DECIPHERING THE STATUTORY LANGUAGE OF 11 U.S.C. SECTION 1102(b)(3): INFORMATION DISCLOSURE REQUIREMENTS IMPOSED UPON CREDITORS' COMMITTEES

INTRODUCTION

Among changes to the Bankruptcy Code made by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") was the addition of subsection (3) to 11 U.S.C. section 1102(b), which enlarged the duties of the creditors' committee to provide certain non-committee members with access to information.[1] Specifically, the language of section 1102(b) now reads:

> (3) A committee appointed under subsection (a) shall—
> (A) provide access to information for creditors who—
> (i) hold claims of the kind represented by that committee; and
> (ii) are not appointed to the committee;
> (B) solicit and receive comments from the creditors described in subparagraph (A); and
> (C) be subject to a court order that compels any additional report or disclosure to be made to the creditors described in subparagraph (A).[2]

The purpose of these amendments to section 1102(b) is arguably an effort by the drafters to protect those creditors who do not hold a position on the creditor's

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[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 405, 119 Stat. 23, 105 [hereinafter "BAPCPA"]; *see Special Duties of Creditors' Committees*, 7-1102 COLLIER ON BANKRUPTCY, ¶ 1102.08 (Alan N. Resnick & Henry. J. Sommer eds., 15th ed. rev.) (2006) (noting section 1102(b)(3) specifies creditors' committee duties); Steve H. Nickles, *Behavioral Effect of New Bankruptcy Law on Management and Lawyers: Collage of Recent Statutes and Cases Discouraging Chapter 11 Bankruptcy*, 59 ARK. L. REV. 329, 384 (2006) (recognizing the more vital role played by creditors' committees due to section 1102(b)(3)(A)); Wanda Borges, Esq. & Bruce S. Nathan, Esq., *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Significant Business Bankruptcy Changes in Store for Trade Creditors*, BUS. CREDIT at 4, May 2005, *available at* http://www.nacm.org/resource/Bankruptcy_reprint.pdf (acknowledging expansion of creditors' committee responsibilities to the general creditor body).

On April 20, 2005, President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") into law, which became effective 180 days later on October 17, 2005. *See President Signs Bankruptcy Abuse Prevention, Consumer Protection Act*, April 20, 2005, http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html# (last visited on Apr. 7, 2007); *see also* Ricardo I. Kilpatrick & Marla A. Zain, *Selected Creditor Issues under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 817 (2005) (providing date President Bush signed BAPCPA); Charles J. Tabb, *The Brave New World of Bankruptcy Preferences*, 13 AM. BANKR. INST. L. REV. 425, 425 (2005) (same).

[2] 11 U.S.C. § 1102(b)(3) (2006); *see* Nickles, *supra* note 1, at 384 n.225 (2006) (summarizing requirement of section 1102(b)(3)(A)).

committee.[3] However, the new language of section 1102(b)(3)(A) is problematic because it creates a burdensome task in statutory interpretation for lawyers and judges. Specifically, terms in the amendment are ambiguous, such as the use of the word "information," without indicating what information is required. This is exacerbated by the potentially large number of creditors to whom access to information must be provided and by the conflicts that arise with the addition of each group of potential recipients.[4] This burden is not only caused by the number of creditors who must have access to information tangibly or physically, but also by having to define what types of information and to whom such information must be provided, which might implicate attorney-client privilege and confidentiality issues.[5] Additionally, the information disclosure is to creditors holding "claims of the kind represented by the committee" (hereinafter "represented creditors") not all creditors; however, the language "claims of the kind" is unclear.[6] Furthermore, the subsequent provisions found in subsections (B) and (C) are contingent upon a clear understanding of subsection (A), specifically, which also requires knowing which creditors hold "claims of the kind."[7] To determine the meaning of section

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[3] *See* ANALYSIS OF PENDING BANKRUPTCY LEGISLATION: COMPARING H.R. 333 EAS (SENATE BILL) AGAINST H.R. 333 EH (HOUSE BILL), NAT'L BANKR. CONF., 118–19 (Sept. 2001) (stating section 1102(b)(3)(A) requires chapter 11 committees to provide information access to non-members); *see also* Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 603, 628 (2005) (explaining purpose of section 1102(b)(3)(A)); A.S. Pratt & Sons, *Pratt's Guide to Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 12–13, *available at* http://www.stroock.com/SiteFiles/Pub365.pdf (noting requirements of section 1102(b)(3)); George W. Shuster, Jr., WilmerHale, *Public of Private? Bankruptcy as a Crossroads of Information*, May 26, 2006, *available at* http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=5d298f4e-b068-48e9-82e9-81345a7ad519&RSS=true ("The changes to [s]ection 1102 indicate a congressional preference toward a public bankruptcy process, at least as far as creditors' committees are concerned . . . .").

[4] Craig E. Reimer, *Congress Overhauls the Nation's Bankruptcy Laws—Mayer, Brown, Rowe & Maw LLP*, MONDAQ BUS. BRIEFING, Apr. 21, 2005, *available at* http://www.mondaq.com/article.asp?articleid=32193&searchresults=1 (recognizing conflict between complying with provision and protecting confidentiality); Andrew I. Silfen and Heike M. Vogel, Arent Fox, *Section 1102 casts uncertainty on creditors and equity committees*, BCD NEWS AND COMMENT, Sept. 20, 2005 (requiring information to be provided to non-committee members); *see infra* Part V.

[5] *See* Reimer, *supra* note 4 (needing to protect attorney-client privilege and confidentiality are key concerns for creditors' committees); John W. Mills III, Colin M. Bernardino & Daniel A. Fliman, *Committee Confidentiality? New act raises issues by requiring creditor committees to disclose data to noncommittee members*, at 1, *reprinted from* THE NAT'L L. J., Nov. 21, 2005, *available at* http://www.kilpatrickstockton.com/publications/downloads/CommitteConfidentiality.pdf (stressing lack of guidance in statute as to type of information to be shared with non-committee members); Erin Van Valkenburg, *Clearing Up Ambiguities in the Bankruptcy Code's New Information-Sharing Provision: Bankruptcy Court Orders Establish Guidelines for Compliance with 11 U.S.C. § 1102(b)(3)(A)*, COM. L. LEAGUE OF AM.: Bankruptcy Section Newsletter, *available at* http://www.cllabankruptcy.org/bankruptcy/may2006.cfm, May 2006 (determining privilege and confidential issues is committee's responsibility and committee can seek court guidance if determination is in dispute).

[6] *See* 11 U.S.C. § 1102(b)(3) (2006); Silfen & Vogel, *supra* note 4 (stating "claims of kind" needs clarification).

[7] *See* 11 U.S.C. § 1102(b)(3)(i) (2006); *Special Duties of Creditors' Committees*, 7-1102 COLLIER ON BANKRUPTCY, ¶ 1102.08, (Resnick & Sommer eds., 15th ed. rev. 2006) (noting requirement to solicit comments); *Duty to Solicit and Receive Comments From Creditors*, 1-13 COLLIER HANDBOOK FOR

1102(b)(3)(A) and the subsequent provisions, clear definitions of "access," "information," and "claims of the kind represented by that committee" are compulsory.[8]

Section 1102(b)(3)'s ambiguity not only raises issues in bankruptcy law, but also implicates federal securities laws[9] and lawyers' ethical responsibilities to clients.[10] Part I of this note will explore these implications, while Part II will illustrate the committee's lawyers' concerns in *In re Refco Inc.* and subsequent bankruptcies in filing their clarification motion to define their section 1102(b)(3) obligations.[11] Part III will address the ambiguities of the language by considering the legislative history of section 1102(b)(3).[12] Part V will analyze the specific terms in section 1102(b)(3)(A) in light of their use elsewhere in the Bankruptcy Code.[13] Part VI will argue that section 1102(b)(3) should be amended again to clearly reflect Congress' intent so as to promote judicial economy and attorney efficiency and, finally, this note will suggest language for the revision of the section to avoid the current problem.[14]

I. THE NEED FOR CLARIFICATION OF SECTION 1102(b)(3)

A. Bankruptcy Code and the Federal Securities Laws

At the outset of *In re Refco*, how to comply with section 1102(b)(3)(A) was unclear, therefore the unsecured creditors' committee filed a motion to clarify.[15] One of the leading concerns was the potential implication of the federal securities laws—specifically Regulation FD, which is triggered when securities issuers disclose non-public material information to enumerated persons requiring public disclosure of that same information.[16] The unsecured creditors' committee argued

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CREDITORS' COMMITTEES, ¶ 13.09 (Matthew Bender & Co. ed. 2005) (same); Mills, et al., *supra* note 5, at 1 (noting section 1102(b)(3) also requires solicitation of comments from non-committee members and disclosure of additional reports, but these provisions are also ambiguous).

[8] Silfen and Vogel, *supra* note 4 (articulating terms which need clarification).

[9] *See infra* Part IA.

[10] *See infra* Part IB.

[11] *See In re* Refco, Inc., 336 B.R. 187, 187 (Bankr. S.D.N.Y. 2006); *In re* Refco, Inc., Case No. 05-60006, 2005 Bankr. LEXIS 2617, at *1 (Bankr. S.D.N.Y. Dec. 23, 2005). *See infra* Part II.

[12] *See infra* Part III; *see also* Part IV which looks to section 707(a)(7) for guidance.

[13] *See infra* Part V.

[14] *See infra* Part VI.

[15] *See* Motion of Official Committee of Unsecured Creditors, Pursuant to 11 U.S.C. §§ 105(a), 1102(b)(3)(A) and 1103(c), for *Nunc Pro Tunc* Order Clarifying Requirement to Provide Access to Information, at 1, *In re* Refco Inc., 336 B.R. 187 (Bankr. S.D.N.Y. 2006) (No. 05-60006), *available at* "Index of key pleadings and U.S. Bankruptcy Court orders concerning the obligation under 11 U.S.C. § 1102(b)(3) of an official committee appointed by the United States Trustee under 11 U.S.C. § 1102(a) to share information with its constituency," http://bankrupt.com/1102b3/05-60006-133.pdf.

[16] *See In re Refco*, 336 B.R. at 196. Regulation FD—General Rule Regarding Selective Disclosure states:

> (a) Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in

that before the addition of section 1102(b)(3)(A), communications between debtor-issuers (i.e., public companies) and its creditors' committee were very likely exempt from Regulation FD.[17] However, section 1102(b)(3)(A) requires disclosure to non-committee members who do not have the express confidentiality agreement and fiduciary obligation with the debtor as the official creditors' committee does.[18]

In his opinion in the *Refco* case, the Honorable Robert D. Drain recognizes the potential implication of Regulation FD and also notes that the committee members' fiduciary duty of loyalty and care to unsecured creditors might be breached if material non-public information is disclosed.[19] These concerns highlighted by the *Refco* court appear to parallel concerns of the framers of Regulation FD.[20]

> paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in § 243.101(e):
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> (1) Simultaneously, in the case of an intentional disclosure; and
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> (2) Promptly, in the case of a non-intentional disclosure.

17 C.F.R. § 243.100(a) (2006).

Section (b)(1) provides the enumerated persons to whom disclosure is made that will trigger Regulation FD—securities market professionals, investment advisors, investment companies and holders of the issuer's securities for whom it is reasonably foreseeable that trading will occur based on that information. 17 C.F.R. § 243.100(b)(1)(i)-(iv) (2006). In addition, section 243.101(e) states that public disclosure requires the filing of a Form 8-K with the Securities and Exchange Commission. 17 C.F.R. § 243.101(e) (2006).

[17] *See* 17 C.F.R. § 243.100(b)(2)(ii) (2006) (stating communications with "a person who expressly agrees to maintain the disclosed information in confidence" is exempt from Regulation FD). However, debtors with registered securities or publicly traded securities have to continue filing their 10-Ks, 10-Qs, 8-Ks, and proxy statements under both the securities laws and file quarterly operating reports with the United States Trustee or bankruptcy court from when the reorganization plan is confirmed through the bankruptcy court's final decree. *See* Harvey L. Tepner, *Common Sense, Nonsense and Higher Authorities: The Need for Improved Chapter 11 Financial Disclosures*, 22-8 AM. BANKR. INST. J. 36, 36 (Oct. 2003) (discussing financial reporting obligations for debtors).

[18] Motion of Official Committee of Unsecured Creditors, *In re* Refco, *supra* note 15, at 11–12. Regulation FD specifically exempts disclosure to parties with whom an express confidentiality agreement or a relationship of trust and confidence exists, however, in the case of section 1102(b)(3)(A)'s requirements, non-committee members probably have not executed a confidentiality agreement. *See* 17 C.F.R. § 243.100(b)(2) (2006).

