

TO: Sen. Sheldon Whitehouse, Chair of the Judiciary Subcommittee on Federal Courts, Oversight, Agency Action, and Federal Right, and Honorable Members

FROM: Professor Marci A. Hamilton

RE: Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy

DATE: February 8, 2022

Dear Sen. Whitehouse and Members of the Subcommittee,

Thank you for permitting me to submit testimony on the abuses of Chapter 11 by organizations that have destroyed the lives of children and their families. By way of introduction, I am the Founder and CEO of CHILD USA, childusa.org, the national nonprofit think tank for child protection, and a constitutional scholar at the University of Pennsylvania. CHILD USA is a leader of the movement to reform statutes of limitations for child sex abuse (CSA) victims and the establishment of civil rights of children.

This hearing is vitally important for the public interest and the well-being of CSA victims. When thrown into the Chapter 11 process, victims soon discover that the organization that endangered them is now the focus and beneficiary of the process while they are mere “creditors” whose interests are sidelined during the process. Chapter 11 as currently operating with respect to cases involving CSA victims is ill-suited to deliver the individual justice victims deserve, and just as bad, it sends a message that once again the institution that created the conditions for their abuse still holds the power, while their voices are silenced as they wait on the sidelines for the institution to preserve itself.

Chapter 11’s goal is to enable organizations to remain operational through debt restructuring and repayment plans guided by a neutral arbiter. That original goal has been transmogrified into a system where institutions like the Hare Krishnas, 29 Catholic dioceses and religious orders, USA Gymnastics, and the Boy Scouts of America have invoked Chapter 11 to limit their exposure while they avoid discovery and full public disclosure of their wrongdoings, and victims never have an opportunity to speak in the forum. The public, especially parents, needs to know the truth about the institutions that have placed their image and finances ahead of child safety. As currently structured, Chapter 11 lets institutions look heroic even though they are avoiding discovery and paying pennies on the dollar to the victims whose lives they destroyed, as they put the victims’ suffering in their rearview mirrors.



I. The Current Bankruptcy System Is Entirely Ill-Equipped to Handle Child Sexual Abuse Cases

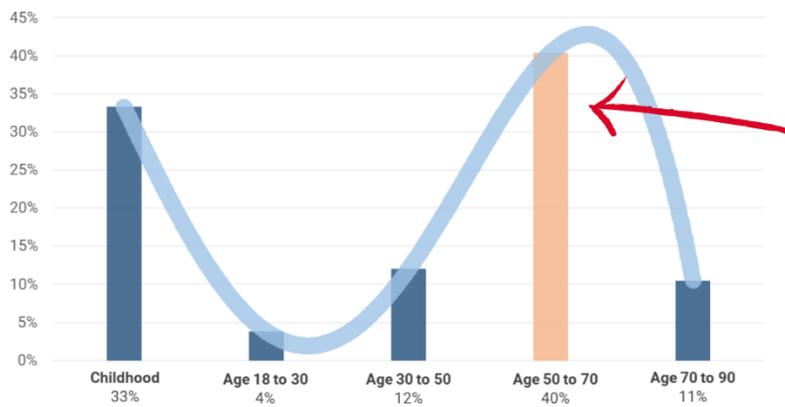
There is a national epidemic of institutions that have permitted and continue to let child sex abuse fester, which must be stopped. The estimated lifetime cost to society of CSA cases occurring in the U.S. in 2015 is \$9.3 billion, and the average cost of non-fatal per female victim was estimated at \$282,734 according to Elizabeth J. Letourneau and her colleagues in *The Economic Burden of Child Sexual Abuse in the United States*. In the United States, approximately 1 in 5 girls and 1 in 13 boys are sexually abused before the age of 18. CSA is a social issue that occurs at all levels of society—including families, religious groups, youth-serving organizations, medical establishments, and sports teams—and it affects everyone involved in these groups. In a survey of BSA victims, CHILD USA established that 50% of victims do not come forward until age 50.

