

U.S. Department of Justice  
Executive Office for United States Trustees

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## Handbook for Chapter 7 Trustees

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*March 1, 2001*



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This Handbook should well serve to update and enhance the administration of chapter 7 cases.

Martha L. Davis  
Acting Director  
Executive Office for  
United States Trustees  
March 2001

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# **CHAPTER 1**

## **INTRODUCTION**



## CHAPTER 1 – INTRODUCTION

### A. **PURPOSE**

The United States Trustee<sup>1/</sup> is charged with the responsibility of establishing, maintaining, and supervising panels of private trustees, and of monitoring and supervising cases under chapter 7 of title 11 of the United States Code (“Bankruptcy Code”). The chapter 7 trustee, as the estate representative responsible for the recovery, preservation, liquidation, and distribution of chapter 7 estates, serves as a fiduciary to various parties in interest in a case. The goal of the United States Trustee is to establish a system that allows for the complete, economical, equitable and expeditious administration of chapter 7 cases, while allowing the trustee to exercise appropriate business and professional judgment in performing the trustee’s fiduciary duty.

This Handbook represents a statement of operational policy and is intended as a working manual for chapter 7 trustees under United States Trustee supervision. This Handbook is not intended to represent a full and complete statement of the law. It should not be used as a substitute for legal research and analysis. The trustee also should be familiar with the Bankruptcy Code, Federal Rules of Bankruptcy Procedure (“FRBP”), any local bankruptcy rules, and relevant case law.

Any reference in this Handbook to the masculine in referring to trustees, also includes the feminine. All statutory references herein refer to the Bankruptcy Code, 11 U.S.C. § 101 et seq., unless otherwise indicated.

### B. **THE BANKRUPTCY LAWS**

The Bankruptcy Code consists of eight chapters:

- Chapter 1: General Provisions;
- Chapter 3: Case Administration;
- Chapter 5: Creditors, the Debtor and the Estate;
- Chapter 7: Liquidation;
- Chapter 9: Adjustment of Debts of a Municipality;
- Chapter 11: Reorganization;
- Chapter 12: Adjustment of Debts of a Family Farmer with Regular Annual Income;  
and;
- Chapter 13: Adjustment of Debts of an Individual with Regular Income.

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<sup>1/</sup>All references to United States Trustee shall include the United States Trustee’s designee, unless otherwise indicated.

The provisions of chapters 1, 3, and 5 apply to all cases under chapters 7, 11, and 13 and, with the exception of § 361, apply to cases under chapter 12. The provisions of chapter 7, chapter 9, chapter 11, chapter 12, and chapter 13 apply only to cases under that specific chapter. The trustee is most concerned with the provisions of chapters 1, 3, 5, and 7. Because chapter 11, 12 and 13 cases may be converted to chapter 7 cases, however, familiarity with these chapters is strongly recommended.

### **C. JURISDICTION AND VENUE**

Pursuant to 28 U.S.C. § 1334, the district court has original and exclusive jurisdiction of all cases under title 11.

All bankruptcy cases and all proceedings arising under, arising in, or related to a title 11 case may be automatically referred by rule of the district court to the bankruptcy court, pursuant to 28 U.S.C. § 157. Section 157 makes further distinctions by the use of the terms “core” and “non-core” proceedings. Bankruptcy judges may hear and determine, subject to appeal, all cases under title 11 and core proceedings arising under or in a title 11 case. The bankruptcy judge may hear non-core proceedings, but the judge’s findings of fact and conclusions of law must be submitted to the district court for entry of the final order.

Cases involving claims based on state law may or may not be heard in the bankruptcy court. The trustee may be required to collect certain assets (e.g., accounts receivable) through actions in state court. 28 U.S.C. §§ 1408-1412.

The appropriate location for a bankruptcy filing is governed by 28 U.S.C. § 1408 which establishes four alternate tests for venue: (1) the location of the debtor’s domicile; (2) the location of the debtor’s residence; (3) the location of the debtor’s principal place of business in the United States; or (4) the location of the debtor’s principal assets in the United States. Venue is appropriate either in the district in which one of these tests has been satisfied for the 180-day period preceding the filing or in the district in which one of these tests has been satisfied for the longest portion of the 180-day period preceding the filing. Venue is also appropriate in the district in which there is a pending bankruptcy case concerning the debtor’s affiliate, general partner, or partnership. The trustee should be alert for cases purposely filed in the wrong venue to accommodate the debtor’s attorney, to inconvenience the debtor’s creditors, or to obtain a perceived advantage in trustee or judge assignments. The trustee should report such cases to the United States Trustee.

### **D. ROLE OF THE UNITED STATES TRUSTEE**

A major reason for the enactment of the Bankruptcy Reform Act of 1978 was to remove the bankruptcy judges from the responsibilities for day-to-day administration of cases.

Debtors, creditors, and third parties litigating against bankruptcy trustees were concerned that the court, which previously appointed and supervised the trustee, may not impartially adjudicate their rights as adversaries of that trustee. To address these concerns, judicial and administrative functions within the bankruptcy system were bifurcated.

The administrative functions were placed within the Department of Justice through the creation of the United States Trustee Program (“USTP”). The USTP acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system. It works to secure the just, speedy, and economical resolution of bankruptcy cases; monitors the conduct of parties and takes action to ensure compliance with applicable laws and procedures; identifies and investigates bankruptcy fraud and abuse; and oversees administrative functions in bankruptcy cases.

Pursuant to 28 U.S.C. § 586, the United States Trustee shall:

1. establish, maintain and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11;
2. serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case;
3. supervise the administration of cases and trustees in cases under chapter 7, 11, 12, or 13 of title 11 by, whenever the United States Trustee considers it to be appropriate:
  - A. (i) reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee (which guidelines shall be applied uniformly by the United States Trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under § 330 of title 11; and
  - (ii) filing with the court comments with respect to such applications and, if the United States Trustee considers it to be appropriate, objections to such application;
- B. monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under § 1125 and § 1128 of such title, comments with respect to such plans and disclosure statements;

- C. monitoring plans filed under chapters 12 and 13 of title 11 and filing with the court, in connection with hearings under § 1224, § 1229, § 1324, and § 1329 of such title, comments with respect to such plans;
  - D. taking such action as the United States Trustee deems to be appropriate to ensure that all reports, schedules, and fees required to be filed under title 11 and this title by the debtor are properly and timely filed;
  - E. monitoring creditors' committees appointed under title 11;
  - F. notifying the appropriate United States Attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States and, on the request of the United States Attorney, assisting the United States Attorney in carrying out prosecutions based on such action;
  - G. monitoring the progress of cases under title 11 and taking such actions as the United States Trustee deems to be appropriate to prevent undue delay in such progress; and
  - H. monitoring applications filed under § 327 of title 11 and, whenever the United States Trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications;
- 4. deposit or invest under § 345 of title 11 money received as trustee in cases under title 11;
  - 5. perform the duties prescribed for the United States Trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe; and
  - 6. make such reports as the Attorney General directs.

## **CHAPTER 2**

# **APPOINTMENT TO THE PANEL OF TRUSTEES**

## **CHAPTER 2 – APPOINTMENT TO THE PANEL OF TRUSTEES**

The United States Trustee establishes a panel of qualified individuals to be appointed to cases on a fair and equitable basis.

The United States Trustee maintains and conducts an open system for the recruitment of persons interested in serving on the panel of private trustees. The United States Trustee may not discriminate on the basis of race, color, religion, sex, national origin, or age in appointments to the panel, and, in this regard, must assure equal opportunity for all appointees and applicants. 28 C.F.R. § 58.5.

Each United States Trustee is authorized to increase or decrease the total membership of the panel. In addition, each United States Trustee is authorized to institute a system of rotation of membership or the like to achieve diversity of experience, geographical distribution or other characteristics among the persons on the panel. 28 C.F.R. § 58.1. The number of individuals on the panel is governed by the need to ensure the prompt, competent, and complete administration of cases, as well as by the need for fair distribution of case assignments.

### **A. ELIGIBILITY**

To be eligible for membership on a panel, a person must possess all of the qualifications established by the Attorney General of the United States under 28 U.S.C. § 586(d) and published in the Code of Federal Regulations at 28 C.F.R. § 58.3. Panel members must also be able to satisfy the eligibility requirements of § 321 for serving in a case. See Chapter 5. Anyone who was employed by the United States Trustee Program within the preceding one-year period is not eligible for appointment. 28 C.F.R. § 58.3. Prior to appointment, each person will be interviewed and informed of the performance expected, as well as the method by which that person will be assigned cases.

The trustee must successfully undergo initial and five-year background checks which include name and fingerprint checks, a tax check with the Internal Revenue Service, and a report on credit history (with disclosure authorization), including any subsequent credit reports requested by the United States Trustee. The trustee's appointment to the panel or the assignment of cases may be terminated based on unresolved problems discovered during background checks.

### **B. QUALIFICATIONS**

The minimum qualifications for membership on the panel are set forth in 28 C.F.R. § 58.3(b). The panel member must:

1. possess integrity and good moral character.

2. be physically and mentally able to satisfactorily perform a trustee's duties.
3. be courteous and accessible to all parties with reasonable inquiries or comments about a case for which such individual is serving as private trustee.
4. be free of prejudices against an individual, entity, or group of individuals or entities which would interfere with unbiased performance of a trustee's duties.
5. not be related by affinity or consanguinity within the degree of first cousin to any employee of the Executive Office for United States Trustees of the Department of Justice, or to any employee of the Office of the United States Trustee for the district in which he or she is applying.
6. be either:
  - a. a member in good standing of the bar of the highest court of a state or of the District of Columbia;
  - b. a certified public accountant;
  - c. a college graduate with a bachelor's degree from a full four-year course of study (or the equivalent) of an accredited college or university, (accredited as described in Part II, § III of Handbook X118 promulgated by the U.S. Office of Personnel Management) with a major in a business-related field of study or at least 20 semester-hours of business-related courses; or hold a master's or doctoral degree in a business-related field of study from a college or university of the type described above;
  - d. a senior law student or candidate for a master's degree in business administration recommended by the relevant law school or business school dean and working under the direct supervision of:
    - (1) a member of a law school faculty;
    - (2) a member of the panel of private trustees;
    - (3) a member of a program established by the local bar association to provide clinical experience to students; or
  - e. have equivalent experience as deemed acceptable by the United States Trustee.
7. be willing to provide reports as required by the United States Trustee.