[19] *See In re Refco*, 336 B.R. at 196. *But see* Akin Gump Strauss Hauer & Feld LLP, *Bankruptcy Update: New Creditors' Committee Information Access Duties Under Bankruptcy Amendments in* Refco, at 2, *available at* http://www.akingump.com/docs/publication/842.pdf (explaining no liability occurs when committee members or their officers are complying with section 1102(b)(3)(A) except when breach of fiduciary duty, gross negligence or willful misconduct occurs). Fiduciary duty is owed to all creditors of a class regardless of whether they hold a seat on the committee. *See* Kurt F. Gwynne, *Intra-Committee Conflicts, Multiple Creditors' Committee, Altering Committee Membership and Other Alternatives for Ensuring Adequate Representation Under Section 1102 of the Bankruptcy Code*, 14 AM. BANKR. INST. L. REV. 109, 113–14 (2006). Gwynne further states, "The committee members' fiduciary duty to the represented class includes obligations of fidelity, undivided loyalty, and impartial service in pursuing the class' interests." *Id*.

[20] *See In re Refco*, 336 B.R. at 196. Regulation FD was promulgated to prevent a loss of investor confidence in the capital markets and to avoid corporate management's use of non-public, material information as leverage with potential analysts and investors. *See* Final Rule: Selective Disclosure and Insider Trading, Securities and Exchange Commission, Release No. 33-7881, 34-43154, 2000 SEC LEXIS 1672 (Aug. 15, 2000), *available at* http://www.sec.gov/rules/final/33-7881.htm. Additionally, the insider trading laws were not sufficiently deterring or punishing selective disclosure and technological advancements no were longer requiring analysts to serve as information intermediaries. *Id*.

Furthermore, the unsecured creditors' committee in *Refco* argued that, even though Regulation FD is only triggered upon dissemination to the enumerated persons, the represented creditors to whom information access must be provided under section 1102(b)(3) will invariably include one or more persons on the enumerated list.[21] The fear of the *Refco* committee was that the debtor will incur post-petition securities law liability which will come at the expense of all creditors and the consequent likelihood that the debtor will be reluctant to disclose information to the creditors' committee.[22] The potential for securities liability to a public company already in bankruptcy might thwart any efforts to effectively reorganize and reestablish the company free from indebtedness.[23]

Although there is no explicit instruction for harmonizing section 1102(b)(3) and the federal securities laws, other provisions in the Bankruptcy Code may help shed some light.[24] For example, section 1145 exempts issuances of the debtor's securities under the plan from section 5 of the Securities Act of 1933 in an effort to better facilitate the debtor's reorganization.[25] This section serves as a compromise between

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[21] *See* Motion of Official Committee of Unsecured Creditors, *In re* Refco, *supra* note 15, at 12. The enumerated list includes brokers, dealers, investment advisors, institutional investment managers, investment companies, and lastly, someone "who is a holder of the issuer's securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information." *See* 17 C.F.R. § 243.100(b)(1) (2006).

[22] *See* Motion of Official Committee of Unsecured Creditors, *In re* Refco, *supra* note 15, at 12–13; John J. Rapisardi, *Protocol for Creditors' Committee to Provide Information to Constituents*, N.Y.L.J. May 23, 2006, at 3 (col. 1), *available at* http://www.weil.com/wgm/pages/Controller.jsp?z=r&sz=bl&db=wgm/cbyline.nsf&d=4290A166E9D6A44C8525718000547497&v=0 ("If the committee could not keep sensitive information confidential, communications between the committee and third parties and among committee members themselves would be improperly curtailed or the debtor might be harmed with a resulting reduction in creditor recoveries.").

Prior to the addition of section 1102(b)(3)(A), confidentiality agreements between committee members and the debtor avoided the implication of the securities laws as the ability of the committee member to share information was restricted. *See* Wendell H Adair, Jr., Gerald C. Bender & Anna Trauschio, Stroock & Stroock & Lavan LLP, *Major Changes in Store for Creditors' Committees*, at 2, July 2005, *reprinted from* J. OF CORP. RENEWAL, *available at* http://www.stroock.com/SiteFiles/Pub367.pdf. Furthermore, committee members, prior to the 2005 Amendments, were likely restricted in trading debt because of the possession of non-public, inside information of the debtor such as their financial position and reorganization plans. *See id.*

[23] *See* Comm. of Equity Sec. Holders v. Lionel Corp. (*In re* Lionel Corp.), 722 F.2d 1063, 1070 (2d Cir. 1983) (recognizing public company's investors face the most risk from company's financial distress as larger creditors are primary focus); SEC v. WorldCom, Inc., 273 F. Supp. 2d 431, 434–35 (S.D.N.Y. 2003) (explaining stockholders typically do not recover in SEC fraud actions, but bankruptcy reorganization plan could potentially provide modest compensation); *see also* Straton v. New, 283 U.S. 318, 320–21 (1931) (noting another purpose is equal distribution of debtor's assets amongst creditors); Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995) ("Our inquiry is guided by one of the principal purposes of bankruptcy law, to secure within a limited period the prompt and effectual administration and settlement of the debtor's estate.") (citing Katchen v. Landy, 382 U.S. 323, 328 (1966)); Fosco v. Fosco (*In re* Fosco), 289 B.R. 78, 86 (Bankr. N.D. Ill. 2002) ("The primary purpose of the bankruptcy laws is to provide a fresh start to 'an honest but unfortunate debtor.'" (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

[24] *See, e.g.*, 11 U.S.C. §§ 1125, 1145 (2006).

[25] *See* 15 U.S.C. § 77 (2000) (containing section 5 of the Securities Act of 1933 which makes it unlawful to sell securities without filing registration statement). Chapter 11 reorganization:

the purposes of bankruptcy laws and federal securities laws.[26] Section 1145 allows the debtor to issue, without registration, non-equity securities for the offer or sale to claim holders or equity security holders of the debtor or the estate to satisfy existing claims or administrative claims.[27] Section 1145 provides an exemption for brokers selling the debtors' securities from filing a prospectus and allows for the use of the section 1125 disclosure statement in its place.[28] However, section 1145 does not fully remove any potential liability under the federal securities laws because subsection (b) clearly states that any entity buying or selling the debtor's securities with a "view to distribution" is deemed an underwriter.[29] As evidenced by section 1145, the federal securities laws are complicated, especially when considering the reorganization of a debtor.

Section 1125 also provides federal security law guidance to the debtor with respect to the post-petition disclosure statement and solicitation for acceptance or rejection. Specifically, sections 1125(d) and (e) exempt a disclosure statement, which operates similarly to a prospectus, from the securities laws.[30] This exemption recognizes the importance of accepting the plan in order to facilitate the debtor's reorganization, which generally involves the offering of securities under section 1145.[31] This in turn furthers the interests of the creditors and the shareholders. Subsection (e) is the safe harbor provision that creates the exemption from the securities laws in conjunction with section 1145. In comparison to section 1102(b)(3)(A) which raises securities laws implications, sections 1125 and 1145 provide clarity and guidance to debtors and creditors with respect to securities offerings in relation to the debtor's reorganization efforts. Rather than create liability, these provisions exempt the debtor and the creditors from securities law

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> [F]requently involves the issuance of new securities of the debtor, or of its affiliates or successors, in exchange for outstanding claims against or interests in the debtor. It may also involve the sale by the debtor of securities of non-affiliated entities, as well as the issuance of securities of the debtor to raise new capital.

8-1145 COLLIER ON BANKRUPTCY, ¶ 1145.01 (Resnick & Sommer eds., 15th ed. rev. 2006)

[26] *See* Oak Indus., Inc. v. Foxboro Co., 596 F. Supp. 601, 604 (S.D. Cal. 1984) (indicating purpose of securities laws is to protect passive investor); Go2net, Inc. v. FreeYellow.com, Inc., 126 Wn. App. 769, 777 (2005) (recognizing other purposes of securities laws are to protect secondary securities market and to promote disclosure); *see also supra* note 23 and accompanying text.

[27] *See* 11 U.S.C. § 1145 (2006); H.R. REP. NO. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess., at 419–21 (1977).

[28] *See* 11 U.S.C. §§ 1125, 1145 (2006); H.R. REP. NO. 95-595, at 419–21; *see also* Hon. Robert D. Drain & Elizabeth J. Schwartz, *Are Bankruptcy Claims Subject to the Federal Securities Laws?*, 10 AM. BANKR. INST. L. REV. 569, 574 (2002) ("For at least some of these reasons, even securities law reporting required outside of bankruptcy is often reduced or eliminated as a practical matter after the start of a bankruptcy case in deference to the debtor's bankruptcy schedules and monthly reporting requirements under the Bankruptcy Rules, not to mention other sections of the Bankruptcy Code that expressly limit the reach of the securities laws or provide a safe harbor.").

[29] 15 U.S.C. § 77(b)(11) (2000) (defining underwriter as contained in section 2(11) of the Securities Act of 1933); *see* 11 U.S.C. § 1145 (2006); H.R. REP. NO. 95-595, at 419–21; *see also* Drain & Schwartz, *supra* note 28, at 598 (noting section 1145's exemption from federal securities laws).

[30] *See* 11 U.S.C. § 1125(d) & (e) (2006); H.R. REP. NO. 95-595, at 408–09.

[31] *See* S. REP. NO. 95-989 to accompany S. 2266, 95th Cong., 2d Sess., at 120–22 (1978).

violations, while the ambiguous language and requirements of section 1102(b)(3)(A) create disincentives for disclosure due to fear of violating the securities laws. Therefore, clarification of section 1102(b)(3)(A) should follow the guidance provided by sections 1125 and 1145 with respect to the federal securities laws.

B. Attorney-Client Privilege and Confidentiality Issues

As pointed out in the *Refco* case, section 1102(b)(3)'s disclosure requirements raise significant attorney-client privilege and confidentiality issues for the creditors' committee and its counsel.[32] Creditors' committee members nearly always execute confidentiality agreements with the debtor, which facilitates efforts to reorganize the debtor, by encouraging free-flowing communication between the debtor and the creditors' committee.[33] New section 1102(b)(3) raises concerns that this communication will be diminished.[34] Disclosure by the debtor to the creditors' committee hopes to achieve financial transparency, ability to evaluate the value of the creditors' claims, and oversight of the debtor and the chapter 11 reorganization process.[35]

A major concern for debtors, especially in the chapter 11 reorganization context, is that confidential and proprietary information will be disclosed to their

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[32] *See* Motion of Official Committee of Unsecured Creditors, *In re* Refco, *supra* note 15, at 10; Reimer, *supra* note 4 (explaining the problems committee counsel faces with balancing requirement of provision with protecting confidentiality and privilege).

[33] *See* Larry Gottlieb & Jay Indyke, *NACM Highlights How Changes to Bankruptcy Code Will Affect Credit Pros*, Managing Credit Receivables & Collections, IOMA, Aug. 2005 ("'Creditor committees . . . are bodies that represent the interests of the unsecured creditors as a whole—and confidentiality agreements are essential to their ability to gather information needed to function.' . . . 'It's unclear what kinds of reports committees will not have to make, whether they must be made even in the absence of requests, and whether information obtained through confidentiality agreements must be reported.' He notes that certain information (for example, information beneficial to competitors) could negatively impact a debtor's ability to reorganize if disclosed."); *see also* Adair, Jr. et al., *supra* note 22, at 2 (noting prior to 2005 amendments that confidentiality agreements were normally executed between committee member and debtor).

[34] *See* Carl A. Eklund & Lynn W. Roberts, *The Problem with Creditors' Committees in Chapter 11: How to Manage the Inherent Conflicts Without Loss of Function*, 5 AM. BANKR. INST. L. REV. 129, 147–48 (1997) (maintaining confidentiality facilitates transfer of information from debtor to creditor); Levin & Ranney-Marinelli, *supra* note 3, at 628–29 (questioning whether executed confidentiality agreement is sufficient limitation to potential scope of disclosure under section 1102(b)(3)(A)); Silfen & Vogel, *supra* note 4 ("Section 1102(b)(3) will likely reduce the current traffic and exchange of information and documents."); Van Valkenburg, *supra* note 5 (listing committee's uses for information such as to "assess . . . debtor's capital structure, assets values, opportunities for restructuring, results of revised operations, and the debtor's overall prospects for reorganization.").