DELAYED DISCLOSURE OF CHILD SEXUAL ABUSE

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February 2022

Delayed disclosure is the phenomenon common to survivors of child sex abuse where individuals wait for years, often well into adulthood, before telling anyone they were abused.

Age of First Disclosure of Survivors of Abuse in Boy Scouts of America



More survivors first disclosed between **age 50 and 70** compared to any other age group

Over half of survivors first disclosed at **age 50 or older**

Source: CHILD USA's Data on those abused in Boy Scouts of America



Youth-serving organizations that have played a role in child sexual abuse cases have found a soft landing in the bankruptcy system. Yes, they may pay large sums of money at once to many victims, but they are typically paying pennies on the dollar as compared to the actual injuries and victims are thrust into an immoral either-or choice: join the bankruptcy by the bar date whether you are ready or not or lose the possibility of obtaining damages or a say in how the organization improves its child-protection measures.

A. Chapter 11 Does Not Account for Ways that the Lifelong Trauma Associated with Child Sexual Abuse Differentiates Victims from Other Creditors

CSA victims approach the Chapter 11 process with different needs, goals, and expectations than those of an average creditor. Trauma affects childhood victims of sexual abuse or assault in a way that is wholly distinguishable from victims of other crimes. The trauma stemming from CSA is complex and individualized, and it impacts victims throughout their lifetimes:

- Childhood trauma, including CSA, can have **devastating and enduring impacts on a child's brain**, including disrupted neurodevelopment; impaired social, emotional, and cognitive development; psychiatric and physical disease, such as post-traumatic stress disorder (PTSD); and disability.
- CSA victims suffer an **increased, lifelong risk of suicide**—in one study, female CSA survivors were two to four times more likely to attempt suicide, and male CSA survivors were four to 11 times more likely to attempt suicide.
- CSA leads to an increased risk of **negative outcomes across the lifespan**, such as alcohol problems, illicit drug use, depression, marriage issues, and family problems.

As a result, trauma can have devastating impacts on the young brain in ways that lead to delayed disclosure of abuse. There is an overwhelming body of science exposing the ways in which the trauma of sexual abuse during childhood impacts memory formation and the repression of memories. It is settled that PTSD, memory deficits, and complete disassociation are common coping mechanisms for child victims.

Financial recovery can be instrumental for victims to cover costs associated with healthcare and healing, but for many, it is not the only reason they came forward. Victims of child sexual abuse and sexual assault often find healing and empowerment in knowing they are safe, knowing they are heard, and receiving very clear communication about the ongoing process of their claims and cases. Instilling a sense of control helps empower victims who may have had that power taken from them. Chapter 11 in its current form takes little notice of and fails to adequately address the individualized needs of traumatized victims of child sexual abuse.

B. Chapter 11 Should Forbid Nonconsensual Releases of Non-Debtor Third Parties from Liability in Cases Involving Child Sex Abuse Claims

When CSA claims are involved, Chapter 11 should forbid non-debtor third-party releases unless the debtor and the victim creditor consents to the release. The reorganization plan in the USA Gymnastics bankruptcy case was structured to include a blanket liability release, without the consent of all releasing victims, for the United States Olympic and Paralympic Committee and certain individuals within the organizations, even though the released parties were not a debtor. Throughout its bankruptcy proceedings, the Boy Scouts of America as the debtor has tried to release charter organizations and councils from liability, with the charter paying a marginal amount into the settlement compared to its substantial assets that are separate from the Boy Scouts. Similarly, Catholic dioceses have sought to release parishes, schools, ministries, and trusts within their jurisdiction from liability without the consent of all releasing victims and without paying into a settlement fund when filing for Chapter 11 protection, despite the existence of assets and/or insurance policies separate from the diocese.