8. have submitted an application under oath, in the form prescribed by the Director, to the United States Trustee for the district in which appointment is sought: Provided, that this provision may be waived by the United States Trustee on approval of the Director.

### **C. TERM**

All panel members are generally appointed for one-year renewable terms. The appointment may be for less than one year. Short-term appointments are often used to adjust a trustee's renewal appointment date or as a compliance measure. Service during the term and the renewal of the appointment are at the discretion of the United States Trustee, subject to the "Procedures for Suspension and Removal of Panel Trustees and Standing Trustees" 28 C.F.R. § 58.6. See Appendix E.

### **D. PERFORMANCE REVIEW**

The United States Trustee prepares a written review of the trustee's performance. The goal of the review is to provide information about the trustee's competency, adherence to fiduciary standards, and commitment to pursue assets for the benefit of creditors. The performance review takes into account a variety of factors, including (but not limited to):

1. the size and age of the trustee's caseload;
2. the trustee's progress in closing cases;
3. the trustee's performance in § 341(a) meetings and in court;
4. the trustee's procedures for safeguarding of estate assets;
5. professional costs incurred by the trustee and maximization of funds distributed to creditors;
6. the number and nature of complaints against the trustee as well as the trustee's responsiveness in addressing the complaints;
7. the trustee's cooperation in furnishing reports and requested information to the United States Trustee;
8. the trustee's judgment in determining whether to administer assets; and
9. the trustee's demeanor in administering his or her cases, including dealing with the debtor's creditors, parties in interest, and other parties pertinent to the trustee performing his or her duties.



The trustee will receive a copy of the performance review and may discuss it with the United States Trustee personally. Any written response by the trustee concerning issues raised in the performance review will become part of the United States Trustee's trustee oversight file, which will be made available to the trustee for review, upon request.

#### **E. TRAINING**

The United States Trustee provides ongoing training for all trustees. The training should help trustees keep abreast of recent developments in bankruptcy law and issues which affect chapter 7 estate administration. Training also covers USTP standards and other requirements for trustee performance, including record keeping and reporting. The training for new trustees includes initial training prior to case assignments and periodic one-on-one training thereafter, as appropriate. Trustees may request specific types of training from the United States Trustee, and new trustees may seek to participate in a mentoring program with an experienced member of the panel.

## **CHAPTER 3**

# **APPOINTMENT OF PANEL TRUSTEES TO CASES**

## **CHAPTER 3 – APPOINTMENT OF PANEL TRUSTEES TO CASES**

### **A. APPOINTMENT AND QUALIFICATION OF INTERIM TRUSTEES**

Section 701 of the Bankruptcy Code mandates that the United States Trustee appoint one disinterested panel member to serve as interim trustee in a chapter 7 case immediately after the order for relief. § 701(a). See Chapter 3.D regarding the appointment of an interim trustee in an involuntary case.

To qualify to serve, the trustee must furnish a bond in favor of the United States that is conditioned on the faithful performance of the trustee's duties. § 322. Unless the United States Trustee directs otherwise, a panel trustee covered by a regional or district blanket bond does not have to file a separate bond in each case. See Chapter 5.E for bonding requirements.

The interim trustee serves until a trustee is elected under § 702 and qualifies under § 322. If no trustee is elected at the § 341 meeting of creditors, then the interim trustee becomes the trustee under § 702(d). The interim trustee has all the duties and powers of a permanent trustee. See Chapter 4 for Elections of Trustees.

### **B. ASSIGNMENT OF CASES**

The United States Trustee appoints panel members to chapter 7 cases on a fair and equitable basis by utilizing a blind rotation system that includes all chapter 7 cases, whether asset or no-asset. As cases are filed, they are assigned to panel members in a manner predetermined by the United States Trustee. A system of blind rotation avoids the appearance of favoritism and eliminates the need to make individual judgments about case assignments. Over a reasonable period of time, this system normally results in asset cases being fairly and equally distributed among the panel. Because the order of assignment is not available to the public, the "blind" rotation also reduces the likelihood that debtors can engage in "trustee shopping" – that is, timing the filing of a petition in order to have a specific trustee appointed in the case. The United States Trustee reviews the processing of chapter 7 cases periodically to evaluate the efficiency and fairness of assignment procedures.

Exceptions to the blind rotation system may be warranted on occasion. Reasons which may warrant such exception include:

1. the unique characteristics of a specific case;
2. the goal of achieving equity in the assignment of cases among panel members;
3. suspension of a trustee from case assignments;

4. previous service in a reopened or converted case;
5. geographic considerations; and
6. training for new panel members.

The United States Trustee documents the reasons for an exception to the blind rotation and will make this information available for review upon request.

There may be circumstances when a trustee may wish to be excluded from the blind rotation system for a limited period of time. In this event, the trustee should submit a Notice of Voluntary Suspension. See Appendix F. Voluntary suspensions are not subject to 28 C.F.R. § 58.6 (Appendix E).

### **C. TIME AND DURATION OF INTERIM APPOINTMENT**

A member of the panel is appointed as an interim trustee upon:

1. the entry of an order for relief under chapter 7;
2. the conversion of a case to chapter 7;
3. the entry of an order directing the United States Trustee to appoint an interim trustee in an involuntary case pursuant to § 303(g); or
4. the resignation, death or removal of the prior trustee, pursuant to § 703.

The interim trustees will be sent a notice of appointment. A panel member who is covered by a regional or district blanket bond is deemed to have accepted the appointment unless the appointment is rejected within five days after receipt of the notice. If a trustee cannot accept the appointment, e.g., where the trustee has a conflict of interest or was an examiner in the case, then the trustee must expressly reject the appointment. FRBP 2008.

A trustee is expected to accept all cases assigned, unless there is a conflict of interest or other extraordinary circumstance.

If the person selected is not covered by a blanket bond<sup>2</sup>, the trustee shall notify the court and the United States Trustee in writing of acceptance within five days after receipt of the notice of selection or shall be deemed to have rejected the appointment. If applicable, a copy of the trustee's acceptance of appointment should accompany the notice of appointment, so that the form can be filed in the clerk's office.

If creditors fail to elect a trustee at the first scheduled § 341(a) meeting, the interim trustee becomes the permanent trustee pursuant to § 702(d).

If a permanent trustee is elected and qualifies, the interim trustee must turn over all records and property of the estate to the elected trustee. Within 30 days after the qualification of the elected trustee, the interim trustee should submit the final report and account for review by the United States Trustee and transmittal to the court.

#### **D. NON-PANEL TRUSTEES IN CONVERTED CASES**

When a case converts to chapter 7, the trustee administering the case immediately prior to conversion may be appointed by the United States Trustee to serve as the interim trustee, regardless of whether the person is a member of the chapter 7 panel. § 701(a)(1). Upon conversion of a chapter 11 case in which a trustee was serving, the United States Trustee will assess the advisability of reappointing the chapter 11 trustee to serve as the chapter 7 trustee. The United States Trustee considers the trustee's performance as the chapter 11 trustee, including compliance with the reporting requirements, and the trustee's ability to carry out the duties of a chapter 7 trustee in the case. Appointing the chapter 11 trustee to serve in the chapter 7 case does not relieve the trustee of the reporting requirements under FRBP 1019. See Chapter 8.U for additional information about the trustee's reporting obligations.

#### **E. INVOLUNTARY CASES**

Generally, the United States Trustee does not appoint an interim trustee in an involuntary case until the order for relief is entered. However, if the court orders the appointment of a trustee pursuant to § 303(g), the United States Trustee should appoint an interim trustee in accordance with § 701. If it appears that assets are being dissipated and that an order for relief will be entered, the United States Trustee should consider moving for the appointment of an interim trustee under § 303(g), if the creditors do not.

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<sup>2</sup>Usually the panel trustees will be covered by the blanket bond, and this may only apply to elected trustees. However, there are other circumstances in which a trustee may not be covered by the regional or district blanket bond, such as a non-panel trustee who was serving in a converted case and is appointed to serve as the chapter 7 trustee.

In an involuntary case, the period of time between the filing of the petition and the order for relief is known as the “gap” period. During the gap period, the interim trustee takes possession of the property of the estate and operates any business of the debtor. If there is a business to operate, the trustee should apply to the court for authority to operate the business and file operating reports as required by the United States Trustee and § 704(8). (Where applicable, see Chapter 8.J for additional considerations when operating a business in a chapter 7 case.)

The debtor can regain possession of the property if the debtor files such bond as the court requires. If a debtor reclaims possession of the property of the estate, and an order for relief in chapter 7 is subsequently entered, the debtor must account for and deliver to the trustee all of the property, or its equivalent value as of the date the debtor regained possession.

Upon the entry of an order for relief under chapter 7 in an involuntary case, the trustee administers the case in the same manner as a voluntary chapter 7 case. If the debtor has not complied with FRBP 1007(c) by filing required schedules and statements, the court may order the trustee, a petitioning creditor, a committee, or other party to file the schedules and statements pursuant to FRBP 1007(k).

