CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

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March 31, 2016

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Richard Shelby
Chairman
Committee on Banking, Housing, and Urban Development
United States Senate
Washington, DC 20510

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairmen Hensarling, Shelby, Goodlatte, and Grassley:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, is dedicated to promoting, protecting and defending America's free enterprise system. One of the bedrock principles of that system is the avoidance of unnecessary government intrusion into the settled expectations of parties that contract with each other for their mutual benefit. Unfortunately, certain recent judicial opinions have called into question the interpretation of a key provision of the Trust Indenture Act of 1939 ("TIA"), throwing a significant wrench into the gears of debt financing in several important business sectors, such as the energy sector. The Chamber encourages Congress to clarify the rules of the road on this important subject.

For nearly three-quarters of a century, capital markets have benefitted from an established, well-settled understanding of the protections afforded by the TIA to issuers and holders of debt issued pursuant to a qualified indenture. Thousands of issuers have obtained debt financing from millions of retail and institutional investors and invested it in job-creating enterprises. For their part, noteholders have taken comfort in the language of section 316 of the TIA, which provides, in pertinent part:

> Notwithstanding any other provision of the indenture to be qualified, the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security, on or after the respective due dates expressed in such indenture security, or to institute

> suit for the enforcement of any such payment on or after such respective dates, shall not be impaired or affected without the consent of such holder[.]

Many market participants have understood this language to proscribe the issuer's unilateral restructuring of a qualified indenture in a manner that impairs the holder's legal right to *demand* payment of principal and interest, not ultimately to *receive* it.[1] This traditional understanding of the TIA has given issuers a degree of flexibility in restructuring debt without resorting to a lengthy and expensive chapter 11 case under the Bankruptcy Code, which often results in an erosion of value. That flexibility, however, is limited: the requirement that an issuer obtain a holder's consent before impairing the right to demand payment under an indenture is a hurdle which can, and in fact does, lead to situations where a "hold-out" creditor may demand more than the market value of his or her contractual position.[2] Congress laid out this careful balance of issuer and noteholder rights when it passed the TIA in 1939; the capital markets have dealt with these rules for decades, pricing debt issues to reflect both retained issuer flexibility and noteholder hold-out risk.

The scope of the protections afforded to noteholders under the TIA, however, has recently become the subject of controversy, unsettling this carefully calibrated pillar of the debt markets. Two recent judicial opinions of the District Court for the Southern District of New York—whether correctly or incorrectly decided—have created confusion among issuers and noteholders; prices in the debt markets have begun to reflect the risk created by this new uncertainty. The court's substantive holding in *Marblegate Asset Management, LLC v. Education Management Corp.* and its reliance thereon in a denial of a motion to dismiss in *MeehanCombs Global Credit Opportunities Funds v. Caesars Entertainment Corp.* stand for the proposition that the terms of a restructuring transaction must be analyzed as a whole—that is, beyond a simple restructuring of the indenture—in determining whether a holder's right to receive payment of principal or interest is impaired.[3] The juxtaposition of the broad reading of the statute in these opinions and the narrower reading of the statute featured in prior opinions poses serious questions, previously thought to have been settled, about what is permissible and not permissible in an out-of-court restructuring.

The marketplace confusion caused by the *Marblegate* line of cases has presented an unnecessary obstacle and additional costs to many businesses in a variety of sectors, such as energy sector companies, which continue to experience pressure to restructure due to sustained decreases in commodities prices, that previously believed they could restructure out of court without first obtaining the consent of every noteholder. Already, minority groups of noteholders are using this new case law to double down on their hold-out rights, driving up the price of restructuring and, consequently, driving down capital investment. If the economy continues its tepid growth, other sectors, too, will increasingly become victims of this uncertainty, including retail, manufacturing, and financial services, as they seek to restructure.

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[1] *See, e.g., YRC Worldwide Inc. v. Deutsche Bank Trust Co. Am.*, No. 10 Civ. 2106 (JWL), 2010 WL 2680336, at *7 (D. Kan. July 1, 2010); *In re Nw. Corp.*, 313 B.R. 595, 600 (Bankr. D. Del. 2004).

[2] In fact, many Rule 144A issues include this TIA language even though they are not required to do so.

[3] *MeehanCombs Global Opportunities Fund LP et al. v. Caesars Entertainment Corp. et al.*, 2015 WL 221055 (S.D.N.Y. Jan. 15, 2015); *Marblegate Asset Management et al. v. Education Management Corp.*, 2014 WL 7399041 (S.D.N.Y. Dec. 30, 2014).

Even amidst the current regulatory burden placed on them, our capital markets remain the deepest, most liquid, and most transparent in the world. Their success continues to depend, however, on the ability of contracting parties to rely on well-settled rules of the road when fashioning their agreements. The Chamber therefore encourages Congress to study the serious economic consequences of the new trend in TIA case law represented by the *Marblegate* decision, including its likely exacerbation of hold-out risk and consequent effect on coupons, and to act swiftly to clarify congressional intent with respect to the TIA.

Sincerely,

R. Bruce Josten