Chapter 11 plans often include non-debtor release provisions, both consensual and non-consensual, though no section of the Bankruptcy Code specifically allows for them, and courts have recently questioned whether the Code permits them. *See e.g. Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 143 (2d Cir. 2005); *Gillman v. Cont'l Airlines*, 203 F.3d 203, 212-14 (3d Cir. 2000); *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Specialty Equip. Cos.*, 3 F.3d 1043, 1047 (7th Cir. 1993); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1079 (11th Cir. 2015); *but see In re Pac. Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *Feld v. Zale Corp.*, 62 F.3d 746, 761 (5th Cir. 1995); *Resorts Int'l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *Am. Hardwoods, Inc. v. Deutsche Credit Corp.*, 885 F.2d 621, 626 (9th Cir. 1989); *Underhill v. Royal*, 769 F.2d 1426, 1432 (9th Cir. 1985); *Landsing Diversified Props.-II v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990); *In re Midway Gold US, Inc.*, 575 B.R. 475, 505-06 (Bankr. D. Colo. 2017)). Regardless of how the courts interpret the existing Code, clarity is needed immediately for the thousands of CSA victims who must decide whether to support a reorganization plan or not.

The nonconsensual release of non-debtors from liability creates an incentive for those organizations to file for bankruptcy with the intent of protecting all in their network responsible for negligently harming children. **The “blanket immunity” provided by nonconsensual releases for non-debtor organizations and the individuals who owned, managed or worked within them, fails to result in any actual accountability or incentive for organizations and those who direct and manage them to prevent future abuse.** It also does not encourage the creation and development of better child protection programs. The victims and the public lose; the immunized institutions embrace the ongoing secrecy.

C. The Bankruptcy Code’s Automatic Stay Provision Halts the Discovery Process and Allows Institutions to Use Reorganization Plans as a Shield Against Disclosing Details of Abuse

Under current law, filing a bankruptcy petition under Chapter 11 operates as an automatic stay of the commencement or continuation of any judicial, administrative, or other proceeding against the debtor that commenced before the bankruptcy case. The automatic stay remains in effect until the case is closed, the case is dismissed, or a discharge is granted or denied. For CSA victims, this means that discovery is foreclosed, and they never learn what they need to understand: how did this trusted institution put me in harm’s way? How much did they know about my perpetrator before he destroyed my life? Instead, Chapter 11 elevates the organization’s desire to reorganize above basic justice that would help the public and parents prevent future abuse of children.

Many CSA victims are motivated by a burning conviction that no child ever be harmed by the offending organization’s employees again. Those victims “seek to investigate [a debtor institution because] . . . exposing the organization’s negligence could reveal other potential defendants.” For victims of Larry Nassar, “the main point of suing USA Gymnastics [was] not monetary, but rather to ‘get to the truth’ of how the abuse continued for as long as it did and who within USA Gymnastics knew about it.” *See* CHILD USA (2022). *“I believe competitive gymnastics and other elite sports break children.” A Case-Study of Systemic Abuse in Sports Perpetrated by Larry Nassar.*

Chapter 11 has also shielded Catholic dioceses from disclosing evidence of knowledge or coverup. The Harrisburg, Pennsylvania diocese, for example, filed for Chapter 11 bankruptcy just as the diocese was beginning to disclose an estimated 100,000 pages of internal documents related to clergy sexual abuse from 1970 to 2002. Victims were “incredibly frustrated” as they “wanted full transparency, and they will inevitably be denied the opportunity to confront witnesses that have the answers to the questions that have haunted them for many years.”

Because of the automatic stay, **victims are unable to gather information and conduct interviews with witnesses through the discovery process to determine the institution’s role in the abuse and the actors responsible for concealing it.** By exposing the organizations’ negligence, victims could also uncover other actors responsible and seek damages from another responsible party. While child custody, domestic violence, and other types of legal actions are exempt from this rule pursuant to Section 362(b) of Chapter 11, CSA claims do not currently fall within the statutory exemption.