[35] *See* Tepner, *supra* note 17, at 36–37 (explaining the rationale for financial transparency and financial disclosures to achieve liquid markets). The financials that should be disclosed include financial projections, ongoing business and economic activities in comparison to reorganization activities, and accounting statements. *See id.* at 37. Other information that can describe the cash, assets, securities and liabilities that the debtor possesses should also be disclosed so that creditors can assess the viability of their claims. *See id.* These financial disclosures enable the necessary liquidity needed in the markets to allow the debtor to reorganize. *See id.*

competitors through section 1102(b)(3)(A).[36] Specifically, the debtor is obligated to share information with the creditors' committee but can do so under a confidentiality agreement.[37] Now, with section 1102(b)(3)(A)'s requirement of disclosure to non-committee creditors, the committee may be in a position of breaching its confidentiality obligations or section 1102(b)(3).[38] The non-members of the committee who have access to information under section 1102(b)(3)(A) can then obtain confidential information to the detriment of the debtor which will impede the debtor's ability to reorganize effectively and remain competitive within its industry.[39] The Bankruptcy Code contains provisions accounting for this type of disclosure and has an express limitation included within the text of the provision.[40] This type of express limitation to protect trade secrets and proprietary information allays the fears of the debtor and will encourage free-flowing communication between the debtor and the creditors' committee.[41] Given the current language of section 1102(b)(3), parties must resort to judicial assistance to determine what information must be disclosed while specifically seeking a protective order for confidential and proprietary information.[42]

Prior to BAPCPA, an attorney-client privilege was recognized between the appointed creditors' committee and its counsel, but now with the broad

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[36] *See* Dennis J. Connolly, *BAPCPA to Change Committee Make-up and Practice*, 24-6 AM. BANKR. INST. J. 24, 55 (July/Aug. 2005) (fearing creditors gaining knowledge of debtor's reorganization strategy and business plan). The airline bankruptcies provide an example where creditors' committees of multiple debtors have the same members. *See* Shuster, *supra* note 3, at 2. With the addition of section 1102(b)(3)(A), these members will have access to confidential information about competitors. *See id*. Specifically in the United, Delta and Northwest cases, the United States trustee requested "information blocking procedures," which "require 'ethical walls' within the committee members' organizations to prevent the disclosure of information regarding one airline to someone involved on the committee of a competitor airline." *Id*. at 2–3.

[37] *See In re* Baldwin-United Corp., 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984) (citations omitted) (using confidentiality agreements to facilitate frank communication between committee and debtor to promote an effective reorganization).

[38] *See* C.R. "Chip" Bowles Jr., *'We Haf Vays to Make You Talk.' No Really, We Do: Committees' New Duties Under Amended § 1102(b)(3) After BAPCPA*, 24-7 AM. BANKR. INST. J. 20, 60 (Sept. 2005) (articulating confidentiality concerns for committee); Connolly, *supra* note 36, at 55 (same).

[39] *See* Lee Barrett, *Professional Liability Under the New Bankruptcy Code*, at 13, Fall 2006, *reprinted from* COM. & BUS. LITIG., Vol. 8, No. 1 (Fall 2006) by the American Bar Association, *available at* http://forsheyprostok.com/articles/Professional-Liability-Under-the-New-Bankruptcy-Code.pdf ("In the course of a committee's undertaking its obligations under section 1103, it is not uncommon for committees to obtain, or be supplied with, confidential information about the debtor or the debtor's operations. Disclosure of such information, whether to a competitor of the debtor or the public at large, could represent a serious threat to the debtor's reorganization.").

[40] *See* 11 U.S.C. § 107 (2006); *Last in Line: Your Secret Might Be Safe with Me Protection of Proprietary Information in Bankruptcy*, 18-2 AM. BANKR. INST. J. 28, 28 (Lisa Sommers Gretchko, contr. ed., Mar. 1999) (relying upon section 107 to reiterate that public's right to access is not unlimited).

[41] *See* Bowles Jr., *supra* note 38, at 60 (recognizing confidentiality and attorney-client issues caused by section 1102(b)(3)(A)).

[42] *See* Claudia Z. Springer, Reed Smith, *Courts Grapple with Obligation of Creditors Committees to Share Information*, at 19 n.6, COM. RESTRUCTURING & BANKR. ALERT, June 2006, *available at* http://www.reedsmith.com/_db/_documents/crab0606.pdf (noting courts provide guidance through "comfort orders" or part of debtor's first day motion); Van Valkenburg, *supra* note 5 (explaining creditors option of seeking judicial guidance for determination of information to be disclosed); *see, e.g.*, *In re Refco*, 336 B.R. at 199 (annexing Exhibit A instructing creditors committee on means and scope of information disclosure).

dissemination required under section 1102(b)(3)(A), this privilege might be waived.[43] Counsel for the creditors' committee in *Refco* argued that attorney-client and work product privilege are implicated because of the committee's duty to investigate and gather information about the estate which will likely make counsel privy to potential causes of action of the estate.[44] Creditors' committees are sometimes given the right to pursue claims on behalf of the debtor's estate and potential waiver of the attorney-client privilege can thwart those efforts.[45] Although creditors share common interests, those interests are not always identical. Therefore, the committee's counsel represents the creditors' committee as opposed to the individual creditors.[46] Disclosure alone to creditors with a common interest does not waive privilege, unless, given the circumstances, an adversary is likely to gain access to that privileged information.[47] The privileges also have a strategic power for the creditors' committee with respect to the debtor and other third parties especially when negotiating chapter 11 reorganization plans.[48] As with the confidential and proprietary information, judicial assistance must be sought to prevent the waiver of attorney-client and work product privilege of the creditors' committee, thereby increasing the administrative expense to the bankruptcy estate.

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[43] Bowles, Jr., *supra* note 38, at 60; Jennifer Feldsher, Weil, Gothsal & Manges LLP, *Bankruptcy Court Clarifies Obligation of Creditors Committee to Provide Information to Creditors*, at 3, BANKR. BULL., May 2006, *available at* http://www.weil.com/wgm/cwgmhomep.nsf/Files/BB%20May06/$file/BB%20May06.pdf . The role of the creditors' committee is varied but the interests of the creditors are at its focus. The committee's counsel needs to promote the interests of the entire creditor class by mediating between the creditors, advising on the reorganization process and fiduciary duties, building a consensus, representing the creditors when they lack the resources to be part of the committee and representing the creditors class in court. *See* Eklund and Roberts, *supra* note 34, at 144 (highlighting duties of creditors' committee).

[44] *See* Motion of Official Committee of Unsecured Creditors, *In re* Refco, *supra* note 15, at 10; *see also In re Refco*, 336 B.R. at 197 (stating importance of attorney-client privilege as consideration with respect to information disclosure).

[45] *See In re* Refco, Inc., No. 05-60006, 2005 Bankr. LEXIS 2617, at *1 (Bankr. S.D.N.Y. Dec. 23, 2005) (acknowledging argument made in motion).

[46] *See* Marcus v. Parker (*In re* Subpoena Duces Tecum), 978 F.2d 1159, 1162 (9th Cir. 1992) (observing attorney-client privilege belongs to creditors' committee); S.N. Phelps & Co. v. The Circle K Corp., (*In re* The Circle K Corp.), 1997 U.S. Dist. LEXIS 713, at *37 (S.D.N.Y. Jan. 28, 1997) (recognizing committee's counsel represents committee not individual creditors).

[47] *See* United States v. Am. Tel. & Tel. Co. (*In re* MCI Commc'n. Corp.), 642 F.2d 1285, 1298–99 (D.C. Cir. 1980) (noting waiver occurs when disclosure to litigation opponent occurs); *In re Circle K Corp.*, 1997 U.S. Dist. LEXIS at *34–35 (focusing on whether information is likely to be disclosed to adversary).

[48] *See In re Refco, Inc.*, 2005 Bankr. LEXIS 2617, at *1; *see also In re* Baldwin-United Corp., 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)) ("If the committee cannot engage in 'full and frank communications' with its attorneys without fear of disclosure to such outsiders, then its work may be seriously hampered, to the detriment of those it represents."); *In re* Featherworks Corp., 25 B.R. 634, 644 (Bankr. E.D.N.Y. 1982) (stressing attorney-client privilege allows committee counsel to fulfill their duties); Burke Gappmayer, *Protecting the Insolvent: How a Creditor's Committee Can Prevent Its Constituents from Misusing a Debtor's Nonpublic Information and Preserve Chapter 11 Reorganizations*, 2006 UTAH L. REV. 439, 441 (2006) (acknowledging debtor's cooperation in disclosing information to committee is based on fiduciary duty owed by committee).

II. RECENT CHAPTER 11'S—APPLICATIONS OF SECTION 1102(b)(3)(A)

A. In re Refco

On October 17, 2005, Refco, Inc. and Refco Capital Management, Inc. and twenty-two related entities filed voluntary chapter 11 petitions.[49] These bankruptcy filings came on the heels of the announcement that entities controlled by then Refco Chief Executive Officer and Chairman, Phillip R. Bennett, owed Refco approximately $430 million.[50] Mr. Bennett faces criminal charges for conspiracy, securities fraud, wire fraud, and making false filings with the Securities and Exchange Commission.[51] Mr. Bennett is alleged to have "engaged in off-setting transactions with a hedge fund client of Refco at the end of each quarter and the beginning of the next to keep the bad debt off Refco's books."[52] To offset debt owed to Refco, transfers to Refco Group Holdings, Inc. and an unidentified Refco customer took place.[53] In mid-September 2005, the connection between the unidentified Refco customer, Liberty Corner Capital Strategies, and Mr. Bennett was unearthed while the accountants were auditing Refco in preparation for compliance with new accounting rules.[54]

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[49] *See Austrian bank to pay $675 million in U.S. fraud case*, THE INT'L TRIB., June 6, 2006; *U.S. Charges Refco CEO With Fraud; Other Developments*, FACTS ON FILE WORLD DIG., Facts on File, Inc., Oct. 20, 2005; Refco Reorganization Updates, http://www.refcodocket.com (last visited on Apr. 7, 2007). It is important to note that this is the same date that the BAPCPA provisions went into effect, therefore, section 1102(b)(3)(A) applied to this bankruptcy. *See Duty to Provide Access to Information*, 1-13 COLLIER HANDBOOK FOR CREDITORS' COMMITTEES, ¶ 13.08 (Matthew Bender & Co. ed. 2005).

Refco was an international corporation specializing as a futures exchange and commodity broker providing electronic trading, trade execution, and clearing. Refco also provides account management, research, risk and facilities management. Refco offered services in futures, capital markets and asset management. *See* Man Financial, Refco Division, www.refco.com, (last visited Apr. 7, 2007). In November 2005, Man Financial acquired Refco's United States operations comprising of Foreign Exchange, securities and futures businesses. *See* Man Financial, http://www.manfinancial.com/aboutMan/aboutMan_about.aspx (last visited on Apr. 7, 2007).

[50] *See In re* Refco, Inc. Official Comm. of Unsecured Creditors v. Tone Grant, No. 06 C 5529, 2007 U.S. Dist. LEXIS 4993, at *2 (N.D. Ill. Jan. 16, 2007) (explaining undisclosed transactions with Refco Group Holdings, Inc. of over $400 million in Refco receivables); *see also Austrian bank*, *supra* note 49; Andrew Caffrey, *Refco woes won't sting Sox owner*, BOSTON GLOBE, Oct. 18, 2005; Andrew Parker, James Politi, & David Wighton, *Top official at Refco helps with fraud probe*, FIN. TIMES, Oct. 27, 2005.

[51] *See Austrian bank*, *supra* note 49.

[52] *See* Zachery Kouwe, *Scam's Anatomy—How Bennett Stole $500M From Refco*, THE N.Y. POST, Oct. 20, 2005; Paul Schaafsma, *Refco's Demise is Topic at FIA Expo*, FIN. ENG'G NEWS, *available at* http://www.fenews.com/fen47/one_time_articles/fia-refco/fia-refco.html.

[53] Schaafsma, *supra* note 52.

[54] *See id*.; Kouwe, *supra* note 52. A further explanation of the scheme:

> According to prosecutors, Bennett repeatedly engaged in a series of circular transactions at the end of Refco's recent fiscal quarters. Prosecutors say these transactions were designed to disguise debt owed to Refco by a private entity controlled by former chief executive Bennett.
>
> For example, prosecutors contend that in late February, a Refco subsidiary, Refco Capital Markets Ltd., lent an unidentified Refco customer $335 million to be repaid in March. On the same day in February, according to the criminal complaint against

As the fraudulent scheme was discovered, customers began withdrawing their money managed by Refco due to lack of confidence.[55] In light of the audit committee investigation into the hidden debt, Refco stock prices plummeted forty-five percent, which eventually led to Refco and its affiliates filing a bankruptcy petition on October 17, 2005.[56] After filing, to repay its customers and retain value in the company, Refco began selling assets.[57] This led to dispute as to who was entitled to the proceeds—the numerous customers or the unsecured creditors.[58] Thereafter, on October 28, 2005, the Official Committee of Unsecured Creditors ("Committee") was appointed and tasked with addressing these issues and to investigate the events that led to the chapter 11 filing.[59] The committee's investigation into the events prior to bankruptcy and analysis of inter-creditor issues required exchange of information with the Refco debtors and other entities which could lead to a violation of the federal securities laws under Regulation FD or deter the success of the Committee's efforts.[60] Therefore, on November 1, 2005, a "Motion of Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 1102(b)(3)(A) and 1103(c), For *Nunc Pro Tunc* Order Clarifying Requirement to Provide Access to Information" was filed in the United States Bankruptcy Court for the Southern District of New York.[61]

On December 23, 2005, the Honorable Robert D. Drain issued an order granting the Committee's motion and providing the much-needed clarification on section 1102(b)(3) by requiring the Committee to maintain a website providing general information about the chapter 11 cases, dockets, written reports summarizing proceedings and events, and creditor's questions and responses.[62] With respect to

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> Bennett, the unidentified customer lent the Bennett-controlled entity, Refco Group Holdings Inc., $335 million. Refco Group Holdings then allegedly used the money to pay down its debt to Refco Inc.
>
> According to prosecutors, the transactions had the effect of temporarily moving debt off of Refco's books and onto those of the customer, identified as New Jersey hedge fund Liberty Corner Capital.

