 -

12 MR. DARR: The quarterly calculations of
13 fees based on disbursements shouldn't change.

14 MS. DAVIS: Let's turn to the
15 instructions on page five of the form. What is
16 the benefit of monthly reporting of under secured
17 debt --

18 MR. DARR: I'm sorry. Where are you?

19 MS. DAVIS: Looking at page five of the
20 MOR instructions. I'm asking what is the benefit
21 of monthly reporting of under secured debt -- that
22 information is available on the schedules.

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1 MR. DARR: Those numbers might change,
2 valuations change, if you look at the W Hotel in
3 Boston, which Mr. Harrington is very familiar
4 with, the numbers change, and values change, and
5 the amount of the debt may or may not change
6 depending on what happens. We think it's
7 information that's meaningful to creditors.

8 MS. DAVIS: If it's available on the
9 schedules, would it be redundant for it also to be
10 --

11 MR. DARR: But it changes.

12 MS. DAVIS: Let's go to one of the
13 points that was raised about the language that's
14 on the signature line, page four. As you are
15 aware, the schedules and cert's are signed under
16 penalty of perjury.

17 MR. LUKENDA: That's correct.

18 MS. DAVIS: Regarding changing the
19 signature line to true and correct to the best of
20 your knowledge, why do you think a lesser standard
21 is more appropriate? This is separate and apart
22 from the stub period that we just talked about.

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1 Let's just talk about it in general.

2 MR. LUKENDA: Right. That is the
3 language that is currently on the monthly
4 operating report. From the standpoint of the
5 person who is signing that, generally it would be
6 the chief financial officer of a company. The
7 chief financial officer may not be the position to
8 know every transaction that goes on.

9 He or she relies upon a process that
10 hopefully is in place internally where if there
11 are people reporting up, people making
12 representations to that individual, so ultimately
13 the person signing that has hopefully gone through
14 a process, but again, that process is based on
15 their being comfortable to the best of their
16 knowledge and belief.

17 I don't think anyone who has a chain of
18 command underneath them signs off on something to
19 an absolute certainty. I think that standard is
20 probably excessive, unless of course you are going
21 to want to have every person who has touched any
22 part of that financial reporting also signing

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1 those statements, which I think is also
2 impractical.

3 I think again as it is currently
4 standard, as it currently sits, I'm responding to
5 the best of my knowledge and belief that these are
6 true, accurate, and correct.

7 Accounting information, financial
8 information is also subject to estimation,
9 accruals, you may not necessarily know an exact
10 amount. At any point in time, the CFO or the
11 person in charge of that reporting is making
12 certain judgments and assessments to the best of
13 their knowledge and belief. I think that standard
14 should carry through to the reports they are
15 filing.

16 MS. DAVIS: Have you found in the cases,
17 however, where you do have indicia of fraud and
18 you suspect, if you will, criminal, Title 18
19 issues with respect to a conglomerate or large
20 corporate debtor, requiring these reports be
21 signed under penalty of perjury is often times an
22 issue at the time an examiner report comes out,

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1 for instance. It is often times an important
2 issue regarding disclosure?

3 MR. LUKENDA: I'm not sure I completely
4 understand the question, Ms. Davis.

5 MS. DAVIS: Let me step back. In those
6 complex cases where you find there is an examiner,
7 for instance, that has been appointed, or there is
8 a specter of fraud in the case, often times isn't
9 the issue of the officers or directors attesting
10 to the veracity, if you will, of the information
11 in the operating report at issue?

12 MR. LUKENDA: It may or may not be. More
13 often than not, I would think most of those issues
14 generally relate to a certain pre- petition
15 period. The reporting law within Chapter 11, at
16 least from my experience, has been that things are
17 fairly clean, and if there aren't issues raised,
18 if there has been a question of fraud, whoever has
19 stepped into that position who is now filing those
20 reports is doing their due diligence to make sure
21 that the information they are asserting to is
22 correct to the best of their knowledge and belief.

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1 I don't think what we are saying in our
2 comments was this wouldn't be under penalty of
3 perjury, but somebody is doing that based on their
4 good faith, knowledge, and belief that what they
5 have filed is correct.