D. Some Institutions Try to Use Chapter 11 to Hide Assets from the Victims for a More Favorable Reorganization Plan

Unless ordered otherwise by the court, an organization filing for Chapter 11 reorganization must file schedules of assets and liabilities; a schedule of current income and expenditures; a schedule of executory contracts and unexpired leases; and a statement of financial affairs. Generally, a written disclosure statement must also be filed with the court and served on interested parties if the debtor is to propose confirmation of a plan of reorganization. History shows, however, that institutions faced with pending CSA cases, such as Catholic dioceses, have attempted to hide the value of their estate and the value of the assets of their non-debtor affiliates to limit the amount paid into a settlement fund in connection with their “reorganization.”

The San Diego Catholic Diocese bankruptcy case in 2007 was fraught with issues related to the diocese’s financial disclosures. While leading up to the eventual settlement, the victims’ attorneys accused the diocese of submitting misleading financial reports, and the bankruptcy judge scheduled a hearing due to apparent financial irregularities. In response, she appointed an independent investigator “to examine the financial structure of the [diocese], its cash flow, including uses and sources of income, and such other issues pertinent to the Cash Management Motion of [the diocese]...” The expert ultimately found that the diocese’s financial statements were inaccurate, and some parishes engaged in “openly questionable activities” in some accounts.

If organizations facing mass tort liability can misrepresent the value of their available assets to a court, or ring-fence assets with non-debtor affiliates, then the victims’ prospects for recovery are undermined from the very beginning of the bankruptcy case.

II. The Necessary Legislative Reforms to the Bankruptcy Code for Chapter 11 Filings Involving Child Sex Abuse Cases

Congress should implement the following amendments to Chapter 11 to shift from merely focusing on the financial state of the debtor and instead ensure that the public and parents learn the full truth about the cover ups of CSA so that they can protect children. It is also needed to ensure CSA victims are no longer marginalized and re-traumatized by the process.

- 1) **Prohibit Non-Consensual Third-Party Releases in Child Sex Abuse Cases:** The plans for reorganization that release third parties from liability significantly impact tort claimants who are victims of sexual abuse. Legislative reform is critical to protecting victims, exposing predators and those responsible for the cover up, and ensuring that no institutions use Chapter 11 to inappropriately shield themselves from accountability. See **Appendix A**.
- 2) **Exempt Child Sexual Abuse Cases from the Automatic Stay and Expand the Scope of Discovery in the Bankruptcy Proceeding:** Instead of halting all active civil litigation related to CSA when an institution files for bankruptcy under Chapter 11, discovery should continue to be conducted, and the scope of the discovery provided in the bankruptcy case should be expanded. These amendments will improve the accuracy and quality of bankruptcy claims and reorganization plans, as well as identify previously unknown predators, provide survivors better access to justice, and prevent future abuse by educating the public and parents on how institutions enable abuse. See **Appendix B**.
- 3) **Provide an Opportunity for Victim Impact Statements in Child Sex Abuse Chapter 11 Cases:** In Chapter 11 cases involving child sexual abuse claims, judges should be required to give victims the right to read a victim impact statement before a reorganization plan is confirmed. When organizations file for bankruptcy, some right before a civil trial is scheduled to begin, victims lose their day in court in publicly confronting these institutions and sharing with the court the effects the abuse has had on their lives. This requirement would allow victims who are ready to share their story to have a voice in the proceeding and speak directly to the judge regarding the proposed outcome of the case, as would be the case in a civil litigation process. See **Appendix C**.
- 4) **Require the Use of Forensic Accountants to Assess the Debtor's Estate and, Where a Non-debtor Release is Sought, the Holdings of the Non-debtor Organization in Child Sex Abuse Chapter 11 Cases:** In cases involving debtor organizations that are registered as 501(c)(3) organizations under the Internal Revenue Code, the bankruptcy courts should be required to employ forensic accountants to review all assets and interests of the debtor, and require the accountants to submit reports on the full assets and interests of the organization, including insurance coverage, prior to the determination of the scope of an organization's estate. This amendment ensures that judges have full knowledge of the debtor's estate and debtor organizations are fairly submitting their assets for consideration in a reorganization plan. See **Appendix D**.

