ABI COMMISSION TO STUDY THE REFORM OF CHAPTER 11

Monthly Meeting
April 2, 2012
New York, New York

MINUTES/SUMMARY

The ABI Commission held its regularly scheduled meeting on Monday, April 2, 2012, at the New York offices of Skadden, Arps, Slate, Meagher & Flom. The following individuals participated in the meeting: Donald Bernstein, Jack Butler, Babette Ceccotti, Sam Gerdano, Honorable Arthur Gonzalez, Michelle Harner, Steven Hedberg, Robert J. Keach, Kenneth Klee, Harvey Miller, Harold Novikoff, James Sprayregan, Albert Togut, Clifford White, Bettina Whyte and Deborah Williamson. Robert Keach called the meeting to order at approximately 2:10 p.m., E.T. The meeting adjourned at approximately 4:55 p.m., E.T. The following matters were discussed during the course of the meeting:

Opening Remarks: Mr. Keach opened the meeting with a review of the agenda, suggesting that the Commission first address the format of the April 19th public meeting.

First Public Meeting: Mr. Keach reviewed the proposed format for the April 19th public meeting set forth in the “Suggested Format” outline circulated to the Commission prior to the meeting. The basic format includes: a short introduction by Mr. Berman, the current ABI President; a Powerpoint presentation by Mr. Keach and Mr. Togut; remarks by the Congressional Honorary Chairs; remarks by other members of Congress; and remarks by select Commissioners. Mr. Keach commented that the format will remain fluid and likely will need to adjust to the schedules of the Congressional representatives present and slated to speak. Mr. Gerdano noted that the public meeting format mimics a Congressional hearing and is intended to introduce the Commission and its mission. The Commission discussed the members of Congress who might be available to attend the public meeting, as well as those who might submit a written statement to be read by the Co-Chairs and entered into the record. Mr. Keach also noted that Mr. Miller had prepared a recorded statement to be shown at the public meeting and that, as previously discussed, Ms. Whyte, Mr. Millstein, Mr. White, Mr. Levin and Mr. Klee also would be prepared to make statements at the public meeting.

The Commission then turned its attention to the content of the draft Powerpoint presentation. Mr. Keach explained the general approach of the Co-Chairs to the Powerpoint presentation, and Mr. Gerdano reviewed each slide with the Commission. Mr. Keach asked the Commission to focus its attention on the content of the slide titled, “Why Reform Now?” The Commission discussed separating the slide into two separate concept slides to distinguish between cause and effect components. It also explored ways to capture key externalities supporting the reform effort in succinct terminology that represented the breadth and the complexity of the issues. Mr. Keach indicated that he would incorporate the Commission’s suggestions and circulate the revised Powerpoint presentation for final review prior to the public meeting.
Mr. Gerdano then previewed the Commission’s website (www.commission.abi.org), which will be live before the April 19th public hearing, and he provided the Commission with details concerning the logistics of the public meeting. He confirmed that the meeting will be held at the House Judiciary Hearing Room, Room 2237, Rayburn Office Building, U.S. House of Representatives. Buses will be available to transport the Commission members to and from the site of the ABI Annual Meeting (the Gaylord National Resort) and the public meeting. He also noted that Commission members could meet the group at the Rayburn Office Building. Mr. Keach and Mr. Togut indicated that they would circulate details on the logistics of the meeting to the Commission prior to April 19th. Mr. Gerdano also stated that the meeting would be recorded for use by the ABI, and a recorder would be present to transcribe an official record. The Co-Chairs and Mr. Gerdano invited the Commission members to submit written statements to be included in the record. Mr. Keach also asked Mr. Klee to submit a written statement in light of a conflict preventing Mr. Klee’s attendance at the public meeting.

Selection of Advisory Committee Members: Mr. Keach presented a revised list of potential members for the thirteen advisory committees. Mr. Keach explained the process used to generate the list, which included feedback from the Commission members supervising each advisory committee. The Commission then reviewed the potential membership of each advisory committee with a focus on diversity and professional expertise. Mr. Butler asked the Commission to consider identifying additional individuals in the commercial banking, hedge fund and business sectors to serve as advisory committee members. Mr. Keach agreed that this was an appropriate objective, and the Commission worked to revise the advisory committees’ composition accordingly. The Commission also considered whether to alter its rule to allow no more than two individuals (plus a Commission member) from the same firm to appear on the advisory committee membership list, and it confirmed its previous decision that such a rule was appropriate. Mr. Keach asked that any further suggestions for, or revisions to, the advisory committee membership list be submitted to him no later than Friday, April 6, 2012.

The Commission members asked the Co-Chairs and Mr. Gerdano how the Commission would cover costs and expenses associated with the advisory committees. Mr. Gerdano explained that a budget could be established for each advisory committee and funded by, among other things, the Endowment grant budget previously approved by the Commission. Mr. Gerdano indicated that he would work with the Endowment and the ABI to determine the amount available to cover the advisory committees’ costs and expenses. The Commission members asked that the Co-Chairs also work to develop guidelines concerning the incurrence and reimbursement of expenses by advisory committee members. Mr. Keach, Mr. Togut and Mr. Gerdano agreed to work together to formulate a budget and corresponding guidelines.

In connection with the budget guidelines, Mr. Keach stated that the Co-Chairs also would work to develop an administrative protocol to govern the use and confidentiality of Commission materials and work product by the advisory committees. Mr. Togut suggested that all Commission materials and work product used or created by the advisory committees be considered confidential until the Commission’s final report is made public. The Commission discussed and accepted this proposal, noting that the academics serving on the advisory committees could continue to write on the topics being studied by the advisory committees but
could not use the work of the advisory committees or their role as a member of those committees in producing their scholarship prior to the Commission’s final public report.

*Initial Topics Discussion: Governance:* Ms. Whyte, Mr. Bernstein and Mr. Butler presented their outline of questions and issues to be analyzed by the Governance advisory committee. Ms. Whyte reviewed each of the subtopics and related questions/issues. The Commission discussed and debated each of the questions/issues, including the role of the debtor in possession in the chapter 11 process and alternatives or supplements to the debtor in possession structure; the nature of fiduciary duties of the various entities involved with the debtor and the bankruptcy estate in the chapter 11 process; and the role of creditors’ committees in cases of large, as well as middle-market, business debtors. After a meaningful, substantive discussion, the Commission approved the preliminary assessment presented by Ms. Whyte and thanked all three supervising Commission members for their work on the outline.

The Commission then discussed administrative issues relating to the advisory committee preliminary assessments. Mr. Gerdano asked whether the preliminary assessments could be posted on the Commission website, and the Commission agreed that the outlines should remain confidential to allow the advisory committees an opportunity to investigate fully the study topics. The Co-Chairs and the Commission then decided that the Sales and the Plan Distribution advisory committee supervisors would present their preliminary assessments at the May 8, 2012 Commission meeting.

*Miscellaneous:* Mr. Keach noted that the Commission likely would not consider any substantive issues at the April 19th public meeting. He reminded the Commission that the next meeting was scheduled for May 8, 2012, from 2:00 to 5:00 p.m., E.T., at Skadden Arps’s New York office.