

# Preparing to Vote on a Chapter 11 Plan: Solicitation, Balloting and Tabulation

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Implementing a creditor-accepted, court-confirmed reorganization plan in a chapter 11 case is the goal of every distressed company attempting to press the reset button. Negotiating, drafting and finalizing the disclosure statement and plan are such herculean tasks, you do not want to risk a plan failure resulting from a flawed voting process. Ensuring confirmation with a voting process that accommodates the unique circumstances of your debtor and its voting population requires preparation, preparation and, yes, more preparation.



Kate Logan

The voting process presents many challenges to a reorganizing company, its counsel and its claims and balloting agent. Helping the claims and balloting agent perform his or her duties expeditiously and at mini-

mal cost will require counsel's planned consideration. Many of the questions—determining who can vote, in what amount and in what case, and which ballots are to be tabulated—are not always answered by the Bankruptcy Code and Rules. In the context of a particular case, there may be issues that can only be addressed by the bankruptcy court pursuant to a well developed voting procedures order. Anticipating obstacles to an efficient ballot delivery and return will prevent jeopardizing the plan confirmation. Expediting the claims-objection process, carefully preparing the voting database and developing explicit and case-specific solicitation and tabulation procedures will assure positive results to that end.

The importance of communication among the debtor, its counsel, and its claims and balloting agent cannot be overstressed. Inform your claims and balloting agent with early drafts of the plan classification scheme and the solicitation and tabulation procedures

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so that the complexities of the voting process are not a last-minute surprise either to the agent or to you. Just as you will need to know the class, quantity and value of the claims pool to draft a credible plan, so too the balloting agent will need to know if it will be mailing a 600-page document to 50,000 people within a short timeframe.

## Determining Who Will Vote and How

The goal of the voting process is to satisfy the Code's requirement for a minimum level of creditor support for the plan. That minimum level consists of having at least one impaired accepting class of claims, with acceptance deter-

mined by "yes" votes cast by creditors who hold at least two-thirds in dollar amount and more than one-half in number of the allowed claims who vote in the class, excluding the votes of insiders. Accordingly, both the dollar amount voted and the number of votes are very important. For the creditor classes, the Code provides that only holders of allowed claims are entitled to vote on a plan, consisting of filed and, to the extent not filed, scheduled claims. Filed claims are deemed allowed as filed unless they are the subject of an objection or have been withdrawn, disallowed or otherwise adjusted by court order. For scheduled claims, the schedules of liabilities constitute *prima facie* evidence of the validity and amount of the claims, which can be relied on by creditors without the necessity of filing a proof of claim. When a filed claim encompasses a scheduled claim, the Bankruptcy Rules take care of the duplication by providing for the filed claim to supersede and replace the scheduled claim.

Complicating matters, filed claims may include any of the following, which

will be deemed allowed for voting purposes unless objected to or otherwise dealt with: duplicate claims, amended claims, wholly or partially unliquidated claims, contingent claims, late claims, claims against an unspecified debtor or that specify multiple debtors, overstated claims or claims in the wrong classification. Creditors with filed claims may also hold scheduled claims that cannot be readily determined to be separate and apart from, and thus superseded by, their filed claims. Moreover, some filed claims or scheduled claims may have been paid post-petition in reliance on first-day orders allowing payment of pre-petition debts.

Identifying all of the foregoing issues in your voting population, and either reconciling them through claim objections or through the voting procedures order, will mitigate the power of a creditor's vote to the true value of its claim in number and in amount, ensuring a fair and equitable vote. In the

## Building Blocks

best of all possible worlds, the claims reconciliation and objection process would be complete by the voting record date. That seldom occurs, however, as most debtors and their counsel by necessity will be focused on formulating the plan and other case priorities. Nevertheless, the claims reconciliation and objection process should be well underway by the time the balloting commences. If there is a tight (or no) window between the claims bar date and the voting record date, you have got your work cut out for you as you prepare to render an accurate vote.