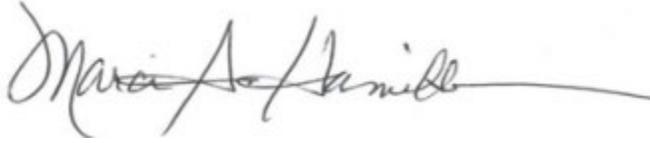
III. Conclusion

Bankruptcy law was designed to provide an honest debtor reprieve from debilitating debt, and Chapter 11 to enable an organization to remain operational until it can restructure its debts through a reorganization plan. Instead, Chapter 11 has been used as an avenue for institutions facing multiple CSA claims to avoid discovery, public accountability, and fair damages for the harm the institution caused.

Legislative reform to Chapter 11 is needed to shift bankruptcy law from its current role of aiding organizations to keep their secrets and their assets from their victims.

Please do not hesitate to contact me if you have questions regarding these proposed changes in the interest of child sex abuse victims or if I can be of assistance in any other way.

Sincerely,

A handwritten signature in black ink that reads "Marci A. Hamilton". The signature is written in a cursive style with a long horizontal line extending to the right.

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Appendix A

Elimination of Nonconsensual Third-Party Releases in Chapter 11 Filings Involving Child Sex Abuse Victims

AMEND 11 U.S.C.A. § 101 to ADD SUBSECTION 51(E):

51(E) The term ‘sexual abuse of a child’ means any act-

(A) that constitutes a violation of-

- (i) section 1589, 1590, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, 2258, or 2258A, of Title 18, United States Code; or section 20341 of Title 34 United States Code.
 - (ii) a non-Federal law that is similar to a law described in clause (i); and
- (B) by reason of the conduct prohibited, a person who, while a minor, was aggrieved.

AMEND Chapter 1 of Title 11 TO ADD §113. Prohibition of non-consensual, non-debtor releases in cases related to claims of child sexual abuse

- a. Except as provided in subsection (b) of this section, subsections (a)(3), (g), (h), or (i) of section 524, section 1201, and section 1301, and in cases regarding debts or other financial liability arising from potential liability stemming from allegations of the sexual abuse of a child or related claims, the court may not-
- 1) With respect to the liability of an entity other than the debtor or the estate on, or the liability of property of an entity other than the debtor or the estate for, a claim or cause of action of an entity other than the debtor or the estate-
 - A) approve any provision, in a plan of reorganization or otherwise, for the discharge, release, termination, or modification of such liability; or
 - B) order the discharge, release, termination, or modification of such liability; or
 - 2) with respect to a claim or cause of action of an entity other than the debtor or the estate, or against property of an entity other than the debtor or the estate, enjoin-
 - A) the commencement or continuation (including the issuance or employment of process) of a judicial, administrative, or other action or proceeding to assert, assess, collect, recover, offset, recoup, or otherwise enforce such claim or cause of action; or
 - B) any act to assert, assess, collect, recover, offset, recoup, or otherwise enforce such claim or cause of action

unless the person whose claim or cause of action is released, terminated, modified, or enjoined under section (1) or (2) above expressly consents pursuant to subsection (b)(5) below.

- b. Nothing in subsection (a) of this section shall affect any power the court may have-
- 1) To authorize a sale, transfer, or other disposition of property free and clear of claims or interests;