6 MR. HARRINGTON: I actually have another
7 question. On the secured lender fees, as you
8 know, our mandate comes out of statutory
9 provisions, and the statutory provisions talks
10 about allowed fees. Secured lender fees,
11 fortunately or unfortunately, are not allowed.
12 They are fees that are contractual fees.

13 How do we balance the mandate that we
14 are told to look for approved fees and allowed
15 fees versus the desire by certain constituencies
16 to want to see all payments?

17 MR. LUKENDA: I guess my take on it is
18 that the two aren't mutually exclusive. If you
19 have captured the allowed fees, you have reached
20 your mandate. If there is a perception that those
21 other non-allowed fees are important, then what is
22 to prevent the standard report from capturing that

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1 information. It's not different than capturing
2 revenue or other expenses.

3 MS. EITEL: To follow up, you consider
4 those non-allowed fees, those lender fees, to be
5 important to understand the debtor's operations?

6 MR. LUKENDA: I think so. It isn't
7 unusual there is some stress in a bankruptcy case
8 about what are the secured lender's professionals
9 being paid in addition to the retained
10 professionals.

11 MR. DARR: If you see a lot of secured
12 lender fees, then you have a question of what's
13 going on. That is an indication that somebody
14 should dig into what's going on with the secured
15 lender. Are these fees reasonable. I know they
16 are not allowed fees, but you can raise enough
17 questions about it to perhaps bring some attention
18 on it.

19 MS. DAVIS: Let's go to one of my last
20 questions before I open it to my colleagues to see
21 if they have anything further. In your letter on
22 page four, you suggest accounts receivable be

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1 shown gross of any reserves, applicable reserves,
2 and the resulting net balance.?

3 What's the value of reporting accounts
4 receivable gross of any revenues versus net of any
5 revenues?

6 MR. DARR: Reserves.

7 MS. DAVIS: Reserves. Pardon me.

8 MR. DARR: A reserve is an estimate from
9 collectible accounts. Typically, you look at
10 that, reserves at their face amount -- I'm sorry,
11 receivables at their face amount less a reserve,
12 and you can look at and form some judgment as to
13 whether or not the reserves are adequate.

14 The accounting standard is the reserves
15 have to be adequate to recognize any losses but
16 not excessive to hide income. We want to look at
17 that number and see the relationship.

18 In the past or for the last 10 years,
19 the reserves were always 10 percent of
20 receivables, and all of a sudden it has dropped to
21 2 percent or it has grown to 20 percent. It's a
22 question, why the difference. What's going on

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1 with the receivables. That's usually one of the
2 primary assets in a commercial case.

3 MS. DAVIS: Thank you. Anything
4 further?

5 MR. HARRINGTON: No.

6 MR. VARA: No.

7 MS. EITEL: Well, thanks all of you for
8 your participation. This has been very
9 enlightening and helpful to go forward, very
10 thoughtful discussion, great engagement.

11 We look forward to getting to a final
12 rule as quickly as we can. Again, we really thank
13 you for the time. It's been very helpful to the
14 process to get to the final rule and forms.

15 MR. DARR: We appreciate being here.
16 Thank you.

17 (Whereupon, at 12:32 p.m., the hearing
18 was adjourned.)

19

20

21

22

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, Christine Allen, the officer before whom the
3 foregoing proceeding was taken, do hereby certify
4 that the proceedings were recorded by me and
5 thereafter reduced to typewriting under my
6 direction; that said proceedings are a true and
7 accurate record to the best of my knowledge,
8 skills, and ability; that I am neither counsel
9 for, related to, nor employed by any of the
10 parties to the action in which this was taken;
11 and, further, that I am not a relative or employee
12 of any counsel or attorney employed by the parties
13 hereto, nor financially or otherwise interested in
14 the outcome of this action.