## **F. SUCCESSOR TRUSTEES**

When a trustee dies, resigns, fails to qualify under § 322, or is removed from a case under § 324, the creditors have a right to elect, in the manner specified in § 702, a person to serve as successor trustee. In the event an election is requested, the United States Trustee will call a special meeting of creditors for the purpose of electing a successor trustee. FRBP 2003(f). Only creditors holding eligible claims may request and vote in the election. The procedures set forth in § 702 must be strictly observed when electing a successor trustee. Any person elected by the creditors must be eligible under § 321 to serve as trustee. See Chapter 4 for more information about trustee elections.

Pending the election of a successor trustee, the United States Trustee will appoint an interim trustee under § 703(b) to preserve or prevent loss to the estate. The interim trustee must be a disinterested person who is a member of the panel of private trustees established under 28 U.S.C. § 586(a)(1).

Section 703(c) provides that if creditors do not elect a successor trustee, or if a trustee is needed in a case reopened under § 350, the United States Trustee shall appoint one disinterested person that is a member of the panel of private trustees established under 28 U.S.C. § 586(a)(1) to serve as trustee in the case. This section appears to apply only if the United States Trustee has not appointed an interim trustee under § 703(b). If creditors do not elect a successor trustee *in the manner specified in § 702*, the interim trustee appointed under § 703(b) should serve as successor trustee by operation of § 702(d). If

creditors elect a successor trustee under § 703(a), the services of an interim trustee appointed under § 703(b) terminate when the successor trustee qualifies under § 322.

FRBP 2012(b) requires a successor trustee to file with the United States Trustee an accounting of the prior trustee's administration of the estate. This accounting should be a separate and distinct record of the activities which were solely within the control of the prior trustee. The rule does not have a deadline for submission of the accounting. Absent some evidence of defalcation or other harm to the estate, the accounting can be submitted in conjunction with the submission by the successor trustee of the standard reports required by the United States Trustee.

## **CHAPTER 4**

### **ELECTION OF A TRUSTEE**



## CHAPTER 4 – ELECTION OF A TRUSTEE

### A. ELIGIBILITY TO REQUEST AN ELECTION AND TO VOTE

Creditors in a chapter 7 case may request the opportunity to elect a trustee at the § 341(a) meeting. The election is properly requested if creditors having 20 percent in amount of the eligible claims request the election. To request an election and to vote in an election, a creditor:

1. must hold an allowable, undisputed, fixed, liquidated, non-priority unsecured claim of a kind entitled to distribution under §§ 726(a)(2)-(4), § 752(a), § 766(h), or § 766(i);<sup>3/</sup>
2. must not have an interest materially adverse, other than an equity interest that is not substantial in relation to the creditor's interest as a creditor, to the interest of creditors entitled to distribution;
3. must not be an insider; and
4. must have "filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) unless objection is made to the claim or the proof of claim is insufficient on its face." FRBP 2003.

A candidate for trustee is elected if the candidate receives the votes of creditors holding the majority in amount of those claims voted. See § 702 and FRBP 2003.

### B. TRUSTEE ELECTION PROCEDURE

If an election is requested, the United States Trustee presides over the election. This eliminates the possible conflict of the interim trustee presiding while having an interest in the outcome of the election. Neither the Bankruptcy Code or Rules requires creditors to provide any advance notice of an intent to request an election.

If the interim trustee anticipates or receives a request for an election, the trustee shall immediately contact the United States Trustee, and the United States Trustee shall preside over the election.

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<sup>3/</sup>Undersecured creditors may bifurcate their secured and unsecured claims for purposes of requesting an election and voting under § 702. Similarly, creditors with both liquidated and unliquidated claims may assert the liquidated portion of their claims for purposes of determining eligibility to vote for a chapter 7 trustee. See In re Klein, 119 B.R. 971, 981-82 (N.D. Ill. 1990), appeal dismissed, 940 F.2d 1075 (7<sup>th</sup> Cir. 1991).

If the creditors move to elect a trustee during the § 341(a) meeting without prior notice, the interim trustee shall adjourn the meeting and immediately notify the United States Trustee, who shall preside over the election then or at a later date. If the clerk of the bankruptcy court has notified creditors that no proof of claim is required in the case pursuant to FRBP 2002(e), the United States Trustee will consider continuing the § 341(a) meeting and notifying the creditors of the requested election and of the need to file a proof of claim in order to participate in the election.

The trustee should notify the United States Trustee if the trustee perceives that an election is being suggested in an attempt to influence the trustee's actions.

When the election is concluded, the interim trustee or the United States Trustee may still examine the debtor or allow the creditors to examine the debtor. However, the United States Trustee will consider continuing the examination of the debtor until the election report is filed and any election dispute is resolved, so that the elected trustee may conduct the examination. Once all parties in interest have had an opportunity to examine the debtor, the meeting should be concluded.

#### **C. DISPUTED ELECTIONS**

The United States Trustee does not resolve any dispute in the election process. The United States Trustee, as the presiding officer, promptly informs the court in writing that a dispute exists. Pending the resolution of the dispute, the interim trustee continues to serve. If no motion for resolution of such election dispute is made within 10 days after the election report is filed, the interim trustee shall serve as the trustee in the case. FRBP 2003(d).

#### **D. QUALIFICATION OF ELECTED TRUSTEES**

The elected trustee is considered qualified once the trustee has returned a notice of acceptance of election, accompanied by a bond. See § 322. The United States Trustee will notify the person elected concerning how to qualify and the amount of the bond. FRBP 2008.

#### **E. DUTIES AND RESPONSIBILITIES OF ELECTED TRUSTEES**

The statutory duties of an elected trustee are the same as the duties of an interim trustee who becomes trustee by operation of § 702(d). An elected trustee must also comply with the requirements of the United States Trustee and will be requested to submit to a background investigation.

## **CHAPTER 5**

# **QUALIFICATIONS AND ACCEPTANCE**

## **CHAPTER 5 – QUALIFICATIONS AND ACCEPTANCE**

### **A. QUALIFICATIONS**

To be eligible to serve as a trustee in a chapter 7 case, a person must be: (1) competent to perform the duties of a chapter 7 trustee, (2) reside or have an office in the district where the cases are pending or in an adjacent district, and (3) be an individual or a corporation authorized by corporate charter or by-laws to act as a trustee. § 321

While corporations are eligible under § 321 for appointment as interim trustees in specific cases, each individual in a corporation who performs the duties of a trustee must individually satisfy the requirements of 28 C.F.R. § 58.3. In view of the fiduciary duties of the trustee, the responsibility of the individual trustee to preside at § 341(a) meetings, possible complications as to coverage under blanket or separate bonds, and possible increases in expenses imposed on estates, corporate entities are rarely appointed. The regulation provides that no professional corporation, partnership, or similar entity organized for the practice of law or accounting is eligible for appointment as a chapter 7 trustee.

To qualify, the trustee must file with the court a bond in favor of the United States. § 322. (See Chapter 5.E below.)

### **B. ACCEPTANCE UPON APPOINTMENT**

A panel member who is covered by a blanket bond filed with the court and who fails to reject the appointment within five days after receipt of notice of selection is deemed to have accepted the appointment. FRBP 2008. No additional appointment is provided if the interim trustee becomes the permanent trustee by operation of law pursuant to § 702.

A trustee is expected to accept all cases assigned, unless there is a conflict of interest or other extraordinary circumstance.

### **C. CONFLICTS OF INTEREST**

A trustee must be knowledgeable of § 701(a)(1), § 101(14), and § 101(31), as well as any other applicable law or rules, and must decline any appointment in which the trustee has a conflict of interest or lacks disinterestedness. A trustee should have in place a procedure to screen new cases for possible conflicts of interest or lack of disinterestedness upon being appointed.

If a trustee discovers a conflict of interest or a lack of disinterestedness after accepting the appointment, the trustee should immediately file a notice of resignation in the case. Conflict waivers by either the debtor or creditor are not effective to obviate the trustee's duty to resign.

The trustee must advise the United States Trustee upon the discovery of any potential conflict or lack of disinterestedness so that a determination can be made as to whether the appointment of a successor trustee is necessary. In addition, the trustee must disclose any potential conflicts on the court record or at the § 341(a) meeting, or both on the court record and at the § 341(a) meeting. The trustee should also advise the United States Trustee upon discovery of any circumstances which might give rise to the appearance of impropriety.

While it is not possible to list all situations presenting an actual or potential conflict of interest or lack of disinterestedness, a non-exclusive list of examples follows:

1. the trustee represents or has represented the debtor, a creditor, an equity security holder, or an insider in other matters;
2. the debtor or creditor is an employee of the trustee or of a professional providing services to the trustee in the case;
3. the trustee is appointed to serve as trustee for a corporate debtor and for a debtor who is an insider, officer, director or guarantor of the corporate debtor;
4. the estate has a potential cause of action against the trustee, an employee of the trustee, a client of the trustee or the trustee's firm or other person or entity with whom the trustee has a business or family relationship;
5. the trustee was an officer, director, or employee of the debtor or of the debtor's investment banker within two years before the commencement of the case;
6. the trustee is a creditor or an equity security holder of the debtor; or
7. the trustee had been an investment banker for a security of the debtor within three years before the commencement of the case or the trustee has represented such an investment banker in connection with the offer, sale, or issuance of a security of the debtor.

Several courts have addressed the issue of whether an actual or potential conflict of interest or lack of disinterestedness of a trustee's partner or associate may be imputed to the trustee. Therefore, the trustee should disclose to the United States Trustee all

situations presenting an actual or potential conflict of interest or lack of disinterestedness for his partners or his firm.

FRBP 2008 allows the appointment of one trustee in jointly administered cases. The existence of interdebtor claims in jointly administered cases must be examined closely because such claims do not automatically disqualify the trustee. See, e.g., In re BH & P Inc., 949 F.2d 1300 (3rd Cir. 1991). However, these cases should be monitored because conflicts can develop and require the appointment of separate trustees.

In districts in which the standing chapter 13 trustee is also a panel trustee, appointment of the chapter 7 trustee in cases converted from chapter 13 should be monitored so that the chapter 13 trustee is not appointed as the chapter 7 trustee.

