Statement of

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Before the

Financial Advisory Committee

In Connection With

ABI Commission to Study the Reform of Chapter 11

First Public Meeting

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I greatly appreciate the opportunity to participate as a member of the American Bankruptcy Institute (ABI) Commission to study the reform of chapter 11 of the United States Bankruptcy Code.

I am a practicing attorney and a senior member of the international law firm of Weil Gotshal & Manges, LLP (Weil), which maintains its principal office in New York, New York. During my professional career, I have represented debtors, debtors in possession, secured and unsecured creditors, trustees in bankruptcy, creditors' committees, equity interest holders, asset purchasers, and I have served as a trustee and as an attorney for a trustee in cases under the Securities Investor Protection Act of 1970 (15 U.S.C. 783a, et. Seq.). My experience in connection with bankruptcy and reorganization legislation and laws began in 1960 under the former Bankruptcy Act of 1898, as amended and extended through the legislative process that led to the enactment of the Bankruptcy Reform Act of 1978.

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[1] Senior Partner, Weil, Gotshal & Manges LLP, New York, New York. The views expressed in this testimony are expressed solely on behalf of myself and not on behalf of any other person or entity.

Since 1973, I have been a conferee and a member of the National Bankruptcy Conference and I am also a Fellow of the American College of Bankruptcy. Currently, I am the lead bankruptcy attorney for American Airlines and its affiliates in the prosecution of their cases under chapter 11 of Title 11 of the United States Bankruptcy Code (Bankruptcy Code) that are pending in the United States Bankruptcy Court for the Southern District of New York. Most recently, I was the lead attorney for Lehman Brothers Holdings Inc. (LBHI) and its affiliates, and for Motors Liquidation Company, f/k/a General Motors Corporation, in the successful prosecution of the respective chapter 11 cases.

I am currently an Adjunct Professor of Law at New York University School of Law, where I have taught a seminar in Chapter 11 Bankruptcy and Reorganization Law since 1975. I am also an Adjunct Lecturer of Law at Columbia University School of Law, where I have taught a course on Corporate Reorganization and Bankruptcy Law for the past 11 years. I have also lectured and written extensively on the subject of bankruptcy and reorganization and previously have testified before Congressional committees on the subject of bankruptcy and financial reform.

In connection with the ABI Commission to Study the Reform of Chapter 11, I note that it is now 34 years since the enactment of the Bankruptcy Reform Act that replaced the Bankruptcy Act of 1898 with Title 11 of the United States Code as the Bankruptcy Code. The addition of the 1978 Reform Act was a result of many years of a diligent and comprehensive review of the then existing Bankruptcy Act and its operation in the perspective of whether a need for reform and revision existed.

The reform effort was precipitated by a study made by the Brookings Institution that demonstrated the existing Bankruptcy law did not meet the societal and economic needs of the nation. The result was the adoption of a joint Congressional Resolution in 1970 for the appointment of a commission to study the Bankruptcy law and its operation and report its findings and recommendations to Congress. The National Commission on Bankruptcy Laws appointed in 1970 included two United States Senators, two members of the House of Representatives, and members from the judiciary and academia.

The National Commission devoted over two years to its comprehensive review of the bankruptcy law and the administration of the bankruptcy court and system. It held hearings throughout the United States and received the views and comments of various constituencies, including financial institutions, labor unions, political organizations, manufacturers, academics and professionals engaged in the practice of bankruptcy law and reorganization. On June 30, 1973, the National Commission filed its extensive report with Congress. The report included a proposed statute entitled "The Bankruptcy Act of 1973."

Over the next approximately four years, a variety of proposed bankruptcy statutes and legislative initiatives were introduced in Congress intended to make the most profound overhaul of the Bankruptcy law since 1938. Spirited hearings were held and submissions were made by a variety of academics, financial institutions, the judiciary and others. As a consequence of the National Commission's report, it was universally agreed that bankruptcy reform was desirable and in the best interests of improving the bankruptcy system. It was recognized that the economic world had changed significantly since 1938.

The Reform Act of 1978 was the first major overhaul of bankruptcy law in 40 years. It followed the enactment of the Chandler Act of 1938, which was the first significant codification of the concept of business reorganizations that had its origins in the railroad reorganizations of the 19th Century. There was major agreement during the legislative process by all of the interested parties and avidly supported by financial institutions, academics, trade associations, industrial and commercial organizations, that there existed a need for an effective, meaningful statute to enable the reorganization and rehabilitation of distressed business organizations – a statute that would enable the preservation of going concern values, employment opportunities, and avoidance of liquidation of such businesses. As a consequence, the Bankruptcy Code, as enacted, merged the reorganization provisions of Chapters X, XI and XII of the former Bankruptcy Act, to provide a unified system to rehabilitate and reorganize distressed businesses, large or small, public or private, in an effective and efficient manner under the new chapter 11. Key to the modernization of the rehabilitation and reorganization process for distressed businesses is the enactment of legislation which provides for flexibility in its application to meet the varieties and vagaries of differing circumstances affecting distressed businesses. One of the objectives of the Bankruptcy Code was to reduce the potential time and expense of reorganization cases that had occurred under the former Bankruptcy Act. The provisions of the Bankruptcy Code and, subsequently, the adoption of the Federal Rules of Bankruptcy Procedure all embrace the concept of effective, efficient and expeditious proceedings that would result in benefits to all parties in interest inclusive of the public interests.