Ben White & Terrence O'Hara, *Crisis at Refco Raises Questions About Accounting*, THE WASH. POST, Oct. 15, 2005.

[55] *See Kouwe*, *supra* note 52.

[56] *See Austrian bank*, *supra* note 49 (filing petition on October 17, 2005); *U.S. Charges*, *supra* note 49 (same); Steven Gelsi, *Refco shares plunge 45% on audit investigation*, MARKETWATCH FROM DOW JONES, Oct. 10, 2005.

[57] *See In re Refco*, 336 B.R. at 191.

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See In re Refco*, 2005 Bankr. LEXIS 2617, at *1.

[62] *See id.* at *4–5; *see also* Laura DiBiase, *Beyond the Quill: "Fair and Efficient:" Are They Really Talking about BAPCPA*?, 25-9 AM. BANKR. INST. J. 44, 45 (Nov. 2006) (explaining advances in website technology will better facilitate information sharing even more so than Representative Velazquez imagined when proposing this amendment in 1999). *But see* Barrett, *supra* note 39, at 15 (recognizing amendments to Federal Rules of Civil Procedure that took effect December 2006, addressing discovery and privilege issues concerning electronic media will impact the extent to which committees rely on the Internet and digital technology when providing "access to information").

privileged and confidential information,[63] the court stated that the Committee need not disseminate this information without further order from the court.[64] In addition, the court required the Committee to respond to creditor's requests for information by either providing access to the information or providing the reasons for refusal.[65] However, the creditors then had the right to seek to compel disclosure, but only after a good faith effort to meet and confer with the Committee.[66] The creditor requesting the information would have the right to request a hearing, to request a log or index of the withheld information, and to request an *in camera* review of said privileged or confidential information.[67] Furthermore, the court provided the Committee with guidance on responding to these requests for information:

> (8) [T]he Committee shall consider whether (a) the Requesting Creditor is willing to agree to reasonable confidentiality and trading restrictions with respect to such Confidential Information and represents that such trading restrictions and any information-screening process complies with applicable securities laws; and (b) under the particular facts, such agreement and any information-screening process that it implements will reasonably protect the confidentiality of such information; provided, however, that if the Committee elects to provide access to Confidential Information on the basis of such confidentiality and trading restrictions, the Committee shall have no responsibility for the Requesting Creditor's compliance with, or liability for violation of, applicable securities or other laws.[68]

The court further clarified that it was in the Committee's sole discretion to determine whether an entity requesting information holds claims of the type

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[63] In *In re Refco*, confidential information included information "regarding businesses proposed to be sold, strategies for negotiating with competing bidders and the evaluation of competing bids." *In re Refco*, 336 B.R. at 191. Furthermore, the order annexed to the *Refco* court's opinion defined confidential information as:

> [I]ncluding (without limitation) with respect to the acts, conduct, assets, liabilities and financial condition of the Debtors, the operation of the Debtors' business and the desirability of the continuance of such business, or any other matter relevant to these cases or to the formulation of one or more chapter 11 plans (including any and all confidential, proprietary, or other nonpublic materials of the Committee) whether provided (voluntarily or involuntarily) by or on behalf of the Debtors or by any third party or prepared by or for the Committee . . . .

Id. at 200–01.

[64] *See In re Refco*, 2005 Bankr. LEXIS 2617, at *6; Akin Gump, *supra* note 19, at 2 (highlighting provision of Information Access Order addressing privileged and confidential material).

[65] *See In re Refco*, 2005 Bankr. LEXIS 2617, at *8–9; *Akin Gump*, *supra* note 19, at 2 (explaining procedure for refusing to comply with information request).

[66] *See In re Refco*, 2005 Bankr. LEXIS 2617, at *8–9.

[67] *See id.* at *9.

[68] *See id.* at *10.

described under section 1102(b)(3)(A).[69] Judge Drain recognized a necessary balancing of the committee's fiduciary duty and the duty to disclose information.[70] On January 20, 2006, Judge Drain articulated the court's rationale in granting the Committee's motion and interpreted section 1102(b)(3)(A) in light of the section's scant legislative history and the section's relation to the duties of creditors' committees.[71] To date, Judge Drain's opinion in *Refco* provides the most articulate guidance to bankruptcy judges and attorneys trying to comply with section 1102(b)(3)(A).[72]

B. Subsequent Bankruptcy Cases' Implementation of Section 1102(b)(3)(A)[73]

After *Refco*, three other bankruptcies filed in the Southern District of New York have involved orders to guide the creditors' committees' compliance with section 1102(b)(3)(A). Calpine Corporation and certain affiliates filed voluntary petitions for chapter 11 relief in December 2005.[74] Soon thereafter, in January 2006, the Official Committee of Unsecured Creditors filed a motion seeking clarification of section 1102(b)(3)(A)'s requirements much like in *Refco*.[75] On February 9, 2006, the debtors and the Official Committee of Unsecured Creditors filed a stipulated order that outlined their protocol for information disclosure which was similar to the *Refco* court's order.[76] On February 15, 2006, the *Calpine* court entered an order very

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[69] *See id*. at *12.

[70] *See* Luis Salazar, *Privacy and Bankruptcy Law: Part II: Specific Code Provisions*, 25-10 AM. BANKR. INST. J. 58, 111 (Dec. 2006) (noting duty to disclose must override fiduciary duty when requiring information dissemination).

[71] *See In re Refco*, 336 B.R. at 192–93.

[72] *See* George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N. DAK. L. REV. 297, 390–91 (2006) (analyzing cases addressing BAPCPA issues).

[73] For a comprehensive listing of section 1102(b)(3)(A) pleadings, see "Index of key pleadings and U.S. Bankruptcy Court orders concerning the obligation under 11 U.S.C. § 1102(b)(3) of an official committee appointed by the United States Trustee under 11 U.S.C. § 1102(a) to share information with its constituency," http://bankrupt.com/1102b3/ (last visited Mar. 16, 2007).

Other cases where 1102(b)(3)(A) has been an issue include *In re Independence Air (FLYi)*, Case No. 05-20011 (Bankr. D. Del.), and *In re Riverstone Networks*, Case No. 06-10110, (Bankr. D. Del.) to name a few. *See* Springer, *supra* note 42, at 10; Deborah L. Thorne (contributing ed.), *Last in Line: Creditors' Committees: The Fallout from BAPCPA Changes to § 1102*, 25-3 AM. BANKR. INST. J. 20, 70–71 (Apr. 2006). In *In re Independence Air (FLYi)*, Case No. 05-20011 (Bankr. D. Del.), Docket No. 145, the Honorable Mary F. Walrath issued an order defining confidential information addressing concerns similar to Refco and also calling for a website to provide non-confidential information. *See* Thorne, *supra*, at 70–71.

[74] *See* Maria Ellena Chavéz-Ruark, DLA Piper "How Courts Are Interpreting the New Duty to Provide Access to Information," n.7, June 2006, http://www.dlapiper.com/interpreting_access_to_information/ (last visited Apr. 7, 2007); *see also* Calpine Official Creditors' Committee website, www.calpinecommittee.com (last visited Mar. 6, 2007).

[75] *See* Motion of the Official Committee of Unsecured Creditors, Pursuant to 11 U.S.C. §§ 105(a), 1102(b)(3)(A) and 1103(c), for *Nunc Pro Tunc* Order Clarifying Requirement to Provide Access to Information, *In re* Calpine Corp., No. 05-60200, Docket No. 494, dated Jan. 18, 2006 *available at* www.calpinecommittee.com/494.pdf.

[76] *See* Notice of Presentment of Stipulation and Agreed Order Between the Debtors and the Official Committee of Unsecured Creditors Regarding Creditor Access to Information Pursuant to 11 U.S.C. §§

similar to that of the *Refco* court providing for the creation of a website as the vehicle for "access to information" and requiring disclosure of similar information as in the *Refco* order.[77]

In January 2006, Musicland Holding Corporation and certain subsidiaries also filed voluntary chapter 11 petitions.[78] On February 2, 2006, the Official Committee of Unsecured Creditors also sought court clarification of their section 1102(b)(3)(A) duties to disclose information.[79] On February 22, 2006, the committee filed an application to appoint an information agent, Donlin, Recano, & Company, Inc. to assist in section 1102(b)(3) duties.[80] By seeking this appointment, Musicland sought to promote effective and efficient administration of the bankruptcy case and to reduce expenses.[81] Furthermore, the information agent would provide the website serving as the access point in complying with section 1102(b)(3) as with *Refco* and *Calpine*.[82] On April 5, 2006, the *Musicland* court entered a similar order to *Refco* and *Calpine* authorizing the retention of the information agent and ordering the creation of a website to provide similar information to that of *Refco* and *Calpine*, while also carving out confidential and proprietary information and limiting liability of the committee for acts of other entities in complying with information disclosure.[83]

Additionally, Dana Corporation and several affiliates filed for bankruptcy in March 2006 and the debtors and the debtors-in-possession filed a motion seeking an order confirming that the official creditors' committee would not disclose

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105(a), 1102(b)(3)(a) and 1103(c), *In re* Calpine Corp., No. 05-60200, Docket No. 772, dated Feb. 9, 2006 *available at* http://www.kccllc.net/calpine (can be found under court documents, page two, docket number 772).

[77] *Compare In re* Refco, No. 05-60006, 2005 Bankr. LEXIS 2617, at *4–13 (Bankr. S.D.N.Y. Dec. 23, 2005) *with* Order Pursuant to 11 U.S.C. §§ 105(a), 1102(b)(3)(A) and 1103(c), Clarifying Requirement to Provide Access Information, *In re* Calpine Corp., No. 05-60200, Docket No. 811, dated Feb, 15, 2006 *available at* http://www.kccllc.net/calpine (can be found under court documents, page two, docket number 811).

[78] *See* Musicland Holding Corp., et al. Committee of Unsecured Creditors – Information Website, "General Case Information," *available at* http://www.donlinrecano.com/mp.dr3?p1=gtp&p9=47&p2=musicland.

[79] Emergency Motion of Official Committee of Unsecured Creditors, Pursuant to 11 U.S.C. §§ 105(a), 1102(b)(3)(A) and 1103(c), for *Nunc Pro Tunc* Order Clarifying Requirement to Provide Access to Information, *In re* Musicland Holding Corp., No. 06-10064, Docket No. 367, dated Feb. 2, 2006 *available at* http://www.donlinrecano.com/dr201/musicland/06-10064/dk000367-0000.pdf.

[80] *See* Application of the Official Committee of Unsecured Creditors of the Debtors Pursuant to 11 U.S.C. § 327 for an Order Authorizing the Committee to Retain Donlin, Recano & Company, Inc. as the Committee's Information Agent, *Nunc Pro Tunc*, to Feb. 9, 2006, at 2, *In re* Musicland Holding Corp. No. 06-10064, Docket No. 497, *available at* http://www.donlinrecano.com/dr201/musicland/06-10064/dk000497-0000.pdf; *see also* Chavéz-Ruark, *supra* note 74 (pointing to appointment of information agent).

[81] *See* Application, *In re* Musicland Holding Corp., *supra* note 80, at 3.

[82] *See id.* In addition, the information agent would be compensated similarly to other professionals engaged by the creditors committee. *Id*; *see* Chavéz-Ruark, *supra* note 74.