#### **D. SOLICITATION OF GRATUITIES, GIFTS, OR OTHER REMUNERATION OR THING OF VALUE**

Neither a trustee nor any employee of the trustee may solicit or accept any gratuity, gift, or other remuneration or thing of value from any person, if it is intended or offered to influence the official actions of the trustee in the performance of the trustee's duties and responsibilities. For specific concerns regarding receipt of computer hardware and software, see Chapter 9.C.

#### **E. BONDS**

Pursuant to § 322(a), a trustee does not qualify for appointment until the trustee has filed with the court a bond in favor of the United States of America conditioned on the trustee's faithful performance of the trustee's official duties. The United States Trustee determines the amount and terms of the bond and the sufficiency of the surety on each bond. § 322(b)(2). The trustee has an obligation to continually review the adequacy of bond coverage and to inform the United States Trustee of any situation, such as an upcoming asset sale, which may necessitate an increase in bond coverage.

Each trustee is a principal on the bond, and all bonds are written in favor of the United States of America. The following are the most common types of bonds available for chapter 7 trustees:

1. **individual case bond** - A single trustee is bonded for a single case for a scheduled amount which includes a cushion based upon a percent of funds on deposit. The deposits are monitored and the bond is adjusted as the deposits significantly increase or decrease. This type of bond is often used for trustees who are operating a business under chapter 7 (see Chapter 8.J), trustees who are not panel active, and for trustees who have a case in which the funds on hand exceed the per case limit under a schedule bond.

2. **blanket bond** - This bond may cover multiple cases for one or more trustees.
- a. **schedule bond** - This bond covers all trustees of a particular group, district, region or other unit, based upon the discretion of the United States Trustee. Each trustee within the group is bonded for an individually scheduled amount and the premium paid by the trustee is based upon the scheduled amount. The scheduled amount should include a cushion based upon a percent of funds on deposit by trustee at the time the bond is renewed. Because of the cushion, there should be no need to adjust a scheduled amount during the term of the bond absent a dramatic fluctuation in the funds on deposit with a particular trustee. These bonds generally have a per-case cap which means an individual case bond is required for cases with funds over a designated amount.
- b. **aggregate bond** - The term "aggregate" means that the trustee is covered for the full amount of the bond, regardless of the premium actually paid by the trustee and regardless of the amount the trustee had on deposit at the time the bond was obtained. There are two general types of aggregate bonds which are distinguishable by the method used to calculate the total amount of the bond. In one type, the United States Trustee will fix the amount of the bond based upon 100 percent of the funds on deposit for all of the trustees covered by the bond, with no cushion included. In the second type, the United States Trustee will fix the bond at an amount which is lower than the total amount of the funds on deposit held by all of the trustees, but significantly higher than the total deposit held by any one of the trustees covered by the bond.

In each aggregate bond, the trustee's share of the premium is based upon the amount of the trustee's deposits used to determine the amount of the bond. The amount of the bond and the trustee's premium share are recalculated each time the bond is renewed, usually annually. There is usually no need to adjust the covered amount during the term of the bond, unless the United States Trustee finds that the total funds on deposit have changed dramatically.

The foregoing types of bonds are illustrative only. Ultimately, § 322 and the language of the bond will determine what is covered. Therefore, the language of every bond, including riders and amendments, should be carefully reviewed. Any new or questionable term, such as a limitation on liability or a requirement to give notice, should be brought to the attention of the United States Trustee immediately.

The United States Trustee ensures that the bond premiums are competitive by periodically seeking bids or making other price comparisons. The United States Trustee also periodically considers changing bonds and sureties for reasons other than price. Most bonds contain a clause that regardless of the number of years the bond is in effect, the surety's liability is limited to the face amount of the bond. Some refer to it as a non-aggregation clause. Thus, if a \$10 million bond is renewed every year for five years, the surety is only liable for \$10 million – not for \$10 million each year for a total of \$50 million. See In re Endeco, 718 F.2d 879 (8<sup>th</sup> Cir. 1983).

The trustee may recover appropriate portions of the bond premium as an administrative expense in the estates with assets subject to its protection. For blanket bonds, the trustee should allocate the blanket bond premium to all of the estates with assets covered by the bond. This includes all chapter 7 asset cases and any chapter 11 cases covered by the bond. The allocation methodology is determined by the United States Trustee, but the allocations are normally based on the funds on hand as of a particular date.

The bond is intended to cover the faithful performance of the trustee's duties. The bonding company will likely seek indemnification from the trustee for any payments the bonding company is required to make to third parties. Since the bond protects the estate beneficiaries and not the trustee, a trustee may wish to consider obtaining professional liability insurance coverage.



## **CHAPTER 6**

### **DUTIES OF A TRUSTEE**

## **CHAPTER 6 – DUTIES OF A TRUSTEE**

### **A. INTRODUCTION**

Pursuant to 28 U.S.C. § 586(a), the United States Trustee supervises the actions of trustees in the performance of their responsibilities. The principal duty of the trustee is to collect and liquidate the property of the estate and to distribute the proceeds to creditors. The trustee is a fiduciary charged with protecting the interests of the various parties in the estate.

A chapter 7 case should be administered to maximize and expedite dividends to creditors and facilitate a fresh start for the debtors entitled to a discharge. A trustee should not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals, or unduly delay the resolution of the case. Chapter 7 trustees must be guided by this fundamental principle when acting as trustee. Accordingly, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to creditors before administering a case as an asset case.

### **B. STATUTORY AND GENERAL DUTIES**

The specific statutory duties of a trustee are set forth at § 704. The trustee shall:

1. collect and reduce to money the property of the estate and close the estate as expeditiously as is compatible with the best interests of parties in interest;
2. be accountable for all property received;
3. ensure that the debtor performs his intentions as to the retention or surrender of property of the estate that secures consumer debts;
4. investigate the financial affairs of the debtor;
5. if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
6. if advisable, oppose the discharge of the debtor (but not the discharge of a particular debt since only the creditor to whom it is owed may do so);
7. unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

8. if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with the responsibility for collection or determination of any tax arising out of such operations, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court or the United States Trustee requires; and
9. make a final report (TFR) and file a final account (TDR) of the administration of the estate with the United States Trustee and the court.

Section 323(a) provides that the chapter 7 trustee is the representative of the estate. The trustee is a fiduciary charged with protecting the interests of all estate beneficiaries – namely, all classes of creditors, including those holding secured, administrative, priority, and non-priority unsecured claims, as well as the debtor’s interest in exemptions and in any possible surplus property. The trustee’s duties enumerated under § 704 are specific, but not exhaustive. To properly represent the estate, the trustee must secure for the estate all assets properly obtainable under applicable provisions of the Bankruptcy Code, object to the debtor’s discharge where appropriate, defend the estate against improper claims or other adverse interests, and liquidate the estate as expeditiously as possible for distribution to creditors.

#### **1. COLLECTION AND LIQUIDATION OF ASSETS, § 704(1)**

A trustee has a duty to ensure that a debtor files all schedules and statements required under § 521 and FRBP 1007. A trustee must also ensure that a debtor surrenders non-exempt property of the estate to the trustee, and that records and books are properly turned over to the trustee.

The trustee should be familiar with the definition of property of the estate as set forth in § 541. Under § 541, all legal and equitable interests of the debtor, wherever located and by whomever held, are property of the estate. Property of the estate also includes any property that the debtor acquires or becomes entitled to acquire within 180 days after the petition date by way of inheritance, property settlement or divorce decree, or life insurance.

Property of the estate is defined more broadly in chapter 13 cases under § 1306 to include property and earnings acquired post-petition. However, if a chapter 13 case is converted to a chapter 7 case, the § 1306 definition does not apply. Upon conversion, property of the chapter 7 estate consists of property of the estate, as of the date of the chapter 13 petition, that remains in the possession of or is under the control of the debtor on the date of conversion, unless the case was converted in bad faith. § 348(f). See also Chapter 8.U for more on conversions.

In reviewing the schedules, the trustee should make a preliminary determination as to whether there appear to be assets in the case or areas warranting further inquiry at the § 341(a) meeting. The trustee should not rely upon the designation by the clerk of the bankruptcy court as to whether the case is an asset or no-asset case. The trustee should conduct an independent investigation to make this determination.

A trustee performs the duty of collecting and reducing to money property of the estate in a variety of ways. For example, the trustee may object to improper exemptions, seek disgorgement of unreasonable attorney fees paid to the debtor's counsel, compel the turnover of non-exempt property, and use the avoidance powers of § 544, *et seq.*, to recover assets. After a trustee has collected all assets of an estate, the assets must be reduced to cash for eventual distribution to creditors under § 726.

## **2. ACCOUNTABILITY OF THE TRUSTEE FOR ALL PROPERTY RECEIVED, § 704(2)**

Section 704(2) requires the trustee to be accountable for all property received, and FRBP 2015 imposes a duty on a trustee to keep records, make reports, and give notice of a case to persons holding property of the estate.

### **Control and Preservation of Property**

The trustee has the duty and responsibility to insure and safeguard all estate property and property that comes into the trustee's hands by virtue of his appointment.

In those cases where the property appears to have value for the estate, the trustee should obtain control over the property (which may include changing locks at the premises, hiring guards, etc.) and determine the extent and value of the property. The trustee also should immediately obtain insurance in an amount sufficient to protect the estate property (which may include insurance against fire, theft, vandalism, liability and other possible hazards) and take any other steps which may be reasonably necessary to preserve the assets. The trustee should request proof of insurance from the debtor and should ensure that it is continued for the benefit of the estate.

