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# Planning For The Unexpected

**N**o one, including those of us who work in the bankruptcy system, could have foreseen that the COVID-19 pandemic would impact the ability of many businesses and governmental agencies to conduct business; nor could we have foreseen the plethora of changes that would have to be made to continue operations. While this extraordinary, global crisis represents precisely the situation that calls for disaster planning, lesser emergencies occur that nevertheless cause substantial disruption to business as usual if appropriate forethought is not taken.

What would happen if you, as the standing trustee, encountered an unexpected event that kept you from performing your fiduciary duties not only to administer assigned cases but also to run the trust operation? What if there was an unexpected event that occurred in the facilities in which your trust operation conducts business, such as a fire, flood due to a water main break, or other conditions that prevented you and your staff from entering your office? What if everything in your office was destroyed due to a catastrophic incident? Are you ready for the next unexpected event?

There is no substitute for a proactive plan to prepare for the unexpected. This article shares best practices for trustees to consider when preparing for the unexpected.

## Continuity of Operations Plan (COOP)

The *Handbook for Chapter Standing 13 Trustees (Handbook)* requires that every trustee develop and maintain a written office disaster recovery plan to ensure continuity of operations.<sup>1</sup> The COOP should cover recovery and maintenance of financial and administrative records, as well as the trust computer system and data.<sup>2</sup> It is critical to maintain off-site storage of back-up files in the event of a natural disaster or physical damage to the office.<sup>3</sup> Safeguards to ensure computer and software security are essential.<sup>4</sup> The *Handbook* also recommends and provides guidance for protecting staff from potential physical hazards.<sup>5</sup>

**Assess Potential Risks.** To develop or update your COOP, identify potential sources of business inter-

ruption. These may include natural disasters, such as hurricanes, wildfires, earthquakes, and pandemics; major computer malfunctions and interruptions, such as loss of function due to area blackouts or hacking; incapacitation or death of the trustee or staff; or other sources of disruption that threaten the safety of the staff.

**Assess Your Office.** Review the safety and integrity of your building's physical structure and design, and if needed, install appropriate safety technology. Fire-proof and waterproof cabinets, security systems, fire extinguishers and smoke alarms, and a back-up power supply all can contribute to a more secure office facility.

**Identify Essential Records, Equipment, and Operational Processes.** As fiduciaries, trustees must safeguard debtors' information, trust banking records reflecting debtor plan payments into the trust, and trustee distributions to creditors out of the trust. Perform daily backups of data and weekly backups of the server.<sup>6</sup> A copy of the backup should be stored in a secured location off site weekly.<sup>7</sup> Additionally, identify essential employees and their duties to plan how and where essential staff will operate in the event of an emergency. Consider maintaining copies of essential records at a location off site. It is also advisable to maintain a list of essential and non-essential equipment to prioritize what items are most important to salvage when an emergency strikes.

## Create a COOP for Your Trust Operation

While each trustee has discretion in establishing the exact details of his or her COOP, having and maintaining a plan is not discretionary. Consider organizing a COOP team comprised of essential employees. Once your COOP has been developed, provide a copy of the COOP to each employee, and conduct periodic training exercises to test the efficacy of your plan.

The following are common elements of a COOP. These suggestions are by no means exhaustive, and trustees should consult the *Handbook* as well as emergency planning resources, which are readily available on the Internet for additional elements that may be appropriate for your trust operation.

**Communications with the United States Trustee.** Maintaining regular communications with your U.S. Trustee is vital to the proper operation of your standing chapter 12 and 13 trust operation. When emergencies occur, whether large or small, immediate notice to the U.S. Trustee is required. Do you and your staff know how to reach the U.S. Trustee, either directly or indirectly through the Assistant U.S. Trustee, if your emergency occurs after hours or on a weekend?

**Staff Communications.** Your staff are essential to the continuity of your trust operation in an emergency. As part of the COOP, the trustee should have a system in place to locate employees in emergencies and to provide for rapid notification of emergency situations. A phone or text message “tree” can be useful. Additionally, yearly practice communication drills to ensure all trust staff are trained in the office emergency communication procedures are beneficial in assisting the smooth implementation of the COOP. This also enables staff to update their phone numbers.

**Communications with Outside Parties.** The plan should include a list of key telephone numbers, including police, fire, trustee, employees, U.S. Trustee and local U.S. Trustee office, court contacts, computer hardware and software vendors, banks, the property owner, insurance, utilities, and other vendors. The trustee and each employee should keep a copy of the list in the office and off site.