## Database Preparation

Once the plan is drafted and the solicitation procedures are in place, the claims and balloting agent will prepare the voting database by categorizing each claim in its proper plan class, whether the claim is entitled to vote. Depending on the solicitation procedures, the claims within the voting plan classes may be further divided between those that are eligible to be voted upon, with the creditors holding such claims to receive a ballot, and those that are not eligible to be

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voted upon, with the creditors holding such claims to receive a notice.

Ask the claims and balloting agent for a report to review all claims by plan class, identifying both those eligible and ineligible to be voted upon and specifying the materials (either the ballot and solicitation package or the specific notice) to be sent to each creditor holding such claims. Your review should reveal any discrepancies or oversights so that the voting database can be properly adjusted.

## **Solicitation Procedures**

The twin aims of the solicitation process consist of providing notice to all creditors and interest-holders regarding how the proposed plan may affect their rights, and ensuring that the proposed plan is fairly accepted by requisite majorities in the voting classes. The voting-procedures order will clearly set forth the voting record date, voting deadline, types of claims within the voting classes that are eligible or ineligible to be voted upon, and various solicitation packages and notices to be distributed, indicating to whom and by which date.

Generally, creditors with claims in plan classes that are entitled to vote will receive the disclosure statement and plan with all exhibits, the voting procedures order, any letters from the debtor and the creditors' committee supporting the plan, notice of the confirmation hearing and objection deadline, a ballot with voting instructions and a return envelope. Creditors with claims in plan classes that are deemed to accept the plan (unimpaired) and those with claims in plan classes that are deemed to reject the plan (impaired) are often sent only a respective notice of nonvoting status. Creditors holding disputed or deemed disputed claims in a voting plan class will be sent a notice of disputed claim status, usually with instructions for moving under Bankruptcy Rule 3018 for temporary allowance of the claims for voting purposes. The balloting agent will also send a copy of all ballots, solicitation materials and notices to the U.S. Trustee, counsel to the creditors' committee and all parties who requested notice pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure.

As to voting eligibility, the solicitation procedures can be used to move problem claims out of the ballot category and into a notice-only category. This may be appropriate when the claims-reconciliation process is not completed before the commencement of the vote,

but it has progressed to the point of identifying claims that should not be granted full voting rights. In this situation, the debtor may seek solicitation procedures that categorize such claims as disputed or otherwise ineligible to vote.

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*The wider your margin of approval, the more confident you will be standing before the judge at the confirmation hearing. Once the plan has been accepted and confirmed, your only concern should be how to then assist the debtor in implementing its plan and emerging from chapter 11 as a reorganized company.*

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If approved by the court, these creditors will receive only a notice designating their claim as disputed or otherwise ineligible to vote. Additionally, they will be granted voting rights only upon the filing and granting of a motion under Bankruptcy Rule 3018. An alternative may be to grant voting rights by providing a ballot in a nominal amount (such as \$1), subject to the right of the creditor to seek to vote in a higher amount. Either way, the solicitation procedures can be used to define which creditors with claims in voting classes are entitled to a ballot from the outset, and the amount of the claim to be voted upon, and which creditors have the burden of seeking permission to vote at all or to vote in an amount other than nominal.

## **Mailing or Other Delivery Procedures**

Once the contents of the solicitation packages and notices have been approved by the court, the documents can be assembled for distribution. This is obviously a complex and costly collection of documents to organize and assemble, so getting all final documents to the balloting agent as soon as possible will assist in expediting the printing, personalizing, collating and mailing of the solicitation packages and notices.