If there is no insurance and there are no estate funds available, the trustee should contact the secured creditor immediately, so that the secured creditor can obtain insurance or otherwise protect its own interest in the property. Where the uninsured property has value, the trustee may consider seeking (a) an agreement with the secured creditor to fund the expense of insurance and provide proper

safeguarding under § 506(c); or (b) a court order allowing the trustee to insure or safeguard the property at the expense of the secured creditor pursuant to § 506(c). When the property cannot be insured, the trustee should liquidate the property as quickly as possible in a reasonable manner. Under these circumstances, the trustee is strongly encouraged to file motions to reduce the time within which objections may be filed to the proposed sale.

When the property is fully secured and of nominal value to the estate, the trustee should contact the secured creditor immediately so that the secured creditor can obtain insurance or otherwise protect its own interest in the property. The trustee should immediately abandon fully secured property or uninsured property of no value to the estate. See Chapter 8.D for further information on abandonments. Note that an order granting relief from stay does not automatically constitute abandonment.

If a loss occurs as a result of the trustee's failure to insure or protect estate property, the trustee could be subject to liability including a surcharge.

### **Inventoring Property**

Pursuant to FRBP 2015(a)(1), a trustee must file a complete inventory of the debtor's property within 30 days after qualifying as a trustee, unless such inventory has already been filed. The nature and extent of the inventory depends upon the type and value of the debtor's assets. The inventory should be sufficient to enable the trustee to later verify whether an auctioneer or other liquidator has accounted for all property turned over for sale.

Generally, the debtor's schedules A and B will satisfy the requirements of FRBP 2015(a)(1) as long as the trustee is able to verify at the § 341(a) meeting that the debtor's inventory, as shown on Schedules A and B or other documents, is complete and satisfactory. The Form 1<sup>4</sup> maintained by the trustee, may provide a sufficient inventory of the debtor's assets. Nonetheless, there may be instances when the trustee will need to obtain a more detailed inventory in order to properly administer the assets. For example, if the debtor has listed Furs and Jewelry at \$10,000 in the schedules, the trustee will need to obtain a detailed list of the items. In addition to the written list, the trustee should consider using other methods to document the assets, such as videotaping the assets.

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<sup>4</sup>See Chapter 9.B for a full description of Form 1, the Individual Estate Property Record and Report.

## **Environmental Issues**

When appropriate, the trustee should take the necessary steps to abate or prevent environmental contamination by or to estate property. If property of the estate has no value and may be hazardous to the health or safety of the general public, the trustee should give immediate consideration to abandoning property under § 554(a). Before abandoning the property, however, the trustee should take all precautions possible in light of the available assets of the estate and consult with appropriate federal, state and local authorities. Consultation is advised to ensure adequate notice and appropriate consideration of public policy issues. A notation of the consultation in the estate file is recommended.

### **3. EXAMINING THE DEBTOR'S EXEMPTIONS AND STATEMENT OF INTENTION, § 704(3)**

#### **Initial Review of Exemptions**

The trustee must object to improper debtor exemptions within 30 days after the conclusion of the § 341(a) meeting or the filing of any amendment to the list or supplemental schedules, unless, within such period, further time is granted by the court. FRBP 4003(b). If the trustee does not file a timely objection to an exemption, it is deemed allowed. See Taylor v. Freeland and Krontz, 503 U.S. 638 (1992). See Chapter 8.C for further information about exemptions.

#### **Review of Statement of Intention**

Section 521(2) requires an individual debtor to file a statement within 30 days of the bankruptcy petition disclosing his intention with respect to the retention or surrender of property of the estate securing consumer debts, and further, to perform such intention within 45 days of the filing of the notice of intent. § 521. The trustee must ensure the performance of such intentions and should examine the statement of intention early in the case and seek the debtor's verification at the § 341(a) meeting that the intentions have been performed.

### **4. INVESTIGATE THE FINANCIAL AFFAIRS OF THE DEBTOR, § 704(4)**

The trustee investigates the debtor's financial affairs in the following ways:

- a. reviews the debtor's schedules of assets and liabilities, statement of financial affairs, and schedules of current income and expenditures which the debtor must file pursuant to § 521 and FRBP 1007 (see Chapter 6.C)
- b. examines the debtor at the § 341(a) meeting (see Chapter 7); and

- c. conducts such other investigation as necessary, such as following up on tips about unscheduled assets.

## **5. EXAMINE PROOFS OF CLAIM, § 704(5)**

Section 704(5) requires a trustee to examine proofs of claim and object to the allowance of any claim that is improper, if a purpose would be served by doing so. For example, if it is clear that there are only sufficient assets to pay priority creditors, then no purpose would be served by examining or objecting to general unsecured claims. See Chapter 8.O for more information about reviewing claims.

## **6. OPPOSE THE DISCHARGE OF THE DEBTOR, § 704(6)**

The trustee has a duty under § 704 to object to the debtor's discharge if advisable. Whenever appropriate, the trustee should examine the acts and conduct of the debtor to determine whether grounds exist for denial of discharge. § 727(c).

Section 727(a) provides that the court shall grant a discharge unless the debtor:

- a. is not an individual (corporations and partnerships do not receive a discharge under chapter 7);
- b. conceals property with intent to defraud;
- c. fails to preserve or conceals financial records;
- d. makes a false oath or account; presents or uses a false claim; gives, offers, receives money, property, or advantage for acting or forbearing to act; or withholds books and records;
- e. fails to explain satisfactorily the loss or deficiency of assets;
- f. refuses to obey an order of the court or to testify after being granted immunity;
- g. commits any of the acts in a through f above within one year of the date of the filing of the petition or during the case, in connection with another case concerning an insider;
- h. receives a chapter 7 or chapter 11 discharge in a case commenced within the previous six years;

- i. receives a chapter 12 or chapter 13 discharge in a case commenced within the past six years under certain circumstances; or
- j. submits a written waiver of discharge approved by the court.

A complaint objecting to discharge must be filed within 60 days of the date first set for the § 341(a) meeting. FRBP 4004(a). The court may extend this time but the motion for extension must be filed before expiration of the 60-day period. FRBP 4004(b). An order granting a creditor's motion to extend the time to file an objection does not necessarily amount to an extension of time for the trustee. The trustee must obtain a separate extension.

A discharge can be revoked within one year after it was granted if the discharge was obtained by fraud and the requesting party was not aware of it until after the discharge was granted. § 727(d)(1) and (e)(1). Alternately, pursuant to § 727(d)(2) and (3) and (e)(2), before the later of one year after the granting of a discharge or the date the bankruptcy case is closed, the discharge may be revoked on the following grounds:

- a. the debtor acquired or became entitled to property that would be property of the estate and knowingly and fraudulently concealed it from the trustee; or
- b. the debtor refused to obey a court order or to respond to a material question after a grant of immunity if the privilege against self-incrimination was invoked.

Section 727 also authorizes the United States Trustee to object to the discharge of a debtor or to seek revocation of the discharge. If the trustee has information that would support an objection to discharge but deems such an action inadvisable, the trustee should promptly bring such facts to the attention of the United States Trustee. In some cases, the United States Trustee has been held to have constructive notice of information acquired by a trustee and has been precluded from bringing an action to revoke the discharge. FRBP 7041 states that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's insistence without notice to the United States Trustee.

## **7. FURNISH INFORMATION CONCERNING THE ESTATE, § 704(7)**

The trustee should reply in an expeditious manner to inquiries from creditors and other parties in interest.



## **8. OPERATING REPORTS, § 704(8)**

Where the trustee is operating a business under § 721, the trustee must meet report filing requirements as described in Chapter 8.J.

## **9. FINAL REPORT AND FINAL ACCOUNT OF THE ESTATE, § 704(9)**

After liquidating all estate assets, converting those assets to cash, and properly investing the cash pending an examination of claims and complete performance of other duties under § 704, the trustee must make a final report and file a final account of the administration of the estate with the United States Trustee and the court. These requirements are more fully discussed in Chapter 8.S.

## **C. REVIEW OF PETITION, SCHEDULES, AND STATEMENTS**

The trustee is responsible for reviewing the sufficiency of the petition, matrix (list of creditors' names and addresses) and statements and schedules.

The debtor's petition must include the debtor's name, social security number, employer's tax identification number and all other names used by the debtor within six years prior to the filing. FRBP 1005.

In addition to the petition, the following schedules and statements must be filed:

- Schedule A - Real Property
  - Schedule B - Personal Property
  - Schedule C - Property Claimed as Exempt
  - Schedule D - Creditors Holding Secured Claims
  - Schedule E - Creditors Holding Unsecured Priority Claims
  - Schedule F - Creditors Holding Unsecured Non-priority Claims
  - Schedule G - Executory Contracts and Unexpired Leases
  - Schedule H - Co-Debtor
  - Schedule I - Current Income of Individual Debtor(s)
  - Schedule J - Current Expenditures of Individual Debtor(s)
- Statement of Financial Affairs.

If the schedules and statements do not accompany the petition, the petition should, at a minimum, be submitted with a list containing the names and addresses of all the debtor's creditors. If such a list is filed, FRBP 1007(c) grants the debtor fifteen days from the filing to supply complete schedules and statement(s) of affairs. Under FRBP 1007(a)(4) and (c), the trustee must receive notice of any request for an extension of time to file documents.

An individual debtor also must file a statement of intention with respect to the retention or surrender of property securing consumer debts. § 521. In addition, the attorney or the petition preparer for the debtor must disclose any fees received or promised in connection with the bankruptcy proceeding. See § 110(h)(1) and FRBP 2016(b). The trustee must verify submission of the above-referenced documents and take action in the event of non-compliance.

The trustee also must be aware of the following issues of special concern:

1. only a husband and wife can file a joint petition, pursuant § 302;
2. in a filing by a corporation, the petition should be accompanied by a copy of the resolution authorizing the filing;
3. in a partnership case, if fewer than all general partners of a partnership consent to the petition for relief on behalf of the partnership, the trustee should notify the United States Trustee. It is an involuntary petition under § 303(b)(3) and FRBP 1004; and
4. upon conversion of a chapter 11, chapter 12 or chapter 13 case to a chapter 7 case, unless otherwise ordered by the court, the previously filed statements and schedules are deemed filed in the chapter 7. If the case is converted from chapter 13, the debtor must file a statement of intention. In addition, the debtor-in-possession or the superseded trustee must file the final report and account and schedule of post-petition debts.