[83] *See* Order Authorizing the Committee to Retain Donlin, Recano & Company, Inc. as the Committee's Information Agent, *nunc pro tunc*, to February 9, 2006, at 3, No.06-10064, Docket No. 840 dated Apr. 5, 2006, *available at* http://www.donlinrecano.com/dr201/musicland/06-10064/dk000840-0000.pdf; *see also* Chavéz-Ruark, *supra* note 74.

confidential or privileged information.[84] Furthermore, as a public company with publicly traded debt and equity subject to the federal securities laws, the debtors raised the same arguments as the *Refco* committee in seeking guidance to avoid the implication of Regulation FD.[85] As exhibits to their motion, the Dana Corporation debtors annexed the orders entered in *Flyi*, Inc, et al., *Calpine*, and *G&G*, which authorized the use of a website and made exception for confidential and privileged information.[86] An opposition was filed in this case by the Pension Benefit Guaranty Corporation ("PBGC") on March 24, 2006 arguing that the confidentiality agreement between the debtors and PBGC protected debtors from the dissemination of confidential information and furthermore that PBGC was not a competitor or an enumerated person implicating Regulation FD.[87] Other parties such as United States Manufacturing, Inc. and Timken Corporation also sought similar access to information as PBGC.[88]

On March 29, 2006, the court entered an order preventing the disclosure of confidential and privileged information, but did not implement a protocol for dissemination noting that the committee would file a future motion with respect to the protocol.[89] In suggesting the use of a website to provide information in a motion to approve filed on May 16, 2006, the committee relied upon *Refco, Calpine, Pliant, FLYi, and Nobex*.[90] On May 31, 2006, the court entered an order granting the committee's motion encouraging the establishment of a website to provide information with the exception of confidential and privileged information.[91]

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[84] *See* Dana Corporation—Information Website, "General Info," *available at* http://www.bmccorp.net/master.asp?InfoType=5&ClientID=110 (recording petition filing date); Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 107(b) and 1102(b)(3)(A) of the Bankruptcy Code, for an Order Confirming that Official Committees are not Authorized or Required to Provide Access to (A) Confidential Information of the Debtors or (B) Privileged Information, *In re* Dana Corp., No. 06-10354, Docket No. 331, dated Mar. 15, 2006, *available at* http://docs.bmccorp.net/dana/docs/nysb_1-06-bk-10354_331.pdf.

[85] *See* Motion of Debtors and Debtors in Possession, *In re* Dana Corp., *supra* note 84, at 8–10.

[86] *See id*. at Exhibit A.

[87] *See* PBGC's Limited Objection to Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 107(b), and 1102(b)(3)(A) Of the Bankruptcy Code for an Order Confirming That Official Committees Are Not Authorized or Required to Provide Access to Confidential Information of the Debtors or (B) Privileged Information, *In re* Dana Corp., No. 06-10354, Docket No. 613, dated Mar. 24, 2006, at 3, *available at* http://docs.bmccorp.net/dana/docs/nysb_1-06-bk-10354_613_0.pdf.

[88] *See* Response to the Motion of Debtors and Debtors in Possession, Pursuant to Sections 105(a), 107(b), and 1102(b)(3)(A) of the Bankruptcy Code for an Order Confirming that Official Committees are Not Authorized or Required to Provide Access to (A) Confidential Information of the Debtors or (B) Privileged Information by Timken Corp., *In re* Dana Corp., No. 06-10354, Docket. No. 697, dated Mar. 27, 2006, *available at* http://docs.bmccorp.net/dana/docs/nysb_1-06-bk-10354_697.pdf.

[89] *See* Order Confirming that Official Committees are not Authorized or Required to Provide Access to (A) Confidential Information of the Debtors or (B) Privileged Information, *In re* Dana Corp., No. 06-10354, Docket No. 737, dated Mar. 29, 2006 at 2–3, *available at* http://docs.bmccorp.net/dana/docs/nysb_1-06-bk-10354_737.pdf.

[90] *See* Motion of the Official Committee of Unsecured Creditors for an Order Establishing Procedures for Compliance with 11 U.S.C. Section 1102(b)(3), *In re* Dana Corp., No. 06-10354, Docket No. 1228, dated May 16, 2006, at 4–6, *available at* http://docs.bmccorp.net/dana/docs/nysb_1-06-bk-10354_1228_0.pdf.

[91] *See* Order Establishing Procedures for Compliance By the Official Committee of Unsecured Creditors with 11 U.S.C. §§ 1102(b)(3) and 1103(c) Effective as of March 10, 2006, *In re* Dana Corp., No. 06-10354,

All four orders issued by various judges within the Southern District of New York are similar, with minor differences to accommodate the particular cases.[92] The *Refco* and *Calpine* orders are more extensive and provide more general guidance as to section 1102(b)(3) responsibilities while the *Dana* order focuses primarily on confidential and privileged information.[93] Specifically, the *Dana* order states "the committee is not 'authorized or required' to provide confidential or privileged information to its constituents but authorizes the committee to provide privileged information to a creditor if the information is not confidential and the privilege is held and controlled solely by the committee."[94] Thus, even within a single district with a published opinion discussing in detail an interpretation of section 1102(b)(3), the interpretation and imposition of section 1102(b)(3) has not been completely uniform—a likely result given the vague and potential broad construction and ambiguity of the statutory section.

III. LEGISLATIVE HISTORY

A. Bankruptcy Act of 1898 and the Bankruptcy Reform Act of 1978 Provide Insight

In its opinion, the *Refco* court looked at the Bankruptcy Act of 1898 to determine whether any similar provisions to section 1102(b)(3)(A) existed.[95] Section 339(1) and Bankruptcy Act Rule 11-29 required the creditors' committee to report and advise the creditors of the status of the proceedings and the progress of the plan and the case.[96] These provisions attempted to further the purposes of the bankruptcy laws in making sure that creditors' interests are protected.[97] In contrast,

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Docket No. 1373, dated May 31, 2006, at 2, *available at* http://docs.bmccorp.net/dana/docs/nysb_1-06-bk-10354_1373.pdf.

[92] *See* Chavéz-Ruark, *supra* note 74.

[93] *See* Chavéz-Ruark, *supra* note 74. *Compare In re Refco*, 2005 Bankr. LEXIS 2617, at *1, *with* Order, *In re* Calpine Corp., *supra* note 77, at 1–2, *with* Order, *In re* Dana Corp., *supra* note 91, at 2.

[94] *See* Chavéz-Ruark, *supra* note 74; *see also* Order, *In re* Dana Corp., *supra* note 91, at 2–3.

[95] *See In re* Refco, 336 B.R. 187, 194 (Bankr. S.D.N.Y. 2006). According to Charles Jordan Tabb, "The Bankruptcy Act of 1898 marked the beginning of the era of permanent federal bankruptcy legislation." Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23 (1995). The Bankruptcy Act of 1898 remained in effect until it was replaced by the Bankruptcy Reform Act of 1978. However, the 1898 Act was largely amended in 1938 by the Chandler Act. *Id.* at 23.

[96] *See In re Refco*, 336 B.R. at 194; *Creditors' Committee*, COLLIER ON BANKRUPTCY, Ch. 11-29(a), 11-29-1 (James W.M. Moore & Lawrence P. King eds. 14th ed. 1976). Section 339(1) was integrated into the Bankruptcy Act in 1967 and Rule 11-29(a) is derived from that section. *Id.* at ¶ 11-29.02, 11-29-3. Section 339(1) of the Bankruptcy Act in relevant portion specifically states:

> (1) The functions of a committee elected as provided in section 338 of this chapter may include the following:
>
> (d) to report to the creditors from time to time concerning the progress of the proceeding;

Id. at ¶ 11-29.02, 11-29-3 n.1.

[97] *See* Tabb, *supra* note 95, at 7 (articulating origins of American bankruptcy laws were pro-creditor); *see also* United States v. Ron Pair Enter., Inc., 489 U.S. 235, 240 (1989) (overhauling bankruptcy laws in 1978

the language of section 1102(b)(3) states the creditors must have "access to information" without providing any limitation to the definition of information.[98] Therefore, these early provisions of the bankruptcy laws establish the possible rationale for section 1102(b)(3)(A), but do not enlighten the courts or practitioners as to the boundaries of the information disclosure.[99]

Prior to the Bankruptcy Reform Act of 1978 ("1978 Act"), the Bankruptcy Code required Securities and Exchange Commission ("SEC") approval for all reorganization plans because Congress felt that creditors and stockholders were unable to make intelligent or informed decisions without SEC guidance.[100] In proposing section 1125, the 1978 Act sought to promote the same informed decision, but instead by providing a mechanism whereby such information would be provided to creditors and stockholders directly.[101] Congress required disclosure of "adequate information" to "investors typical of holders of claims" but intended for the standard to be flexible.[102] Furthermore, the SEC had an absolute right to be heard on the adequacy of information in the disclosure statement, however, they did not have to issue the formal report or hold the approval hearing, as the previous law required.[103] In comparison to section 1102(b)(3), disclosure was clearly intended in the proposed section 1125 of the 1978 Act, but a flexible approach was used in determining to whom and what form of information would be disseminated.[104]

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was to protect secured creditors and secured claims). *But see In re* Northwest Airlines Corp., 2007 Bankr. LEXIS 557, at *1–2 (Bankr. S.D.N.Y. Feb. 26, 2007) (ruling on FED. BANKR. R. P 2019). In *In re Northwest Airlines Corporation*, the court granted debtor's motion that the current Rule 2019 motion was inadequate because it failed to disclose "the amounts of claims or interests owned by the members of the committee, the times when acquired, the amounts paid therefore, and any sales or other disposition thereof." *Id*. (citing FED. BANKR. R. P. 2019); *see also* Clearly Gottlieb Steen & Hamilton LLP, *Bankruptcy Court Requires Ad Hoc Equity Committee Members to Submit Detailed Information on Holdings Under Bankruptcy Rule 2019(a)*, Mar. 13, 2007, *available at* http://www.cgsh.com/files/tbl_s5096AlertMemoranda%5CFileUpload5741%5C536%5C19-2007.pdf. Here, is an instance where the ad hoc creditors' committee must make disclosures to the debtor. *In re Northwest Airlines Corp*., 2007 Bankr. LEXIS 557, at *7.

[98] 11 U.S.C. § 1102(b)(3)(A) (2006).

[99] *See In re Refco*, 336 B.R. at 194.

[100] *See* 11 U.S.C. § 572 (1970) (referring to Bankruptcy Act of 1898 before 1978 reforms). Before the 1978 Act, in July 1973, Harold Marsh, Jr., Chairman, in the *Report of the Commission on the Bankruptcy laws of the United States*, explained the need for Securities and Exchange Commission involvement but recommended that the duty to provide advisory reports on reorganization plans be transferred to an administrative agency to oversee bankruptcies. *See* H.R. DOC. NO. 93-137, Part I, 93d Cong., 1st sess., at 26 (Sept. 6, 1973). Specifically, the Marsh Commission "recommends that the administrator prepare and furnish to interested parties advisory reports on plans and make recommendations concerning fee and expense applications." *Id*. at 249.

[101] *See* H.R. REP. NO. 95-595, at 226–27.

[102] *See id*.

[103] *See id*. at 228–29.

[104] *See id*. at 226–29.

B. Specific Congressional Discussion on Section 1102(b)(3)

The direct legislative history of section 1102(b)(3) is slim and uninformative.[105] Specifically, the House Report states:

> Section 405(b) requires the committee to give creditors having claims of the kind represented by the committee access to information. In addition, the committee must solicit and receive comments from these creditors and, pursuant to court order, make additional reports or disclosures available to them.[106]

This language merely mimics the enacted language of the statute without providing guidance as to the legislative intent or purpose in using these words.[107]

The 2005 Amendments began to take shape in 1998 with significant changes proposed in 1999 and 2000.[108] In 1999, Representative Nydia Velázquez of New York proposed the following amendment to section 1102(b):

> (3) A committee appointed under subsection (a) shall provide access to information for creditors who hold claims of the kind represented by such committee and who are not appointed such committee, shall to be open for comment from such creditors, and shall be subject to a court order compelling additional reports or disclosure to be made to such creditors.[109]

After proposing this amendment, Representative Velázquez articulated her rationale on the House floor whereby she made clear that small business creditors were her focus.[110] Small businesses owed a significant amount in proportion to their gross annual revenue are often excluded from the debtor's unsecured creditors' committee since that debt amount is not as large as other that of bigger companies.[111]

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[105] *See In re Refco*, 336 B.R. at 192; Feldsher, *supra* note 43, at 1; Silfen & Vogel, *supra* note 4 (stating legislative record is silent as to purpose of section 1102(b)(3)).

[106] H.R. REP. NO. 109-31, 109th Cong., 1st Sess. 87, § 405(b) (2005).

[107] *Compare id.*, *with* 11 U.S.C. § 1102(b)(3)(a) (2006).

[108] *See* Catherine E. Vance, "The Origin of Information Sharing Under New § 1102(b)(3)," DEV. SPECIALISTS, INC., 2–3 (2006).

[109] Amendment No. 4 printed in H.R. REP. NO. 106-126, 145 CONG. REC. H2706, H2709, 106th Cong., 1999.

[110] Representative Velázquez is the Chairwoman of the House Small Business Committee and has made several other proposals supporting small businesses. *See* Congresswoman Nydia Velázquez, Representing New York, 12th District, http://www.house.gov/velazquez/biography.htm (last visited Apr. 7, 2007); *see also* House Small Business Democrats, http://www.house.gov/smbiz/democrats/ (last visited on Apr. 7, 2007).