**Life Safety.** The first priority should be protection of the health and safety of all trust operation staff. Take reasonable steps to secure the office and the safety of your staff.<sup>8</sup> Use security features to prevent unauthorized access from public areas to secure areas of the office.<sup>9</sup> Visitors should not be cleared into secure areas of the office until they identify the staff member they wish to see and provide the reason for their visit, and until you or the staff member clear the visitor to enter.<sup>10</sup> Prudent security countermeasures should be developed in consultation with the U.S. Trustee, U.S. Marshals, or other law enforcement.<sup>11</sup> In the event of an emergency, determine whether to evacuate, seek shelter, shelter in place, or initiate a lockdown.

**Shelter.** Taking shelter, either in your office building or in a nearby public facility, may be necessary in instances such as tornado warnings, chemical or radiological hazards, or other instances where advance notice is short and leaving the building is more dangerous than remaining in the building. Select an interior room or rooms within your building or office, or ones with no or few windows, and take refuge there. A stock of medical supplies, water, and food may be advisable, depending on the likelihood that you and your staff may need to take shelter or shelter in place. A lock-

down is a type of sheltering in place more likely to be required with an active shooter. As part of emergency preparedness, active shooter training is available from law enforcement agencies. In a pandemic, such as the COVID-19 pandemic, sheltering in place may require you and your staff to shelter at your homes.

**Evacuation Plan.** Consider evacuation in situations such as fire and hurricanes, where remaining in the facility is more dangerous than leaving. A copy of the building's site plan and evacuation plan should be included in your COOP. If there is none, consider contacting the property owner to establish a formal evacuation plan for the building or create one specific to your office. Ideally, the site plan should include diagrams of ingress to and egress from the office and the building and the location of emergency equipment, access roads, and building utility controls. Consider assigning staff specific duties to facilitate evacuation. In the event the office is unsafe or inaccessible, an alternate site should be identified where staff may assemble, mail may be delivered, and staff can carry on the essential work of the trust operation. Consider establishing an off-site storage location for keeping duplicate copies of irreplaceable records, an inventory of critical supplies that cannot be purchased and received within two to three days, a copy of a calendar with appointments and deadlines that is updated weekly, as well as other important records. If possible, the off-site location should provide an emergency storage site to hold any salvageable equipment and records.

**Property Destruction.** Imagine your office is flooded or a fire has destroyed the building. Your equipment is damaged or inaccessible. Assemble your staff and determine, in consultation with your property owner and emergency providers such as police and firefighters, whether your building is safe to enter. Assuming the building is safe to enter, identify equipment that can be salvaged for use and remove the equipment to your designated alternate site according to the priorities assigned in your asset list. Document damage to the premises and equipment. It is useful to include in your COOP a list of contractors and repair services that may be able to assist with clean up and repair of damaged premises, equipment, and utilities.

**Insurance.** The *Handbook* requires trustees to maintain various insurance policies.<sup>12</sup> This includes insurance required by contract with your landlord to cover the office premises.<sup>13</sup> Coverage of the physical assets and equipment of the trust and general liability insurance are also required.<sup>14</sup> Copies of your insurance policies and contact information for your insurers should be kept both on and off site. Be sure to review your policies periodically so that your coverage is adequate.

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**Computer Security.** Because so much of the work of the trust operation is conducted via computer, maintaining computer security and back-up data is of the utmost importance. The *Handbook* sets forth mandatory computer security requirements in Section 4.E. Your software provider's contact information should be included in your COOP. Verify that your provider maintains a reasonable amount of errors and omissions insurance to cover actual or alleged acts and errors or omissions arising out of professional services rendered for the trustees.<sup>15</sup> In an emergency, contact your software and hardware providers to determine the timeframe for provision of technical support. It is important to have a back-up plan in place in case a provider is not able to provide support due to exigent circumstances. If necessary, have an agreement with another trustee to provide assistance in case of a business interruption. If your computer system is compromised due to a physical disaster or to hacking or some other malfunction, notify the U.S. Trustee as soon as possible.

**Remote Work.** As we have learned from our recent experience with the COVID-19 pandemic, a great deal of work can be performed remotely when needed. The COOP may include plans for the use of computers remotely and for the acquisition of computers for staff who cannot access their in-office computers (with budget approval from the U.S. Trustee). However, care must be taken to comply with the *Handbook's* remote access security requirements. The *Handbook* recommends the use of a virtual private network (VPN).<sup>16</sup>

Only trustee-owned laptops and storage media should be used remotely.<sup>17</sup> Moreover, the *Handbook* Advises that the trustee should consider retaining a computer security consultant to review the proposed remote access solution and verify that it meets industry security standards.<sup>18</sup>