If there is no individual who is performing the duties of the corporate or partnership debtor, the trustee should request the bankruptcy court to designate a party (officer, director, partner, or person in control) to perform the duties of the debtor. FRBP 9001(5). The person who is the subject of the designation should be given notice of the trustee's application to the court.

#### **D. REVIEW OF DEBTOR'S ATTORNEY FEES**

The debtor's attorney in a bankruptcy case, whether or not the attorney intends to apply for compensation post-petition, must file a statement in compliance with § 329(a) and FRBP 2016(b) setting forth the amount of compensation paid or agreed to be paid for services in connection with the case. This statement must be filed within 15 days after the order for relief, or as otherwise ordered. The trustee should review this disclosure of compensation and make an independent determination whether the fee paid or agreed to be paid is excessive. If the fee is questionable, the trustee or the United States Trustee should move, pursuant to § 329(b) and FRBP 2017(a), to have the court review the fee

for reasonableness. To the extent the fee is excessive, the court may order cancellation of the fee agreement or the return of all or any portion of the fee.

Claims for unpaid attorney fees for pre-petition services provided to the debtor generally will be discharged in a chapter 7 case. The trustee should advise the United States Trustee if a debtor's attorney attempts to collect fees from the debtor for pre-petition services.

Some courts hold that a chapter 7 debtor's attorney may not be compensated for post-petition services from estate assets in light of a 1994 revision to § 330 which eliminated chapter 7 debtors' attorneys from the list of professionals who may be awarded compensation pursuant to that section. See, e.g., Ingllesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re American Steel Products, Inc.), 197 F.3d 1354 (11th Cir. 1999); Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distributors, Inc.), 157 F.3d 414 (5th Cir. 1998). Contra In re Top Grade Sausage, Inc., 227 F.3d 123 (3rd Cir. 2000); U.S. Trustee v. Garvey, Schubert & Barer (In re Century Cleaning Services, Inc.), 195 F.3d 1053 (9th Cir. 1999).

The trustee should be alert for retainers held by debtors' attorneys. While courts generally hold that an unearned retainer on hand at the commencement of a case constitutes estate property, the trustee may have to initiate action to obtain the balance of the retainer.

## **E. REVIEW FOR PETITION PREPARERS**

In 1994, Congress enacted legislation to regulate the conduct of lay persons who assist debtors in preparing bankruptcy petitions. Section 110 requires bankruptcy petition preparers to disclose their name, address, social security number, and fee. It prohibits preparers from signing documents for debtors, from collecting fees if court fees have not been paid, and from using the word "legal" or similar terms in advertisements. It requires preparers to provide a copy of the bankruptcy documents to the debtor at least by the time that documents are presented for the debtor's signature. The section also authorizes the court to order the return of excessive fees. The court may impose fines of up to \$500 for each statutory violation.

Section 110 also provides remedies to address certain petition preparer abuses. Damages include the debtor's actual damages, the greater of \$2,000 or twice the amount the debtor paid for the preparer's service, and reasonable attorney fees and costs. The trustee can pursue actions under § 110 and may receive an additional \$1,000 plus reasonable attorney's fees and costs.

The petition preparer statute also authorizes injunctive relief against preparers under certain circumstances. If a case is dismissed as the result of a preparer's knowing attempt

to disregard bankruptcy requirements, the preparer may be subject to criminal liability under 18 U.S.C. § 156.

Section 110 in no way permits the unauthorized practice of law.

The trustee should report potential violations of § 110 to the United States Trustee.

## **F. REVIEW FOR SUBSTANTIAL ABUSE UNDER § 707(b)**

The trustee must review the schedules, statements of affairs, and statements of current income and expenses in each case, for any evidence of substantial abuse that may provide the basis for a motion to dismiss pursuant to § 707(b). Such evidence may also arise or be confirmed at the § 341(a) meeting. If such evidence exists, the trustee should notify the United States Trustee. The United States Trustee determines whether to move for the dismissal of the case under § 707(b).

The following guidelines are provided to assist the trustee in determining whether a case involves substantial abuse.

### **1. DETERMINATION OF “PRIMARYLY CONSUMER DEBT”**

#### **Consumer Debt**

Section 707(b) applies only to a case filed by an individual with debts incurred primarily for personal, family, or household purposes.

The trustee should be aware that credit card debts may not in all instances constitute consumer debts. When the credit transaction involves a profit motive, it is outside the definition of a consumer credit transaction. Mortgage debt is considered a consumer debt, *In re Kelly*, 841 F.2d 908, 915 (9th Cir. 1988), unless the proceeds are used for a business purpose. *In re Funk*, 146 B.R. 118 (D.N.J. 1992). The trustee should be alert to residential mortgage borrowing that is used to finance business operations or investments and, therefore, constitutes a non-consumer obligation.

#### **Primarily Consumer Debt**

The term “primarily consumer debt” is not defined in the Bankruptcy Code. One court has held that a debtor’s obligations may be adjudged primarily consumer debts not only by the aggregate amount, but by their relative number as well. Other courts have concluded, however, that it is appropriate to give more weight to the aggregate amount than the number of debts. The trustee should be alert to any decisions on this point within the trustee’s judicial district.

## 2. DETERMINING SUBSTANTIAL ABUSE

The precise meaning of “substantial abuse” is presently left to judicial interpretation. The following factors have been considered by the courts in determining if there is substantial abuse under § 707(b) and should, therefore, be considered by the trustee:

### **Ability to Repay Debts**

The trustee should examine the statement of financial affairs and statement of income and expenses of the debtor for any evidence that indicates that the debtor could pay a meaningful percentage of debts owed to creditors over a period of time. The 9th Circuit Court of Appeals, in In re Kelly, 841 F. 2d 908, 915 (9th Cir. 1988), held that “a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse,” justifying dismissal under § 707(b). In addition, several other courts have indicated that the primary factor to be considered in determining the existence of substantial abuse is whether the debtor would have sufficient disposable income to repay a meaningful part of the debtor’s debts within the context of a chapter 11 or chapter 13 plan.

In analyzing the ability to repay debts, the trustee should review the debtor’s statement of income and expenditures for reasonableness and accuracy. The trustee also should consider the future earnings potential of the debtor, even if the earnings arise from an exempt source. To the extent possible, consideration should be given to the debtor’s experience, education, background, skills, health, and aptitude.

In determining disposable income, the trustee should be guided by the provisions of § 1325(b), which define disposable income as income which is received by the debtor and which is not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor.

The Fourth Circuit, however, has held that an ability to repay standing alone will not support a finding of substantial abuse. In re Green, 934 F.2d 568 (4th Cir. 1991).

### **Motivation and Factors Surrounding Filing**

Some courts have also sustained a finding of substantial abuse if the debtor’s motivation for filing evidences a lack of honesty. One leading case stated:

Substantial abuse can be predicated upon either lack of honesty or want of need.

It is not possible, of course, to list all the factors that may be relevant to ascertaining a debtor's honesty. Counted among them, however, would surely be the debtor's good faith and candor in filing schedules and other documents, whether he has engaged in "eve of bankruptcy purchases," and whether he was forced into Chapter 7 by unforeseen or catastrophic events.

In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989). Accord, First USA v. Lamanna (In re Lamanna), 153 F.3d 1 (1st Cir. 1998).

### **3. TIMING**

The trustee should notify the United States Trustee of any reasonable basis for a motion to dismiss pursuant to § 707(b) as soon as possible. If the United States Trustee decides to bring an action, it must be filed within 60 days of the date originally scheduled for the first meeting of creditors, not the date on which the meeting was actually held. FRBP 1017(e)(1).

The trustee should refer cases which appear to be abusive, but do not meet the criteria for § 707(b), to the United States Trustee for consideration under § 707(a).

### **G. TRANSMISSION OF DOCUMENTS**

In the administration of a case, the trustee and the attorney for the trustee should transmit to the United States Trustee a copy of all notices, motions, applications, pleadings and orders filed, prepared or served by the trustee (unless otherwise notified by the United States Trustee). FRBP 2002(k).

Although FRBP 5005(c) provides a safety net for creditors filing proofs of claim with the trustee, the trustee should encourage creditors to file claims with the clerk of the bankruptcy court and should not generally accept claims at the § 341(a) meeting or at any other time. If the trustee receives an original proof of claim, the trustee should note the date of receipt and transmit the claim to the clerk.

## **CHAPTER 7**

### **SECTION 341(a) MEETING**

## CHAPTER 7 – SECTION 341(a) MEETING

Section 341(a) states that the United States Trustee shall preside at the meeting of creditors. The meeting of creditors provided for in § 341(a) is the official forum where the debtor must appear and answer under oath questions from the trustee, creditors, and other parties in interest regarding the estate. The trustee is the presiding officer at the § 341(a) meeting as designee of the United States Trustee. The trustee may not delegate the duty to preside at the § 341(a) meeting. The trustee must seek prior approval, confirmed in writing, from the United States Trustee if the trustee is unable to preside at a scheduled meeting. If the United States Trustee designates another to serve at the § 341(a) meeting, the trustee is responsible for ensuring that the designated presiding officer is qualified and trained to conduct the meeting.

The § 341(a) meeting is held for the benefit of creditors and parties in interest. It is their opportunity to question the debtor regarding the debts and assets of the estate. It also provides them with the chance to learn about the debtor's financial situation in greater detail through questioning by other creditors. Prior to the § 341(a) meeting, the trustee can ask the debtor to provide documents to corroborate the information contained in the petition, statements, and schedules. See § 521(4). Such documents may include, but are not limited to: tax returns, financial statements, loan documents, trust deeds, titles, insurance policies, and wage and bank statements.

