



REPORT FROM THE EOUST

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Planning for the Unexpected: Proactive Measures for the Trustee to Consider

KEY POINTS

1. There is no better time to plan for the unexpected than before the unexpected happens.
2. Each chapter 7 trustee has discretion in establishing the exact details of his or her Continuity of Operations Plan ("COOP"), which is required to be developed and maintained by every trustee pursuant to the *Handbook for Chapter 7 Trustees* (Section 5.B.8, 5.G.4).
3. A chapter 7 trustee's COOP should be detailed and address the recovery and maintenance of financial and administrative records; security and back-up procedures for protecting the computer system and data; off-site storage of back-up files; communications with the U.S. Trustee, staff and outside parties; life, safety and the protection of staff from potential physical hazards; shelter; an evacuation plan; property destruction; insurance; remote work; and the death or incapacitation of the trustee.
4. A chapter 7 trustee's COOP should be maintained in the office and at an alternative site, provided to all staff and tested with periodic COOP exercises and updated at least once each year.

About the Author

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As we continue to meet the challenges of COVID-19 in 2021, the need to plan for the unexpected remains a critical component for all businesses. Of course, no one, including those of us who work in the bankruptcy system, could have foreseen the degree to which the COVID-19 pandemic would impact the ability of many businesses and governmental agencies to conduct business and 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 may cause substantial disruption to business as usual if appropriate forethought is not taken.

What would happen if you, as a chapter 7 panel trustee, encountered an unexpected event that kept you from performing your fiduciary duties to not only administer assigned cases but also to run your trustee operations? What if there was an unexpected event that occurred in the facilities in which you conduct your chapter 7 trustee case administration, 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?

While some chapter 7 trustees are members of a law firm that may have a disaster or continuity of operations plan, some additional measures may need to be taken with respect to the chapter 7 trustee's case administration work. 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 7 Trustees* (*Handbook*) requires that every trustee develop and maintain a written office business interruption and disaster recovery plan to ensure continuity of operations ("COOP").¹ The COOP should cover recovery and maintenance of financial and administrative records and follow the security and back-up procedures for protecting your computer system and data.² 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.³ Safeguards to ensure computer and software system security are essential.⁴ Protecting staff from potential physical hazards is of prime importance.⁵

Assess Potential Risks. To develop or update your COOP, identify potential sources of business interruption. 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 man-made 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. Fireproofing and waterproofing cabinets, as well as installing security systems, fire extinguishers, 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 as well as case administration and banking records and trustee distributions to creditors out of the trustee bank accounts. Performing daily backups of data and weekly backups of the server and ensuring that the backup

and recovery procedures are tested periodically are important.⁶ A copy of the backup should be stored in a secured location offsite weekly.⁷ Consider maintaining copies of essential records at a location offsite. 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 Business Operations

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 plan 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 trustee operation.

Communications with the United States Trustee. Maintaining regular communications with your U.S. Trustee is vital to the proper maintenance of your trustee operations. 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 trustee operations 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 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 any change in 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, landlord, 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 staff. Take reasonable steps to secure the office⁸ and the safety of your staff. 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 lockdown is a type of sheltering in place more likely to be required when dealing with an active shooter. As part of emergency preparedness, active shooter training is available from various 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 landlord 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, the location of emergency equipment, access roads and the location of 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 the trustee can continue to administer the cases. 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 an appointments/due dates/deadlines calendar 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 landlord 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. It is recommended that chapter 7 trustees regularly assess their insurance needs. This should include insurance required by contract with your landlord to cover the office premises. Coverage of the physical assets and equipment of the trustee operation, attorney liability, employee fidelity and general liability insurance are recommended. Copies of your insurance policies and contact information for your insurers should be kept both on site and off site. Be sure to review your policies periodically so that your coverage is adequate.

Computer Security. Because so much of the work of your trustee 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 5.G.3. Your software provider’s contact information should be included in your COOP. Verify

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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. If your provider conducts back-ups of the data, the trustee should obtain written assurances from the provider regarding data integrity, security and recovery within a reasonable amount of time (e.g., 24 to 48 hours).⁹ 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. 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).¹⁰ Only trustee-owned laptops and storage media should be used remotely and only authorized staff should have access to the programs and data. Moreover, the *Handbook* advises that the trustee should confirm with their vendor, or an independent computer security consultant that the proposed remote access solution meets industry security standards.¹¹

Death or Incapacity of the Trustee. Upon the death, incapacitation or resignation of the trustee, the U.S. Trustee will appoint a successor trustee. The U.S. Trustee will immediately secure all estate bank accounts, assets, computer systems and files in the event of death or incapacitation and when an unexpected immediate resignation is provided by a trustee. 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, any employees, insurance providers, landlord and any estate professionals to ensure a smooth transition of the records and bank accounts in assigned cases. Your software systems operation manual should be kept up to date. 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 panel 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 trustee 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 trustee business operations. Verify security of remote computer access.
- ✓ Contact contractors, utilities, landlord and others to assess and perform necessary repairs.

- ✓ Maintain a succession and wind-down plan for dealing with the absence, incapacity or death of the trustee.

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, trustees should consider adding a written pandemic response plan, including preparation, response and recovery measures, to the COOP. We suggest that trustees include best practices implemented in 2020 as part of any updates.

Chapter 7 panel 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 trustee case administration and business operations by COVID-19. 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:

¹ *Handbook*, Section 5.B.8, 5.G.4.

² *Handbook*, Section 5.G.3.e.

³ *Id.*

⁴ *Handbook*, Sections 5.G.4.b and 5.G.3.e.

⁵ An outline₁ for a business interruption plan and a sample chapter 7 disaster recovery plan are posted on the Program's website. See <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials> and scroll down to the supplementary materials.

⁶ *Handbook*, Section 5.G.3.e.

⁷ *Id.*

⁸ *Handbook*, Section 5.G.4.

⁹ *Handbook*, Section G.5.3.

¹⁰ *Id.*

¹¹ *Id.*