[111] In her time to speak in support of Amendment No. 4, Representative Velázquez stated the following:

> Mr. Chairman, while H.R. 833 provides a plan for overhauling our Nation's bankruptcy law, there is one issue that, while seemingly small, will have a great impact

Speaking in support of Representative Velázquez's proposed amendment, Representative Talent provided this example:

> [S]uppose that a firm goes bankrupt and that it owed Microsoft $100,000 for software and it owes a small consulting firm, computer consulting firm, 30 or $35,000 for the work that has been done and that both of them are unsecured creditors. Well, Microsoft is going to get on the creditors committee because it has the larger debt, but $100,000 to Microsoft may be nothing, in terms of that firm is nothing in terms of that firm's total revenue. But that 30 or $35,000 could be a crucial account for that small business consulting firm, and they need to be represented on the creditors committee. That is really the only way that their interests can be protected.[112]

> on this Nation's small businesses. That is the way that the bankruptcy process leaves small businesses who are creditors on the outside looking in.
>
> To solve this problem, I am offering an amendment that will quickly and fairly address the issue by ensuring more small business involvement and greater communication in the bankruptcy process. My amendment will make two simple changes.
>
> First, it would allow a small business involved as a creditor in a Chapter 11 bankruptcy case to be added to the creditor committee by the court. The court could make such an appointment by comparing the amount of the claim as a proportion of the business' gross annual revenue, thus showing that a business is disproportionately affected.
>
> Second, my amendment will ensure that those small businesses not included on the creditor committee will have access to critical information regarding the credit committee's actions. This could be achieved by simply making the committee open to comments from and required to provide additional information to those small businesses not included on the committee but who will nonetheless be affected by the outcome.
>
> I urge the adoption of these measures which will help small businesses. The need to take them can be underscored by looking at just one example of a company that was nearly devastated when one of its customers filed for bankruptcy.
>
> Unicare Corporation, a small business located in Ohio, was caught off guard when one of its largest customers filed for bankruptcy. The debt to Unicare represented almost 10 percent of the company's annual revenue. The bankruptcy court created an unsecured creditors committee based on total outstanding debts owed.
>
> Not only did Unicare not qualify as a member of the credit committee, but it was left on the outside looking in with no involvement in the process. This made Unicare's future uncertain, forcing it to reduce staff and revise plans for expansion. Fortunately, because of hard work and strong strategic planning, Unicare was able to recover, and today it continues as a very strong business.

145 CONG. REC. H2706, H2709.

[112] *Id*. at H2710.

Much like Representative Talent's hypothetical, BAPCPA also amended section 1102(a) to allow for an increase in the number of creditors on the committee to include a "small business concern" if the claim of the small business concern's claim is largely disproportionate to its annual gross revenue. 11 U.S.C. § 1102(a)(4) (2006). *See* Levin & Ranney-Marinelli, *supra* note 3, at 628 (explaining the rationale for the amendment but questioning whether a small business concern would actually put forth the effort to seek committee service);

This hypothetical seems to provide explicit reason for small business creditor's needs to be represented on the creditor's committee.[113] The amendment was agreed to by a voice vote and included as part of H.R. 833.[114]

Between 1999 and 2005, the Velázquez amendment was included in the proposed amendments to the Bankruptcy Code.[115] From the time Representative Velázquez proposed the amendment in 1999, there was little to no discussion in Congress on the amendment, however, the National Bankruptcy Congress ("NBC") reported on section 1102(b)(3) in 2001.[116] The NBC opposed the proposed section 405(b), which sought to amend section 1102(b)(3) by including the "access to information" requirement for non-committee members.[117] The NBC highlighted the lack of clarity in the proposed language as it "does not distinguish between non-public information and competitively sensitive information, it may be in conflict with fiduciary and other duties of confidentiality of the committee."[118] The NBC also noted that the provision as written could implicate the federal securities laws and could prevent easy flow of information between the debtor and the creditor committee.[119]

Catherine Vance, "Everything Starts Somewhere: DSI's Catherine Vance Unlocks the Mystery Behind the Origin of BAPCPA's Section 1102(b)(3), Which Requires a Creditors' Committee to Provide Creditors with Access to Information and a Ready Ear—Part I," BANKR. LITIG. BLOG, http://www.bankruptcylitigationblog.com/archives/bapcpa-everything-starts-somewhere-dsis-catherine-vance-unlocks-the-mystery-behind-the-origin-of-bapcpas-section-1102b3-which-requires-a-creditors-committee-to-provide-creditors-with-access-to-information-and-a-ready-ear-part-i.html (last visited Apr. 7, 2007) (noting clarity of section 1102(a)(4) to include small business creditors while section 1102(b)(3) seems to be heading away from its "intended beneficiaries").

[113] *See* Borges & Nathan, *supra* note 1, at 1 (explaining sections 1102(a) & (b) were enacted to protect the interests of small businesses); *see also supra* note 111 and accompanying text. *But see* Linda J. Rusch, *Unintended Consequences of Unthinking Tinkering: The 1994 Amendments and the Chapter 11 Process*, 69 AM. BANKR. L.J. 349, 349 (1995) (noting that an unsecured creditors' committee is comprised of the seven largest creditors who are to be representative of the different kinds of claims held).

[114] *See* 145 CONG. REC. H2706, H2710; *see also* Vance, *supra* note 108, at 4.

[115] *See* Vance, *supra* note 108, at 4.

[116] The National Bankruptcy Conference also issued a report on May 1, 1997, however, their discussion of the provision did not address access to information by non-members of the creditor's committee. *See* REFORMING THE BANKRUPTCY CODE: THE NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT, NAT'L BANKR. CONF., 30–31 (May 1, 1997). At this time, the National Bankruptcy Conference argued that the provision should be amended to provide for appointment to a creditor's committee rather than election in an effort to reduce the length and cost of bankruptcy actions. *See id.* On October 20, 1997, the National Bankruptcy Review Commission ("NBRC") issued a report entitled *Bankruptcy: The Next Twenty Years*. In this report, small businesses were covered in recognizing that chapter 11 rules and procedures do not always fulfill the needs of the small business debtors, however, small business creditors were not covered. *See* BANKRUPTCY: THE NEXT TWENTY YEARS, NAT'L BANKR. REV. COMM'N 609 (Oct. 20, 1997). Furthermore, the report also addressed the composition of the creditors committee to ensure adequate representation of creditors and equity holders. *See id.* at 492–93.

[117] *See* ANALYSIS OF PENDING BANKRUPTCY LEGISLATION: COMPARING H.R. 333 EAS (SENATE BILL) AGAINST H.R. 333 EH (HOUSE BILL), NAT'L BANKR. CONF., 118–19 (Sept. 2001).

[118] *Id*. at 118.

[119] *See id*. at 118–19.

IV. LOOK TO 11 U.S.C. §704(a)(7) FOR SOME GUIDANCE[120]

In *In re Refco Inc.*,[121] the parties sought judicial assistance to clarify their obligations under the provision because section 1102(b)(3)'s plain meaning could generate absurd results.[122] In that case, the Honorable Robert D. Drain clearly acknowledged the difficulties for the parties under section 1102(b)(3) and used section 704(a)(7) as a source of statutory construction for the ambiguous section in dispute.[123] Section 704(a)(7) states that a "trustee shall . . . unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest."[124] As the *Refco* court notes, the two provisions seem to be rather similar; therefore, an analysis of section 704(a)(7)'s legislative history and application can provide guidance.[125]

Section 704(a)(7) specifies one of the trustee's fiduciary duty to creditors.[126] In comparing section 704(a)(7) and section 1102(b)(3)(A), the *Refco* court points to three important propositions of section 704(a)(7) that are applicable to section 1102(b)(3)(A).[127] First, section 704(a)(7) imposes an extensive duty on the trustee to provide the information that parties request and very little leeway to avoid disclosure.[128] Second, trustees can seek protective orders in an effort to protect attorney-client privilege and proprietary and confidential information.[129] Lastly, the trustee's right to a protective order stems from the trustee's fiduciary duty to the

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[120] In 2005, BAPCPA amended this provision to include subsection (a) prior to "trustee shall." Other than this clarifying inclusion of a subsection no substantive changes were made to this amendment. *See* BAPCPA, Pub. L. No. 109-8, § 102(c), 119 Stat. 23, 32 (2005); *Compare* 11 U.S.C. § 704(a)(7) (2006), *with* 11 U.S.C. § 704(7) (2000).

[121] *See In re* Refco, Inc., 336 B.R. 187 (Bankr. S.D.N.Y. 2006).

[122] *See* Motion of Official Committee of Unsecured Creditors, Pursuant to 11 U.S.C. §§ 105(a), 1102(b)(3)(A) and 1103(c), for *Nunc Pro Tunc* Order Clarifying Requirement to Provide Access to Information, at 1, *In re* Refco Inc., 336 B.R. 187 (Bankr. S.D.N.Y. 2006) (No. 05-60006), *available at* "Index of key pleadings and U.S. Bankruptcy Court orders concerning the obligation under 11 U.S.C. § 1102(b)(3) of an official committee appointed by the United States Trustee under 11 U.S.C. § 1102(a) to share information with its constituency," http://bankrupt.com/1102b3/05-60006-133.pdf.

[123] *See In re Refco*, 336 B.R. at 192 (suggesting section 704(a)(7) could serve as source for understanding section 1102(b)(3)(A)). Furthermore, all references to section 704(a)(7) in the case are written as section 704(7) as the provision was listed prior to the 2005 Amendments. *See id*.

[124] 11 U.S.C. § 704(a)(7) (2006). It is important to note that the debtor-in-possession bears the same responsibilities and duties as that of the trustee. *See* 11 U.S.C. § 1107 (2006); *In re* Modern Office Supply, Inc. 28 B.R. 943, 944 (Bankr. W.D. Okla. 1983) (recognizing duties of debtor-in-possession).

[125] *See In re Refco*, 336 B.R. at 192. The *Refco* court argues that "facial differences . . . do not appear to be material." *Id*. The main difference is that the parties must make a request for the information under section 704(a)(7) while it is unclear under what terms information is disclosed under section 1102(b)(3)(A). *Id*. Even though the mechanics of information dissemination differ, the *Refco* court states that by recognizing that the court will decide disputes over what information is to be shared, then the provisions are rather similar. *Id*. Additionally, section 704(a)(7) and section 1102(b)(3)(A) respectively define estate and information rather broadly, therefore, in practicality, these definitions act in similar manners. *Id*. at 192–93.

[126] *See id.* at 193–94.

[127] *See id.* at 193.

[128] *See id.* at 193 (citing Pineiro v. Pension Benefit Guar. Corp., 318 F. Supp. 2d 67, 102 (S.D.N.Y. 2003)).

[129] *See id*. at 193 (citing *In re* Robert Landau Assoc., Inc., 50 B.R. 670, 677 (Bankr. S.D.N.Y. 1985)).

creditors and the estate.[130] The trustee seeks to balance the interests of both the creditors and the estate to promote their future capabilities.[131]

Additionally, section 704(a)(7) must be read in conjunction with section 107 of the Bankruptcy Code.[132] Section 107 makes a bankruptcy case's court filings and dockets public and open to reasonable review by any corporate or individual entity.[133] However, section 107 only applies to the papers filed and dockets, not to all information relevant to the bankruptcy since section 107(a) is limited by section 107(b).[134] Specifically, section 107(b)(1) authorizes the bankruptcy court to "protect an entity with respect to a trade secret or confidential research, development, or commercial information," either upon the parties' request or upon the court's own motion.[135] This appears to be a clear manifestation of Congressional intent as the legislators specifically included this language in section 107 to provide courts with guidance. In contrast, the ambiguity in section 1102(b)(3) also requires access to information, but the courts are left to interpret the limitation on access.

Section 704(a)(7) was added to the Bankruptcy Code in 1978.[136] However, the language duplicates section 47(a) of the Bankruptcy Act of 1898.[137] Thus, cases that relied on section 47(a) may also aid the interpretation of section 704(a)(7).[138] The broad construction of section 47(a) and section 704(a)(7) is recognized in the early case law where courts state that the furnishing of information is not unlimited.[139] Specifically, "[t]he provisions of the Bankruptcy Act invoked, 'broad as they are, should not be construed to require the divulgence to a claimant against the general

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[130] *See id*. at 193–94 (citing *In re* Scott, 172 F.3d 959, 967 (7th Cir. 1999)).

[131] *See id.* at 194; John J. Rapisardi, *supra* note 22 (describing *Refco* court's analysis of section 704(7)).

[132] *See* 2-704 COLLIER BANKRUPTCY MANUAL § 704.11 (Matthew Bender & Co. ed. 3d ed. rev. 2006).