**Death or Incapacity of the Trustee.** Upon the death, incapacitation, or resignation of the trustee, the U.S. Trustee may appoint a successor trustee. Additionally, in the interim between the departure of the trustee and appointment of a successor trustee, the U.S. Trustee may serve as a trustee.<sup>19</sup> The U.S. Trustee will immediately secure the trust bank accounts, assets, computer systems, and files. To provide uninterrupted continuity of operations, the trustee should maintain a list of family contacts and a succession plan containing the identity and contact information of the trustee's bank and computer software vendor, the U.S. Trustee, trust employees, insurance providers, landlord, and any estate professionals to ensure a smooth transition of the records and bank accounts. Your software systems operation manual should be kept up to date.<sup>20</sup> Moreover, a manual containing documentation and instructions for the operation of each aspect of the trust operation will enable the U.S. Trustee to more easily administer the trust, as needed, and to prepare a successor to assume the role of trustee. The trustee should discuss the COOP and succession plan with family members, as well the U.S. Trustee's role in the event of the trustee's incapacitation or death.



### Checklist for Trustee and Staff

The following checklist includes best practices for a standing trustee to consider in planning for the unexpected.


- ✓ Maintain a detailed COOP in the office and at an alternative site.
- ✓ Conduct COOP drills to prepare the office staff to react in accordance with the plan.
- ✓ In the event of an emergency, notify the U.S. Trustee, staff, and appropriate persons on the emergency contact list.
- ✓ If the situation permits, secure trustee and debtor files to safeguard the confidentiality and protect the integrity of the contents. Files that have locks should be locked and keys should be taken into custody and safeguarded. Depending on the type of emergency, cover files and records with plastic or other protective coverings to protect from water damage.
- ✓ Maintain a stock of medical supplies, water, and food or snacks in case office staff must shelter in the building.
- ✓ If evacuating, follow the evacuation plan and assemble at the designated site.
- ✓ Assess and document damage if the trust office is safe to enter.
- ✓ Salvage priority equipment and remove to the alternative work site.
- ✓ Contact your insurance providers, computer vendors, banks, the U.S. Trustee, the court, and others to submit claims and to re-establish trust operations. Verify security of remote computer access.
- ✓ Contact contractors, utilities, the property owner, and others to assess and perform necessary repairs.
- ✓ Maintain a succession and wind-down plan for dealing with the absence, incapacity, or death of a staff member or the trustee.

### Update the COOP

The COOP should be updated regularly and, as a best practice, at least yearly. A copy of the plan should be maintained in the trustee's office and at a secure off-site location known to the trustee and staff. In light of the lessons learned from this year's pandemic, a written pandemic response plan including preparation, response, and recovery measures should be annexed to the COOP. Best practices implemented this year should be detailed in case of future occurrences.<sup>21</sup>

Standing chapter 12 and chapter 13 trustees perform a vital function in the bankruptcy system. Trustees and

their staff are to be commended for their resilience in quickly adapting to the restrictions imposed on trust operations by COVID-19, including the successful transition to conducting section 341 meetings remotely. With the lessons learned and best practices developed during 2020, trustees are encouraged to critically assess their plans to deal with the unexpected and consider implementing the proactive measures discussed above. There is no better time to plan for the unexpected than before the unexpected happens.

*Portions of this article are drawn from materials prepared by U.S. Trustee Nancy J. Gargula and Assistant U.S. Trustee Ronald Moore. *

### Endnotes

- <sup>1</sup> *Handbook*, Section 4.F.5.
- <sup>2</sup> *Id.*
- <sup>3</sup> *Id.*
- <sup>4</sup> *Handbook*, Section 4.E.3, 4, and 5.
- <sup>5</sup> *Handbook*, Section 4.F.
- <sup>6</sup> *Handbook*, Section 4.E.3.
- <sup>7</sup> *Id.*
- <sup>8</sup> *Handbook*, Section 4.F.
- <sup>9</sup> *Id.*
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.*
- <sup>12</sup> *Handbook*, Section 5.K.2.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.*
- <sup>15</sup> *Handbook*, Section 4.E.1., Practice Tips.
- <sup>16</sup> *Handbook*, Section 4.E.
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.*
- <sup>19</sup> 11 U.S.C. § 1302. *See also* Fed. R. Bankr. P. 2012(b), providing for the automatic substitution of the successor trustee in any pending action, proceeding, or matter, and requiring the successor trustee to prepare, file, and transmit to the U.S. Trustee an accounting of the prior administration of the estate.
- <sup>20</sup> *Handbook*, Section 4.E.2.
- <sup>21</sup> For additional information for your COOP, consider consulting resources from FEMA at [www.ready.gov/business](http://www.ready.gov/business), the Department of Homeland Security at <https://www.dhs.gov/how-do-i/prepare-my-business-emergency>, and the CDC at <https://emergency.cdc.gov/planning/>.