The sooner the solicitation materials are delivered, the more efficient the return and tabulation of the ballots will

be. The traditional print copy mailing of solicitation materials may not be the way to go in every case. For example, if the only voting classes consist of lending groups with agents who routinely communicate with the lenders via email and Intralinks, subject to court approval in the voting procedures order, it may be possible to circulate solicitation materials by email, with an Intralinks posting as backup. If actual delivery of the solicitation package is necessary, the form of the solicitation package—CD or hard copy—should be determined based on the nature of the voting population and approved in the voting procedures order. While an increasingly higher percentage of Americans now have Internet access, that number is dramatically lower in certain populations, such as the elderly and rural areas. The creditor matrix of a bankrupt nursing home operator or an asbestos manufacturer may skew wildly into those populations, so keep this in mind when considering the method of delivery. The advent of technology can be a great boon to the debtor for reducing printing and postage costs. Voluminous multi-page documents on an executable CD is easier to ship, reduces postage and allows the creditor to print the document at his or her own expense. Posting the documents to a dedicated website also makes it more efficient for creditors, their attorneys and any other interested parties to access.

## **Tabulation Procedures**

Creditors who are unfamiliar with bankruptcy voting may not understand what they are receiving and what they are required to do. As a result, the executed ballot they return may be confusing to interpret. How much latitude will your voting procedures order provide the balloting agent to make judgment calls on unclearly rendered ballots? Granting the balloting agent certain discretion to decide the validity of ballots is helpful, but the more specific the procedures are, the better for all. For example, such procedures may provide that, to be counted, (1) ballots must be timely received; (2) ballots must be signed; (3) ballots must be returned in original form with an original signature and copies of ballots returned by email, facsimile or other means will not be counted; (4) ballots must clearly specify acceptance or rejection of the plan, or alternatively ballots that specify neither acceptance nor rejection

*continued on page 77*

# ***Building Blocks: Preparing to Vote on a Chapter 11 Plan***

*from page 51*

tion or both acceptance and rejection will either not be counted at all or will be counted as a deemed acceptance or as a deemed rejection; and (5) subsequent ballots that change a prior vote will be counted if the last vote is a dated and timely received ballot from the creditor, or alternatively it will not be counted without a court order.

If the plan seeks the vote of beneficial holders of securities, a shorter balloting period limits the time for the ballots to reach those beneficial holders. If possible, allow the record-holders to file a master ballot to report the voting results of the beneficial holders, specifying the rules for tabulating those votes.

## ***Gather Important Contact Information***

If the vote deadline draws near and your numbers are still too close for comfort, it may be necessary to reach out to particular creditors to encourage their votes. You can prepare for eleventh-hour communications by having all contact information readily available before the voting begins. Know your major creditors' contact names, telephone numbers, fax numbers and email addresses so any encouraging correspondence or

other communication can be delivered quickly and efficiently. An important bondholder's representative may have a New York street address, but if she is working out of the Chicago branch, you need to know how to reach her. Blast faxing and email may put your solicitation package more quickly on someone's front burner than a snail-mail envelope or even a FedEx package. As the voting period proceeds and approaches the deadline, the balloting agent will be able to tell you who has voted and how, and who has not voted. Be prepared to communicate with the creditors to ensure solid acceptance of your plan.

## ***Timing Considerations***

If your case is not one in which you will have the luxury of proceeding at a leisurely pace toward confirmation, there are a number of issues to consider as you set the schedule for the voting process. If you have time for claims reconciliation and objections, you will be better positioned to ballot only valid claims.

Between the disclosure statement approval date and the solicitation mailing date, you will be finalizing and duplicating your solicitation package and notices. In consultation with the balloting agent,

be sure to leave enough time between the two dates—factoring in the specific number of solicitation packages and notices as well as the form they will take—to get all documents done and ready to send out. Remember that there can be a difference in lead time between making CDs and printing hard copies.

Finally, the balloting agent's declaration of voting results must be filed in advance of the confirmation hearing, sometimes a set number of days in advance under the local rules of certain bankruptcy courts. Be sure that the balloting agent is aware of the deadline, and is processing ballots and auditing results on a timetable that allows for that deadline to be satisfied.

## ***Conclusion***

Making these preparations will pave the road to a successful voting process. The wider your margin of approval, the more confident you will be standing before the judge at the confirmation hearing. Once the plan has been accepted and confirmed, your only concern should be how to then assist the debtor in implementing its plan and emerging from chapter 11 as a reorganized company. But that's another topic. ■

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