[133] *See* 11 U.S.C. § 107 (2006); 2-704 COLLIER BANKRUPTCY MANUAL § 704.11. "Dockets" include the claims docket, proceedings docket and the papers filed. *See* H.R. REP. NO. 95-595, at 317–18.

[134] *See* 11 U.S.C. § 107(a)-(b) (2006).

[135] *Id.* § 107(b)(1). Section 107(b)(2) protects an individual person from scandalous or defamatory information being included in their papers filed. *See Id.* § 107(b)(2).

[136] H.R. REP. NO. 95-595, at 379.

[137] *See id.*; *see also* Bankruptcy Act of 1898, ch. 5, § 47(a)(10) *reprinted in* JACOB I. WEINSTEIN, ESQ., THE BANKRUPTCY LAW OF 1938: *CHANDLER ACT*: A COMPARATIVE ANALYSIS PREPARED FOR THE NATIONAL ASSOCIATION OF CREDIT MEN, 92 (1938) (retaining language of clause (5) of bankruptcy law pre-*Chandler Act*); *In re* Saur, 122 F. 101, 102 (S.D.N.Y. 1903) (relying upon section 47(a) to describe the trustee's duties to furnish information).

[138] *See, e.g.*, Petition of Moulthrop 249 F. 468, 469 (6th Cir. 1918) (holding testimony became part of public record therefore debtor was entitled to copy); *In re* Greenbaum 243 F. 965, 967 (E.D. Mich. 1917) ("[T]he provisions of sections 47 and 49 of the Bankruptcy Act give any person interested in any bankrupt estate an absolute statutory right to the inspection of all accounts and papers of the trustee, and to be furnished with any information concerning the bankrupt estate which the trustee has.") (citations omitted).

[139] *See* Stein v. Elizabeth Trust Co. (*In re* Winton Shirt Corp.), 104 F.2d 777, 780 (3d Cir. 1939) ("[I]t has been held that a creditor or even the bankrupt himself is entitled to examine the testimony given at hearings as well as books and records in the possession of the trustee."); *In re* Samuelsohn, 174 F. 911, 912 (W.D.N.Y. 1909) (maintaining party-in-interest has absolute right to examine debtor and be informed about estate by trustee or referee); *In re Saur*, 122 F. at 101–03 (holding that trustee must allow examination of books, papers and financial report of the estate except for information, in the opinion of the trustee, that will be detrimental to the reclamation proceedings).

estate of information which might tend to [the estate's] detriment or depletion.'"[140] In addition, section 704(a)(7) relies upon a similar rationale to that of Bankruptcy Rule 218(3), where the intention is to encourage easy access to information about the estate and its administration.[141] The language "unless the court orders otherwise . . . ,"[142] shifts the burden of determining reasonableness of the parties' requests to the court as opposed to the trustee.[143] Although trustees have a broad duty to comply with requests for information, they have the flexibility to provide the information in a reasonable manner or form and do not have to comply with the exact form requested by the creditor.[144] This is especially true in situations where information is requested by one creditor and the expense to create a different form for another creditor would be unnecessary in the eyes of the first creditor, not to mention the debtor.[145]

A further limitation on the duty to furnish information under section 704(a)(7) is that only "parties in interest" are entitled to request information.[146] "Parties in interest" is defined through judicial construction to include the debtor, creditors and "persons whose pecuniary interests are directly affected by proceedings in bankruptcy . . . ."[147] Although this definition encompasses a broad group of parties, it does provide some clarification as to whom information must be furnished.[148] The language of section 1102(b)(3)(A), where information can be accessed by creditors who hold similar claims to those appointed to the committee, seems to be far broader because "similar claims" appears to be a limitless concept.[149]

A trustee's powers are designed to promote the purposes of the bankruptcy laws and the limitations on power are also designed to further those same purposes.[150] In a chapter 11 bankruptcy, debtors provide information on their ability to reorganize

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[140] *See In re Greenbaum*, 243 F. at 967 (citing *In re* Saur, 122 F. at 101).

[141] *See In re* Sports Accessories, Inc., 34 B.R. 80, 81 (Bankr. M.D. 1983) (explaining the relationship between section 704(a)(7) and rule 218(3)). Rule 2015 includes the provisions previously found in Rule 218(3). *See* FED. BANKR. R. P. 2015; *Chapter 2015: Duty to Keep Records, Make Reports, and Give Notice of Case*, 9-2015 COLLIER ON BANKRUPTCY, ¶ 2015.RH (Resnick & Sommer (eds.) 15th ed. rev. 2006) (noting history of rule).

[142] 11 U.S.C. § 704(a)(7) (2006).

[143] *See In re Sports Accessories*, 34 B.R. at 81.

[144] *See In re* Berneddy's, 108 F. Supp. 183, 185 (D. Mass. 1952) (stating form that information is provided must be reasonable).

[145] *See id*. (explaining rationale for why form must only be reasonable).

[146] *See* 11 U.S.C. § 704(a)(7) (2006).

[147] Nintendo Co. Ltd. v. Patten (*In re* Alpex Computer Corp.), 71 F.3d 353, 356 (10th Cir. 1995); *see In re* Roslyn Sav. Bank v. Comcoach Corp. (*In re* Comcoach Corp.), 19 B.R. 231, 234 (Bankr. S.D.N.Y. 1982) ("A noncreditor of a debtor, even though owed a debt by a creditor of the debtor, does not have standing to seek relief from the automatic stay for the purpose of recovering on its claim."); *In re* Transatl. & Pac. Corp., 216 F. Supp. 546, 552 (Bankr. S.D.N.Y. 1963); s*ee also In re* United Button Co., 137 F. 668, 672 (D. Del. 1904) (defining "parties in interest"); *In re* Devonian Mineral Spring Co., 272 F. 527, 532 (E.D. Ohio 1920) (same).

[148] *See In re Transatl*., 216 F. Supp. at 552 (illustrating how parties in interest provides classification as to whom information must be provided, while section 1102(b)(3)(A) does not include statutory limitation).

[149] 11 U.S.C. § 1102(b)(3)(A) (2006); *see In re Refco*, 336 B.R. at 190.

[150] *In re* Bill Walters, 136 B.R. 256, 258 (Bankr. C.D. Cal. 1992) (providing information to creditors allows them to determine if trustee is protecting their interests in debtors' estate).

and continue the business in order to encourage creditors to continue their investments in the debtor.[151] Furthermore, the information provided to creditors enables them to protect their interests.[152] Under section 704(a)(7), information to be furnished is limited to that of the estate and its administration.[153] The courts have recognized that any broader disclosure could potentially harm the debtor. Courts interpreting section 1102(b)(3)(A) recognize similar harm from broad disclosure to creditors not appointed to the committee.[154] However, the language of section 704(a)(7), as broad as it is, appears to be narrower than that of section 1102(b)(3)(A).[155]

V. AMBIGUOUS TERMS THAT THE PROVISION RESTS UPON

The problems with section 1102(b)(3) arise because of the ambiguity of seemingly simple terms.[156] Despite its brevity, the few key words—"access," information," "claims of the kind"—are problematic.[157] The United States Supreme Court has attempted to take a strict statutory interpretation stance when addressing the Bankruptcy Code, especially since the appointment of Justice Antonin Scalia in 1986.[158] Strict statutory interpretation focuses on the words themselves to determine legislative intent as opposed to examining legislative history such as committee reports.[159] Furthermore, the Supreme Court also adopted a "holistic approach" whereby the Bankruptcy Code is analyzed in its entirety when trying to interpret a term in an effort to maintain the same definition across the Bankruptcy Code.[160]

A. "Access"

Following the Supreme Court's holistic approach, a search of the Bankruptcy Code shows that "access" is found in ten sections.[161] Although many of those sections relate to chapter 15 foreign bankruptcies, in addition to section 1102(b), there are two sections that contain the word "access"—section 107 and section

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[151] *Id.* at 258 (illustrating purpose of disclosure of information); Rusch, *supra* note 113, at 349 ("The premise of reorganization law is that the debtor is worth more economically alive than economically dead.").

[152] *See id.* at 258 (protecting creditors' interests is amongst trustee's goal)

[153] *See* 11 U.S.C. § 704(a)(7) (2006); *In re Bill Walters*, 136 B.R. at 258 (requiring disclosure of information regarding estate and estate administration).

[154] *See In re Refco*, 336 B.R. at 191 (recognizing broad disclosure might be harmful to debtor's ability to reorganize).

[155] *Compare* 11 U.S.C. § 704(a)(7) (2006), *with* 11 U.S.C. § 1102(b)(3)(A) (2006).

[156] *See* Silfen & Vogel, *supra* note 4 (noting vagueness of provision).

[157] *See* 11 U.S.C. § 1102(b)(3)(A) (2006); *see also* Silfen & Vogel, *supra* note 4 (listing key words not defined by BAPCPA).

[158] *See* Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979-2004*, 78 AM. BANKR. L.J. 373, 386 (2004).

[159] *See* Carlos J. Cuevas, *Public Values and Bankruptcy Code*, 12 BANKR. DEV. J. 645, 645–46 (1996) (defining strict statutory interpretation).

[160] Cuevas, *supra* note 159, at 646 (explaining holistic approach).

[161] *See, e.g.*, 11 U.S.C. §§ 107, 333 (2006).

333.[162] In section 107 and section 333, the access provided is for dockets, court papers and patient files, which are all recorded materials.[163] Thus, in section 107, the access is for publicly held documents likely maintained by the court and patient records under section 333 likely maintained by the health care business. In section 1102(b), the mechanics of accessing information are not delineated. This is largely because the type of information that needs to be accessible is unclear, which makes it difficult to determine what form of access is most efficient. Therefore, a uniform method of providing access to information has not yet been defined for section 1102(b)(3)(A) and likely will not be determined until courts or Congress agree upon a uniform definition for "information."

B. "Information" and "Claims of the Kind"

A similar search of the Bankruptcy Code results in approximately one hundred instances where the term "information" is used.[164] Presumably, information should mean the same thing across the Code, however, it is unclear if that is the case, especially given the ambiguity in section 1102(b)(3)(A).[165] In some sections, the type of information that is pertinent and disclosed is clear within the context of the section, however, in others, information seems undefined.[166] The term information on its face is clear and intelligible, however, the use of "information" within the Code is inconsistent.[167] Moreover, the scope of the information to be disclosed is

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[162] Section 107 is entitled Public Access to Papers. 11 U.S.C. § 107 (2006). Section 107 provides access to dockets and papers filed in relation to the bankruptcy. 11 U.S.C. § 107(a) (2006). However, that access is not unlimited, as subsection (b) gives the bankruptcy court authority to protect entities with respect to confidential or proprietary information and trade secrets, while subsection (c) protects an individual from defamatory or scandalous matters. 11 U.S.C. § 107(b)-(c) (2006). Section 333 is entitled Appointment of Patient Care Ombudsman where subsection (c)(2) provides that a patient care ombudsman has access to patient records when dealing with a debtor in the health care business. 11 U.S.C. § 333 (2006).

[163] *See* 11 U.S.C. §§ 107, 333 (2006).

[164] *See, e.g.*, 11 U.S.C. §§ 527, 707, 727, 1106, 1112, 1126 (2006). In addition, there are numerous provisions relating to chapter 15 where "information" is found.

[165] *Compare* 11 U.S.C. § 1102(b)(3)(A) (2006) (lacking definition for information), *with* 11 U.S.C. § 542 (2006) (including recorded information), *with* 11 U.S.C. § 1126 (2006) (requiring "adequate information"). The long-standing rule of statutory interpretation is "identical words used in different parts of the same act are intended to have the same meaning." Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (quoting Sorenson v. Sec'y of Treasury, 475 U.S. 851, 860 (1986)). Furthermore, "equivalent words have equivalent meaning when repeated in the same statute." Wells-Fargo Equip. Fin., Inc. v. Circuit-Wise, Inc. (*In re* Circuit-Wise, Inc.) 277 B.R. 460, 462–63 (2002) (quoting Cohen v. De La Cruz, 523 U.S. 213, 220 (1998)) (citations omitted).

[166] *See supra* note 162 and accompanying text.

[167] Dictionary.com provides eight definitions of "information." *See* "Information" Dictionary.com. *Dictionary.com Unabridged (v 1.0.1)*, Based on the RANDOM HOUSE UNABRIDGED DICTIONARY, Random House, Inc. 2006 *available at* http://dictionary.reference.com/browse/information. For example, information can mean "knowledge communicated or received concerning a particular fact or circumstance; news;" or "knowledge gained through study, communication, research, instruction, etc.; factual data." *See id*. Both of these definitions seem to be relevant to "information" found in the Bankruptcy Code. However, these definitions do not really shed light as to what types of information would have to be disclosed.

without limitation in section 1102(b)(3) while other provisions have clear parameters included within the statutory language.