15

16

Christine E. Allen

17

18

Christine Allen
Notary Public in and for the
District of Columbia

19

20



21

22

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<p style="text-align: center;"><u> </u> \$</p> <p>\$1,000 39:10</p> <p>\$10,000 40:17</p> <p>\$100 36:18</p> <p>\$14 71:18</p> <p>\$2 63:12</p> <p>\$20 71:17</p> <p>\$25,000 40:20</p> <p>\$3,000 40:13</p> <p>\$300,000 38:10</p> <p>\$5,000 39:10</p> <p>\$500,000 73:3</p> <p>\$6 71:22</p> <p style="text-align: center;"><u> </u> 1</p> <p>1 2:6 11:4 12:20 46:15 47:10,13 113:8</p> <p>1.g 86:22</p> <p>10 12:14 71:21 110:5 123:18,19</p> <p>10,000 48:11</p> <p>100 12:20 14:19 22:14 24:11 103:17</p> <p>100,000 108:12</p> <p>10th 109:18,20</p> <p>11 1:8 4:18,22 5:9,17,19 6:7,19 7:2 9:9,10 10:1,8 11:19,20 12:10,13,17,21 13:2 19:2 20:9,11 21:2 29:18,19 30:15 31:9 32:6 36:7,8,9,12,14,1 7 37:21,22</p>	<p>38:1,3,4 41:15 44:19 45:2,4,9 50:19 59:8 60:5,9 74:21,22 110:7 113:14 120:15</p> <p>11:10 58:6</p> <p>12 3:5</p> <p>12:32 124:17</p> <p>123-A 107:5</p> <p>124 3:13</p> <p>13 30:17 38:2,11 40:14 114:8</p> <p>150 101:18</p> <p>15th 64:21 111:10</p> <p>17 1:12 2:5 11:5</p> <p>18 119:18</p> <p>1980 15:22 16:2 23:21</p> <p style="text-align: center;"><u> </u> 2</p> <p>2 2:6 11:4 46:16 62:3 115:1 116:6 123:21</p> <p>2,000 40:13</p> <p>20 25:21 123:21</p> <p>20,000 40:20</p> <p>200 104:10,11,12</p> <p>2004 12:16 82:4</p> <p>2007 12:20</p> <p>2012 13:11</p> <p>2014 6:5 13:3 63:12</p> <p>2015 8:9</p> <p>2016 1:12</p> <p>20th 65:22 90:21</p>	<p>22 43:12</p> <p>22.1 43:13</p> <p>25th 66:1,7</p> <p>26th 66:11</p> <p>27th 66:1</p> <p>28 116:1</p> <p>28th 116:2,9</p> <p>29th 111:8</p> <p style="text-align: center;"><u> </u> 3</p> <p>3 2:8 11:3 46:16</p> <p>3,000 37:10 84:9</p> <p>30 91:12 113:8</p> <p>30-40-50 71:9</p> <p>30th 111:7</p> <p>31 91:12</p> <p>31st 109:20 111:8 116:2</p> <p>327 27:8</p> <p>327(a) 22:17</p> <p>35 12:11</p> <p>37 3:7</p> <p style="text-align: center;"><u> </u> 4</p> <p>4 3:4 13:11 46:16</p> <p>400 13:3</p> <p>441 1:13</p> <p style="text-align: center;"><u> </u> 5</p> <p>5 10:19 26:15,20 46:16</p> <p>58 3:9</p> <p style="text-align: center;"><u> </u> 6</p> <p>6 46:16</p> <p>60 32:3</p>	<p>67 3:10</p> <p style="text-align: center;"><u> </u> 7</p> <p>7 46:16 47:10 58:1,4</p> <p>70 32:3</p> <p>77 63:9</p> <p>78 63:10</p> <p style="text-align: center;"><u> </u> 8</p> <p>8 30:4,8 45:20 46:2,5,7,10 48:5 60:12 76:15</p> <p>80 74:21 75:21 115:2,3,7 116:7</p> <p>86 3:12</p> <p style="text-align: center;"><u> </u> 9</p> <p>9 8:9</p> <p>9:59 4:2,3</p> <p>90-7 42:3 48:7 55:4</p> <p>99 103:18 104:1</p> <p style="text-align: center;"><u> </u> A</p> <p>a.m 4:2</p> <p>ABI 12:18,21 13:9,18 24:22</p> <p>abilities 25:6</p> <p>ability 20:2 69:16 87:15,18 94:3 110:12 125:8</p> <p>ABI's 13:1</p> <p>able 16:16 23:1 26:11 32:1 35:13 41:19 50:10 65:10,15,16 68:22 71:2 72:10 75:8 77:21 87:10</p>
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