The trustee should consult with the United States Trustee regarding the general procedures for approving a debtor's alternative appearance at a creditors' meeting when extenuating circumstances prevent the debtor from appearing in person. Extenuating circumstances may include military service, terminal illness, or incarceration. In such instances, a debtor's appearance at a § 341(a) meeting may be secured by alternative means, such as a telephonic meeting under oath. A trustee may not unilaterally waive a debtor's appearance at the creditors' meeting.

When a trustee becomes aware of a debtor's disability, including hearing impairment, the trustee must notify the United States Trustee immediately so that reasonable accommodation can be made. The United States Trustee has procedures in place to address the special needs of debtors.

There is no statutory obligation to provide language interpreters at § 341(a) meetings. However, the trustee should attempt to communicate with a non-English speaking debtor by seeking the assistance of third parties present such as attorneys and family members. All parties who offer to interpret must be placed under oath. The parties should raise their right hands and respond affirmatively as the trustee administers the oath. A suggested oath is:

“Do you solemnly swear or affirm that you will truthfully and impartially act as an interpreter for the debtor during this meeting?”



If a non-English speaking debtor is unable to communicate with the trustee, or the trustee plans to take any adverse action against a non-English speaking debtor, the trustee should consult with the United States Trustee.

#### **A. CONDUCTING THE MEETING**

The trustee must conduct the meeting in an orderly, yet flexible manner, and to provide for questioning of the debtor as to matters affecting the debtor's financial affairs and conduct. The trustee's demeanor toward all parties should be appropriate and professional.

All § 341(a) meetings must be electronically recorded. The trustee is responsible for ensuring that the recording equipment is operating properly. The trustee should announce that testimony is being recorded on a tape recorder and must require parties to speak clearly. The spelling of the names of any parties formally entering their appearance on the record should be obtained in case a transcript is requested at a later date. The trustee must provide the tape recording to the United States Trustee upon conclusion of the day's meetings. The recording will be retained by the United States Trustee for a period of two years. FRBP 2003(c).

At the beginning of each § 341(a) session, the trustee should make an introductory statement. A suggested introductory statement is:

“My name is \_\_\_\_\_, and I have been appointed by the Office of the United States Trustee, a component of the United States Department of Justice, to serve as interim trustee in the cases scheduled for this morning/afternoon. I will preside at these meetings and examinations of the debtors. Debtors are here today because the Bankruptcy Code requires that they be examined under oath with respect to the petitions they have filed. All persons appearing must sign the appearance sheet. All persons questioning the debtor must state their name and whom they represent for the record, and speak clearly. All examinations will be electronically recorded and testimony is under penalty of perjury.”

The trustee must administer the oath to each debtor individually, not to the debtors collectively. The trustee should require the debtor to raise his right hand and respond affirmatively to the following:

“Do you solemnly swear or affirm to tell the truth, the whole truth, and nothing but the truth?”

FRBP 2003(b) states that the presiding officer has the authority to administer oaths. There is no requirement that the trustee must be a notary or bring a notary to the meeting to administer the oath.

The trustee should examine the debtor to the extent appropriate to determine the existence of estate assets, transfers, exemptions, prior filings, possible fraud, abuse, and other matters. Sample § 341(a) questions for individuals and businesses are provided in Appendix A. The first ten questions listed on Appendix A are required. The trustee shall ensure the debtor answers the substance of each of the ten questions, and that the answers are recorded on the § 341(a) meeting tape.

A trustee may use a questionnaire to supplement the information obtained during the oral examination of the debtor. The questionnaire may not substitute for the oral examination. If a questionnaire is used, the trustee should use discretion with respect to which answers on the questionnaire should be verified or explored further on the § 341(a) meeting tape, which is the official record of the meeting. The trustee should ensure that the tape clearly reflects the nature of the matter under discussion without the necessity of referring to the questionnaire, which in most cases will not be part of the official records. When in doubt, the trustee should place the information on the tape. In the rare instance when the trustee thinks it is appropriate or it is requested that the questionnaire be made part of the official record, the trustee must so designate this on the record and deliver the questionnaire to the United States Trustee along with the tape recording at the conclusion of the meeting.

Paraprofessionals, such as a paralegal or a petition preparer, may not sit next to the debtor at the table, advise the debtor, or stand-in for the debtor's attorney at the meeting. Representatives of the media are permitted to be present, but no one is permitted to televise, photograph, or electronically record the proceedings (other than certified court reporters). Questions by creditors and other parties in interest are allowed. Individuals who represent creditors but who are not attorneys may be present at the meeting. Generally, the trustee should permit these persons to examine the debtor. Some jurisdictions, however, may view this as the unauthorized practice of law. The trustee should consult with the United States Trustee regarding local practices.

During the § 341(a) meeting, the trustee should not answer questions seeking legal advice and should avoid actions which would result in the perception that the trustee is a judge or has judicial power. If an election is requested, the trustee should follow the procedures set forth in Chapter 4.

The trustee must exercise control over the demeanor of the debtors, attorneys, and creditors during the course of the § 341(a) meeting. Uncooperative or recalcitrant debtors should be reminded of their duties under § 521 and FRBP 4002, especially the duty to cooperate with the trustee in the administration of the estate. Questioning

should not be allowed to deteriorate to a level constituting harassment or to focus exclusively on the dischargeability of a particular debt.

Pursuant to § 341(d), the trustee must establish on the record that the debtor acknowledges an awareness of:

1. the potential consequences of seeking a discharge in bankruptcy, including the effects that this action may have on the debtor's credit history;
2. the ability to file a bankruptcy petition under a different chapter of the Bankruptcy Code;
3. the effect of receiving a discharge of debts under chapter 7 of the Bankruptcy Code; and
4. the effect of reaffirming a debt, including the debtor's knowledge of the provisions of § 524(d).

This information is contained in the information sheet available from the United States Trustee. At the § 341(a) meeting, the trustee must verify on the record that the debtor has received the information sheet and that the debtor is aware of the matters set forth in § 341(d). Establishing the debtor's awareness of these items by a questionnaire is not sufficient.

If the debtor responds in the negative, the trustee must provide a copy of the information sheet and adjourn the meeting to the end of the calendar or another appropriate time. The meeting cannot be concluded until the information has been conveyed.

If a debtor asserts the Fifth Amendment privilege in response to a particular question, the trustee should proceed with the meeting and continue to question the debtor. At the conclusion of the questioning, the trustee should adjourn or continue the meeting and immediately notify the United States Trustee. (See Chapter 7.B below for additional information.) The United States Trustee will, if appropriate, advise the United States Attorney who may take appropriate action to seek a grant of immunity. If the claim of privilege is not well founded, the trustee should seek an order from the court compelling testimony or granting such other relief as may be appropriate, such as dismissal or denial of discharge.

The trustee should inventory the debtor's property unless the trustee accepts as that inventory the debtor's schedules A and B. FRBP 2015(a)(1). Given the debtor's duty to cooperate with the trustee in the preparation of this inventory, the trustee should verify at the § 341(a) meeting that the debtor's inventory, as shown on the A and B

schedules or other documents, is complete and satisfactory. See Chapter 6.2 for further information about inventorying estate property.

After the trustee has completed the examination, the trustee should inquire if there are any creditors or parties in interest present who wish to ask questions. Parties should not be permitted to take more than a reasonable period of time to make inquiries at the meeting since they can use other avenues of discovery, such as the examination provided under FRBP 2004, to obtain more detailed information. The trustee should halt any examination that appears to be primarily aimed at harassing the debtor. The trustee should seek to balance the informational needs of the creditor with the time available to complete the entire calendar. Cases requiring more time may need to be adjourned temporarily in order to finish more routine cases. The lengthy case should be reconvened at the end of the calendar, or, if necessary, adjourned or continued to another day.

The trustee may be required to complete a record of the proceeding, such as a minute sheet, for each case. If required, a copy must be submitted promptly to the United States Trustee and filed with the clerk of the bankruptcy court, if the clerk so requests. The trustee should keep a copy in the estate file.

## **B. RESCHEDULING AND CONTINUANCES**

Continuances of § 341(a) meetings are not mandated by the Bankruptcy Code and should be granted only under exceptional circumstances. The trustee should consult with the United States Trustee about the local rules and practices regarding debtor rescheduling requests and continuances.

The trustee should not routinely continue § 341(a) meetings when the debtor appears. If a trustee must continue the meeting, however, the trustee must, if at all possible, announce the continued date to all parties present at the initial meeting, and advise the United States Trustee and, if necessary, the clerk of the bankruptcy court, of the continued date.

Any continued or rescheduled meeting should be held before the time for objection to discharge has expired unless the trustee has obtained an extension of time to object to the debtor's discharge. If the debtor does not appear at a continued or rescheduled meeting, the trustee should ensure that action is taken for dismissal, unless dismissal would not be in the best interest of the estate.

See also Chapter 7.C below regarding non-attendance by attorneys and Chapter 7.D regarding non-attendance by debtors.

### **C. NON-ATTENDANCE BY ATTORNEYS**

When the debtor's attorney fails to appear, the trustee should advise the debtor of the right to proceed without an attorney or to request a continuance to ensure the debtor is represented by an attorney. The trustee should consider filing a motion under § 329(b) to compel turnover or refund of the fees received by an attorney who unjustifiably fails to appear.

### **D. NON-ATTENDANCE BY DEBTORS**

The debtor or, in a case of a partnership or corporation, a designated representative of the partnership or corporation must attend the § 341(a) meeting. This is true even if no creditors attend, and even though there are no assets in the case. When spouses have filed jointly, the Code requires both debtors to be present at the § 341(a) meeting. The trustee should consult with the United States Trustee regarding the general procedures to be followed when one spouse does not appear.