Comparing provisions of the Bankruptcy Code where "information" is found illustrates the inability of the drafters to provide consistent limitations on the scope of information.[168] For example, section 542 requires property to be delivered to the trustee unless it is exempt under section 522's exemptions or section 363's use, sale, or lease provision.[169] The relevant "information" provision is found at section 542(e), where recorded information, such as books and papers, relating to the debtor's property or financials must be turned over or disclosed to the trustee.[170] In addition, section 727, the discharge provision, requires that discharge be denied if the debtor destroys any recorded information or knowingly withholds recorded information.[171] Considering these two provisions, it appears that recorded information is defined as books, papers, records pertaining to the debtor's business or financials. However, it begs the question of whether "information" means recorded information in other areas of the Code such as section 1102(b)(3)(A) since section 542(e) and section 727 limit information to "recorded information." It seems likely that the legislators used "recorded information" where they specifically meant papers and records relating to the financials and business of the debtor as that term appears in the Bankruptcy Code five times.[172] In addition, it appears that "papers" likely means documents filed with the court.[173]

Other types of information clearly delineated within the Bankruptcy Code include "personally identifiable information."[174] For an individual seeking a product or service from the debtor, this entails legal first and last name, residential address, electronic address (e-mail address), telephone number, social security number, and credit card number.[175] There is a catchall provision which includes a limitation to any other information that will enable contacting or identifying such individual.[176] There are four other instances where "personally identifiable information" is found which relate to the use, sale or lease of property.[177] In addition, "personally identifying information" is found in section 521 where the debtor must disclose this

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[168] *See, e.g.*, 11 U.S.C. § 101(4A) (2006) (defining bankruptcy assistance where an express or implied purpose is providing information to an assisted person defined by section 101(3)); 11 U.S.C. § 308(b) (2006) (providing reporting requirements whereby a small business debtor must file periodic financial statements and reports); 11 U.S.C. § 1112 (2006) (noting dismissal of chapter 11 or conversion of chapter 11 to chapter 7 can occur for cause where cause includes failure of debtor to provide trustee with requested information).

[169] *See* 11 U.S.C. § 542 (2006).

[170] *See id.* § 542(e).

[171] *See id.* § 727(a)(3), (a)(4)(D).

[172] *See, e.g.*, 11 U.S.C. § 521(a)(4) (2006); 11 U.S.C. § 542(e) (2006) (two times); 11 U.S.C. § 727(a)(3) (2006); 11 U.S.C. § 727(a)(4)(D) (2006).

[173] *See* 11 U.S.C. § 107 (2006); *supra* note 162 and accompanying text.

[174] *See* 11 U.S.C. § 101(41A) (2006).

[175] *See id.* § 101(41A)(A).

[176] *See id.* § 101(41A)(B)(ii).

[177] *See* 11 U.S.C. § 363(b)(1) (2006).

information for the purposes of debtor identification when requested by the trustee.[178]

Similarly, there are provisions that require the disclosure of information but at least they provide some limitation to the scope of the information.[179] This appears to be the most significant issue with respect to section 1102(b)(3)(A) because the scope of "access to information" seems overbroad.[180] For example, under section 542(e), a court order is required to disclose recorded information that is subject to an applicable privilege.[181] Additionally, sections 1113 and 1114 respectively govern the rejection or assumption of a collective bargaining agreement and the payment of retirement insurance benefits.[182] These provisions have explicit limitations such as protective orders preventing the disclosure of information that can be detrimental to the debtors with respect to the debtor's competitors.[183] It clearly appears when Congress drafted these provisions they considered the implications of disclosing information to competitors. Even though the result is likely to be the same when parties seek court assistance with respect to section 1102(b)(3)(A), the question is what was the reason for the legislators non-inclusion of a similar limiting provision to that of sections 1113 and 1114.

The Bankruptcy Code's post-petition disclosure and solicitation provision found at section 1125 seems to provide the closest parallel to section 1102(b)(3) in that it contains similar terms to "information" and "claims of the kind represented by that committee."[184] Section 1125 explicitly defines "adequate information" and "investor typical of holders of claims or interests of the relevant class"[185] This is again an

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[178] *See* 11 U.S.C. § 521(h)(2) (2006).

[179] *See* 11 U.S.C. § 107 (2006); *supra* note 162 and accompanying text.

[180] *See* Feldsher, *supra* note 43, at 1; Silfen & Vogel, *supra* note 4 (indicating terms in provision that are undefined and vague).

[181] *See* 11 U.S.C. § 542(e) (2006).

[182] *See* 11 U.S.C. §§ 1113, 1114 (2006).

[183] *See* 11 U.S.C. § 1113(d)(3) (2006) (allowing protective orders to "prevent disclosure of information provided to [employees' authorized] representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged."); 11 U.S.C. § 1114(k)(3) (2006) (containing the same language to prevent disclosures that could compromise position with competitors); *see also* Gappmayer, *supra* note 48, at 451 (suggesting use of protective orders in complying with section 1102(b)(3)(A)).

[184] *See* 11 U.S.C. §§ 1102(b)(3)(A), 1125 (2006).

[185] Section 1125(a) provides the following definitions:

> (1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information; and

instance in the Bankruptcy Code where Congress defined the scope of information that comprises the "adequate information" disclosure required for the acceptance or rejection of the debtor's reorganization plan that may be solicited.[186] Furthermore, solicitations for acceptance or rejection require that the holder of interests in the plan receive a court-approved disclosure statement.[187] This provision specifically provides that interest holders of the same class must receive the same disclosure statements, however, there need not be uniformity across classes.[188] "Investor typical of holders of claims or interests of the relevant class" is explicitly defined within section 1125 which is different from the section 1102(b)(3)(A)'s language of "claims of the kind represented by the committee."[189] The two definitions included in section 1125 read together indicate that adequate disclosure is based on the standard of the typical hypothetical investor.[190] The goal is to ensure that the typical investor is making an informed judgment when accepting or rejecting the plan, however, Congress recognized that the information itself would differ case-by-case.[191]

Looking at section 1102(b)(3) in light of section 1125 seems to demonstrate that section 1102(b) is promoting a similar goal where all creditors have the right to make informed comments even if they are not members of the creditors' committee.[192] This right is facilitated by the mandatory access to information that the creditors' committee must provide under section 1102(b)(3)(A). Additionally, section 1102(b)(3)(C) allows the court to compel additional disclosures to the non-members of the creditors' committee holding similar claims. In comparison, section 1125 provides that the mechanics of disseminating "adequate information" which is through a disclosure statement that must be approved by the court after notice and

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> (2) "investor typical of holders of claims or interests of the relevant class" means investor having—
>
> (A) a claim or interest of the relevant class;
>
> (B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and
>
> (C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interests in such class generally have.

11 U.S.C. § 1125 (2006).

[186] *See id.*

[187] *See id.* § 1125(b).

[188] *See id.* § 1125(c).

[189] *Compare* 11 U.S.C. § 1125(a)(2) (2006) (defining "investor typical of holders of claims or interests of the relevant class"), *with* 11 U.S.C. § 1102(b)(3)(A)(i) (2006) (lacking definition for "hold claims of kind represented by that committee").

[190] *See* S. REP. NO. 95-989 to accompany S. 2266, 95th Cong., 2d Sess., at 120–22 (1978).

[191] *Id.* at 120–22; H.R. REP. NO. 95-595, at 408–09.

[192] *Compare* 11 U.S.C. § 1102(b)(3) (2006) (requiring solicitation of comments from certain creditors holding similar claims as that of committee), *with* 11 U.S.C. § 1125 (2006) (containing disclosure and solicitation requirements).

hearing, while section 1102(b)(3)(A) merely requires access.[193] Similarly, section 1125 allows for the disclosure statement to vary in accordance with the differing classes, while section 1102(b)(3) requires the same access to be provided to all creditors. Section 1125's approach seems to be more rational as the kinds of creditors in a case will vary greatly and their interests and needs for information will clearly differ.

Moreover, under BAPCPA in 2005, section 1125 was expressly amended to include provisions governing small business cases found at subsection (f).[194] This is a clear articulation of legislative intent to protect the interests of small business debtors. Congress provided some flexibility in small business cases with the possibility of the plan itself satisfying the adequate information requirement of section 1125 making a separate disclosure statement unnecessary.[195] These small business provisions arguably seem to create a way to reduce the expense accrued and the judicial resources used in small business cases. Contrarily, section 1102(b)(3)(A) seeks to protect small businesses, albeit creditors, however, the language of the statute does not evidence that intent. Furthermore, section 1102(b)(3)(A) creates the need for using judicial resources to make a case-by-case determination of the type of information for which and to whom access must be provided.[196]

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[193] 11 U.S.C. § 1125(b) (2006); *Chapter 1125: Postpetition Disclosure and Solicitation*, 7-1125 COLLIER ON BANKRUPTCY (Resnick & Sommer eds.15th ed. rev. scope) (Bender 2006).

[194] 11 U.S.C. § 1125(f) (2006) states:

> Notwithstanding subsection (b), in a small business case—
> (1) the court may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary;
> (2) the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28 [*28 USCS § 2075*]; and
> (3) (A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;
> (B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the date of the hearing on confirmation of the plan; and
> (C) the hearing on the disclosure statement may be combined with the hearing on confirmation of a plan.

[195] *See* 11 U.S.C. § 1125(f)(1) (2006); *see also* BAPCPA, Pub. L. No. 109-8, § 431, 119 Stat. 23, 109–10 (2005); COLLIER ON BANKRUPTCY, *supra* note 193 (noting flexible standards for small business disclosure statements).

[196] *See* Levin & Ranney-Marinelli, *supra* note 3, at 603 (recognizing increased litigation costs and delays to ensue from poorly drafted amendments); Mills, et al., *supra* note 5, at 1 (determining information to disclose will result in litigation which increases costs of chapter 11 cases); *see also In re Refco*, 336 B.R. at 190 (lacking definition of information provides difficulty for courts).

VI. PROPOSED AMENDMENTS TO SECTION 1102(b)(3)(A)

When drafting a revision to the amendment, including an express limitation as to the types of information and to whom this information might be disclosed would be most effective. There are other provisions in the Code that include limitations so as to avoid securities laws and confidentiality issues, which could provide guidance. In addition, definitions of the ambiguous terms access, information and claims of the kind could be added. Furthermore, if the true legislative intent behind section 1102(b)(3)(A) is to protect small business creditors, then specific language articulating that intent might also be a favorable solution.

A suggestion for additional language to section 1102(b)(3) is adding subsequent subsections to provide limitations such as those found in other provisions of the Code. First, subsection (D) could be added to protect against securities law violations with language mimicking that of section 1125(e). For example, the new subsection (D) could state:

> *(D) A committee providing access to information in compliance with subsection (A) will not be liable on account of such information disclosure, for violation of any applicable law, rule, or regulation governing the offer, issuance, sale or purchase of securities.*

Second, subsection (E) could be added to protect against the disclosure of confidential or privileged information, somewhat like the limitation included in section 107(b). For example, the new subsection (E) could state:

> *(E) On request of a creditor or on its own motion, the bankruptcy court may allow access to confidential, proprietary, trade secret, and/or commercial information of a debtor, only if:*
>
> *(i) reasonable confidentiality and trading restrictions are agreed upon and that these trading restrictions comply with the federal securities laws and other applicable areas of law;*
>
> *(ii) upon disclosing confidential information with a confidentiality agreement and trading restrictions in place, the creditors' committee shall not have liability or responsibility for requesting creditor's violations of the federal securities laws or other applicable areas of law.*[197]

These additional provisions may not end all judicial involvement with respect to section 1102(b)(3)(A), but these limitations would provide a solution to the issues raised by recent chapter 11 creditors' committees. These limitations would reduce

[197] This language replicates the guidance provided by the *Refco* court in its order providing clarification of the creditors' committee's section 1102(b)(3) duties. *See In re Refco*, 336 B.R. at 201–02.

the need for jurisdiction-by-jurisdiction comfort orders and would instead provide more uniformity throughout the nation.

CONCLUSION

The concerns raised by section 1102(b)(3)(A)—specifically, violation of the federal securities laws and disclosure of privileged and confidential information—could thwart the debtor's reorganization efforts. The scant legislative history shows that the amendment was enacted to protect small business creditors; however, its language does not articulate those intentions. Instead, the language is without much limit; therefore, disclosure can be to certain kinds of creditors who might be competitors and who have not executed confidentiality agreements.

The federal bankruptcy laws were created to promote uniformity across jurisdictions, however, given the current status of section 1102(b)(3)(A), the goal of uniformity might not be possible. Presently, the best solution is each bankruptcy jurisdiction providing an order for how debtors and creditors should proceed with respect to the ambiguities and requirements of section 1102(b)(3)(A) either jurisdiction-wide or case-by-case. However, because that solution does not create a uniform approach throughout the nation, a further amendment by Congress is necessary.

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