Since the enactment of the Reform Act, however, the world and, in particular, the world of business has changed dramatically. The world has gotten smaller, more complex and more interconnected than ever before. Business operations are more international and, in many respects, more esoteric than ever before. The passage of 34 years in terms of the changes that have occurred in the world of business and the national economy is profound. Time and practices have outraced the provisions of the 1978 Code.

Chapter 11, as adopted in 1978, recognized the changes that had occurred in the world of finance and business subsequent to World War II. During the first 20 to 25 years of the new chapter 11, and despite the negative effect of restrictive amendments made to the Bankruptcy Code during that time, the universal conclusion was that although it was not a perfect statute, it worked and was achieving the original objectives of its adoption. Distressed businesses were being rehabilitated and reorganized, as originally contemplated. Creditors, employees and the public interests were being protected and benefitted. Businesses such as Federated Department Stores (retail) n/k/a Macy's, Storage Technology Corporation (computer technology), Global Marine Corporation (off-shore drilling), K-Mart Corporation (retail), LTV Corporation (industrial conglomerate), Johns-Manville Corporation (mass tort offender), Maxwell Publishing Corporation (publishing and media), Continental Airlines Corporation, United Airlines Inc., Delta Airlines Corporation, Northwest Airlines, to name just a few, were successfully reorganized and thousands of jobs saved and communities enhanced.

However, as stated, it has been 34 years since the enactment of the Reform Act. As was the case in respect of the consideration of the Reform Act, the worlds of finance, business, and global interests have radically changed; changed more intensely, faster, and more

intrusively than in the 1970s or what could have been imagined in the 1980s. The introduction of free trading of bankruptcy claims, distressed debt traders, hedge funds dedicated to the bankruptcy and reorganization process, and the innovations in financing involving derivatives, credit default swaps and other opaque, esoteric securities and financing techniques have materially complicated the world of reorganizations and the manner in which the bankruptcy law is applied and administered. This is particularly true as business and commercial institutions are transforming and have become more global and interconnected. In addition, the market for the purchase and sale of assets and businesses has expanded, thereby increasing values and offsetting the threat of depressed liquidation sales proceeds.

The volatility of change has been accelerated by the advance of technology. The span also of time for implementation of change has been profoundly shortened to the point that change occurs in real time without periods of consideration, orientation and gradual implementation. These changes have had a material impact on the ability to reorganize and rehabilitate distressed businesses. The adverse effect of these monumental changes have been exacerbated by the legislative amendments to the Bankruptcy Code, and particularly to chapter 11, that have unbalanced the playing field by overly favoring the interests of certain creditor constituencies while limiting debtors' protections as adopted and contemplated in 1978. These negative amendments, particularly those adopted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, have also limited the powers of the bankruptcy court to aid and facilitate reorganization by withdrawing from the jurisdiction of the bankruptcy court many types of financial transactions.

Accordingly, and very similar to the circumstances that existed in the 1970s, the world of changes necessitates a comprehensive review of the nation's bankruptcy law and the operation and administration of the bankruptcy system. We must examine the balance of the equities and powers among competing parties in interests in a reorganization case to permit the reorganization system to operate effectively, expeditiously and to serve the national interests. As the economy becomes more volatile and business cycles more severe, chapter 11 may play an even more central role in our economy. Chapter 11 over the past 34 years, as applied, involved a major portions of the legal spectrum, including, torts, contracts, labor law, environmental regulation, banking regulation, pension regulation, and other major legal disciplines. We need to determine 1) is a reorganization and rehabilitation statute a desired goal; and 2) if so, then there must be full consideration of the protections for all interests and affected parties. Also, a dynamic relationship must exist between the legislation and the bankruptcy court so that the objectives of the legislation may be realized.

Business failure is a fundamental part of a capitalist system. The assumption of risks in an environment of economic volatility and business cycles will always result in some degree of failures. The means to deal with business failure to protect the nation's interests and those of the economic stakeholders is an essential legislative objective. The dramatic changes which have occurred in the economy over the last ten years, and the relationship of those changes to the reorganization process, must be intensively studied. Determinations must be made as to the role of a statutory reorganization and rehabilitation process that recognizes the needs of the various constituencies and enables the reorganization and rehabilitation process to achieve its objectives of preserving values in terms of assets, employment and community

interests. It is an awesome undertaking, but must be done with diligence, dedication, expertise and objectivity.

The creation of the ABI Bankruptcy Reform Commission is a step in the right direction. It is now the turn of Congress to accept the challenge that lies before it to bring the bankruptcy law and its administration and operation into the 21st Century. The ABI Reform Commission stands ready, willing and able to assist Congress in the discharge of that responsibility.

I thank you for the privilege of being able to present this statement to emphasize the need for reform consideration.