- 2) To prevent an entity other than the debtor or the estate from exercising control over or otherwise interfering with a right or interest (including a claim or cause of action) of that is property of the estate;
 - 3) To bar a claim or cause of action for indemnity, reimbursement, contribution, or subrogation against an entity that the estate has released from a claim or cause of action for which the holder of the barred claim or cause of action also is or may be liable or has or may have secured;
 - 4) under applicable nonbankruptcy law, title 28, or the Federal Rules of Bankruptcy Procedure, with respect to any claim or cause of action the court is hearing under section 157(a) or 1334(b) of title 28;
 - 5) to approve any disposition of a claim or cause of action of an entity other than the debtor or the estate to which such entity expressly consents in a signed writing provided that—
 - A) such consent is given only after clear and conspicuous notice to such entity of the proposed disposition in language appropriate for the typical holder of such claim or cause of action
 - B) such consent cannot be given by-
 - (i) accepting a proposed plan; or
 - (ii) failing to accept or reject a proposed plan, failing to object to a proposed plan, or any other silence or inaction; and
 - C) treatment of such entity, and any claims or interests of such entity, under a plan cannot be more or less favorable by reason of such entity's consent or failure to consent; or
 - 6) enjoin the commencement or continuation (including the issuance or employment of process of a judicial, administrative, or other action or proceeding against an entity appointed or employed (or whose appointment or employment was approved) by or under the auspices of the court, in another court and without leave of the court, with respect to acts or omissions for which the entity was so appointed or employed.
- c. In a case under chapter 11 of this title, no order or decree temporarily staying or enjoining, pursuant to this title, the commencement or continuation (including the issuance or employment of process) of a judicial, administrative, or other action or proceeding to assert, assess, collect, recover, offset, recoup, or otherwise enforce a claim or cause of action against an entity other than the debtor or the estate against an entity other than the debtor or the estate, or against property of an entity other than the debtor or the estate, shall extend (or be extended) beyond 90 days after the date of the order for relief without the express consent of the entity whose claim or cause of action is stayed or enjoined.
- d. Nothing in subsection (b) or (c) shall be construed to authorize relief within the scope of subsection (b) or (c).

Except as provided in subsection (b), this provision shall take effect on the date of enactment and shall apply to any case under title 11, United States Code, that is-

- 1) pending in bankruptcy as of the date of enactment; or
- 2) filed or reopened on or after the date of enactment.

Appendix B

Elimination of the Automatic Stay in Chapter 11 Filings Involving Child Sex Abuse Victims

AMEND 11 U.S.C.A. §362(b) TO ADD SUBSECTION (b)(2)(vi):

362(b)(2)(A)(vi): concerning the sexual abuse of a child.

AMEND Federal Rule of Bankruptcy Procedure 2004(b) as follows:

Scope of Examination. The examination of an entity under this rule or of the debtor under §343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan. In a reorganization case under chapter 11 of the Code related to the alleged sexual abuse of a child, the examination may also relate to the abuse allegations against the debtor and any affiliated entity, remedial policies and responses to those allegations, information on the debtor or an affiliated entity's finances and financial projections, and any other matter relevant to the case or to the formulation of a plan.



Appendix C

Creating an Opportunity for the CSA Victims in Chapter 11 Proceedings to Submit Victim Impact Statements

AMEND 11 U.S.C.A. §1109(b) as follows:

(c) A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter. In cases for claims related to alleged sexual abuse of a child, victims of the alleged sexual abuse may submit in writing to the court or present orally at a hearing a victim impact statement before the confirmation of a reorganization plan.

AMEND 11 U.S.C.A. §1101 TO ADD SUBSECTION §1101(3):

(3) “victim impact statement” means a means a voluntary written or oral statement, submitted to the court in the name of the victim or a pseudonym, describing the emotional, physical, familial, and/or financial impact suffered as a result of the sexual abuse of the victim who is a creditor in a Chapter 11 proceeding. The court will hold a hearing during which victims may speak about the impact of the wrongdoing of the debtor on them.



Appendix D

Requiring Forensic Accountants to Assess the Debtor's Estate and, Where a Non-debtor Release Is Sought, the Holdings of the Non-debtor Organization in Child Sex Abuse Cases

AMEND 11 U.S.C.A. § 541 TO ADD SUBSECTION §541(g):

(g) In all cases regarding debts or other financial liability arising from allegations of sexual abuse of a child, involving debtors that are organizations described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, the Court shall engage the services of an independent forensic accountant to review the assets and interests of such debtor, and any non-debtor sought to be released from liability in a proposed reorganization plan, and require preparation of a report to assist the Court with ensuring that such assets and interests are properly included or excluded from the estate as defined in this section.