Depending on the situation and local rules and practices, the following remedies are available to the trustee for a debtor's failure to appear:

1. Continue the § 341(a) meeting to another calendar date and notify the United States Trustee and, if necessary, the clerk of the bankruptcy court, of the new date;
2. File a motion to dismiss the case; or
3. File an application to designate an individual to perform the duties of the debtor pursuant to FRBP 9001(5) if the debtor is not a natural person. If that individual fails to appear at the § 341(a) meeting, the trustee should seek an order to compel attendance.

In any event, in an individual debtor case, if the availability of these remedies extends beyond the date fixed for objecting to the discharge of the debtor or the time to file a motion pursuant to § 707(b), then the trustee should:

1. obtain a consensual order extending the deadlines;
2. file a motion to extend the trustee's time to object to discharge; or
3. notify the United States Trustee of the need to file a motion to extend the time to move to dismiss.

## **CHAPTER 8**

# **ADMINISTRATION OF A CASE**

## **CHAPTER 8 – ADMINISTRATION OF A CASE**

The trustee should consider the likelihood that sufficient funds will be generated to make a meaningful distribution to creditors prior to administering a case as an asset case. This section describes a variety of issues for the trustee to consider.

### **A. DETERMINATION AND ADMINISTRATION OF NO-ASSET CASES**

Prior to administering a case as an asset case, the trustee must consider whether sufficient funds will be generated to make a meaningful distribution to creditors. If the trustee determines after the § 341 meeting that the case is a no-asset case, then the trustee must timely execute and file a Report of No Distribution (NDR). § 704(9).

Pursuant to the Amended Memorandum of Understanding (dated April 1, 1999) (“AMOU”), which delineates the respective responsibilities of the clerk of the bankruptcy court, the trustee and the United States Trustee in the case closing process, the trustee shall submit the NDR to the United States Trustee and the court within 60 days after the initial examination of the debtor at the § 341(a) meeting. If the trustee submits the original NDR to the United States Trustee, then the United States Trustee shall file the NDR with the court within five days of receipt. The trustee should retain a copy of the NDR in the estate file.

The purpose of the NDR is to close administration of the case. An NDR certifies that the trustee has reviewed the schedules, investigated the facts, and determined that there are no assets to liquidate for the benefit of creditors. It also certifies that the trustee has examined the debtor’s claimed exemptions and concluded that there is no purpose served to object to their allowance, and that all security interests and liens against non-exempt property are properly documented, perfected, and not subject to attack as preferences or otherwise voidable. A sample Trustee’s Report of No Distribution is attached at Appendix B.

If assets are subsequently discovered, the trustee should: (1) seek to have the case reopened, and (2) withdraw the NDR in writing to administer the assets. See Chapter 8.V below for additional procedures concerning reopening closed cases. The trustee should seek to deny or revoke the debtor’s discharge if the debtor failed to disclose the assets. See Chapter 6.B.6 regarding objections to discharge.

Pursuant to § 330(b), the trustee receives a \$60 fee in each case administered. The timing of the payment of this fee for no-asset cases varies by district. Generally, the clerk of the bankruptcy court will not submit no-asset cases to the district court for

payment of the trustee's fee until either the no-asset report is filed, the discharge order is entered, or the case is closed by the court, depending upon the local jurisdiction.

Failure to timely and properly file NDRs may result in an appropriate remedial action.

## **B. CLAIMS BAR DATE**

In most districts, a notice of insufficient assets to pay dividends is provided to creditors as part of the § 341(a) meeting notice. FRBP 2002(e). Promptly upon determination that the administration of a case will generate funds to pay creditors, the trustee must ensure that the clerk of the bankruptcy court provides notice to creditors to file proof of claims on or before a certain date. FRBP 3002(c)(5).

## **C. EXEMPTIONS**

A debtor must list property claimed as exempt on the schedule of assets filed with the court. FRBP 4003 (a). Only individuals may claim exemptions; corporations and partnerships may not. The trustee must object to improper debtor exemptions within 30 days after the conclusion of the § 341(a) meeting or the filing of any amendment to the list or supplemental schedules, unless, within such period, further time is granted by the court. FRBP 4003(b). See FRBP 4003(b) and Taylor v. Freeland and Kronz, 503 U.S. 638 (1992). The objecting party has the burden of proving that the exemptions are not properly claimed. If an objection is not filed in a timely manner, the exemption will be allowed by the court.

The trustee should object to a claimed exemption if to do so benefits the estate. The trustee may use the § 341(a) meeting to gain information on the debtor's claimed exemptions. FRBP 1009 allows the debtor to amend the bankruptcy schedules as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. Thus, where the debtor has incorrectly exempted assets that would be exempt under another section if claimed properly, or has exempted assets that provide no equity for the estate after accounting for secured claims and properly claimed exemptions, the trustee probably would not want to object. However, if allowing the improperly claimed exemption would remove assets from the estate that should be available for payment of creditor claims, the trustee must object.

Specific exemptions are not addressed in depth in this Handbook. Section 522 sets forth allowable exemptions under federal bankruptcy law. The trustee must know which states have opted out of the federal exemptions. If a state has opted out, the state property exemptions apply instead of those provided in § 522(d), although other non-bankruptcy federal exemptions will apply. If a state has not "opted out," a debtor may still elect either state or federal exemptions.



## D. ABANDONMENTS

Abandonments of property are governed by § 554. A trustee should abandon any estate property that is burdensome or of inconsequential value to the estate. Property should be abandoned when the total amount to be realized would not result in a meaningful distribution to creditors or would redound primarily to the benefit of the trustee and professionals.

In determining whether property has consequential value to the estate, the trustee should consider a number of issues, for example:

1. The amount, validity and perfection of purported security interests against such property. Since the trustee has a duty to use the trustee's avoidance powers under §§ 544, 545, § 547, and 548, to the extent a purported lien is invalid or could be avoided by the trustee, the property should not be abandoned if the value thereof without the lien would benefit the estate.
2. The value of the property. Value can be determined in various ways. The trustee can consult with the debtor and the debtor's attorney, have the secured party provide documentation as well as the pay-off statement, obtain price lists, conduct physical inspections or appraisals, and use common sense. The precision with which value is determined often depends on the margin between the lien or encumbrance and the estimated value of the property.
3. Tax considerations, including any § 724(b) issues.
4. Administrative expenses and litigation costs to be borne by the estate resulting from the recovery and sale of the property.

The trustee should be able to justify the decision to abandon estate property. Any documentation in support of this decision should be kept in the estate file.

Scheduled property that is not administered before the case is closed is deemed abandoned upon entry of the order closing the estate. § 554(c). However, the trustee should not rely on the deemed abandonment provisions of § 554(c) where property may expose the estate to some type of liability. An order granting relief from stay does not remove property from the estate. The trustee should immediately abandon fully secured property or uninsured property of no value to the estate. Immediate consideration should be given to property of no value to the estate which may be hazardous to the health or safety of the general public. Such property should be abandoned after consultation with appropriate federal, state, and local authorities.

Creditors are entitled to notice of a proposed abandonment. § 554(a). A notice of abandonment should identify each asset to be abandoned by reference to the description provided in the debtor's schedules and any unlisted assets should be clearly described. The notice should also provide such additional information as is needed to demonstrate the basis upon which the decision to abandon was made, such as: (a) the amount of secured claims exceeds the value of the asset; (b) the costs of recovering and/or liquidating the asset are estimated to exceed its value to the estate; (c) the expenses of preserving the asset are estimated to exceed its value to the estate; and (d) any other information that would assist creditors in evaluating the proposed action of the trustee.

## **E. TAX CONSIDERATIONS**

### **Overview**

Particularly with respect to tax issues, this Handbook contains only an abbreviated summary of the provisions which may be of interest to chapter 7 trustees. The Handbook is not intended to answer all of the questions that might arise in each bankruptcy case. Tax advice should be sought on a case-by-case basis when the need arises. See also IRS Publication No. 908 (Bankruptcy).

Sections 346 and 728 of the Bankruptcy Code, as well as § 1398 and §1399 of the Internal Revenue Code, 26 U.S.C. § 1, et. seq., set forth special tax provisions with which the trustee should be familiar. These sections generally provide that the trustee must prepare and file appropriate income tax returns for any estate income earned during the administration of the estate. (If the debtor has not already done so, the trustee also may consider filing pre-petition tax returns, especially where it appears the estate would be entitled to a refund. The trustee cannot sign an individual tax return for a period that ended before the bankruptcy filing. If the debtor will not sign the return, the trustee can have the returns prepared and then ask the taxing authority to file the return.)

In preparing estate tax returns, the trustee should review the debtor's prior year returns. If the debtor is unwilling or unable to provide copies of these returns, the trustee can request copies from the IRS using Form 4506. Such requests should be directed to the Service Center where the debtor's tax returns were filed. 26 U.S.C. § 6103(e)(4)-(5). The trustee may wish to contact the local IRS Special Procedures Unit to determine if it can obtain the returns more quickly.

Under certain limited circumstances, the IRS may grant the trustee relief from filing a particular estate tax return. The trustee may wish to consult with the IRS Special Procedures Unit for further information. See also Rev. Rul. 84-123, 1984-2 Cum. Bull. 244 and Rev. Proc. 84-59, 1984-2 Cum. Bull. 504.

## **Individual Chapter 7 Debtors**

For both federal and state tax purposes, the individual and the bankruptcy estate are treated as separate taxable entities, and a separate tax identification number is required for the estate. If a husband and wife file a joint petition under § 302, absent substantive consolidation, two separate estates and two separate taxable entities are created. Each estate obtains its own tax identification number and files its own tax returns.

The trustee must file a federal income tax return in an individual chapter 7 case for any year in which gross income of the estate equals or exceeds the exemption amount under 26 U.S.C. § 151(a) plus the basic standard deduction under 26 U.S.C. § 63(c)(2)(D) for a taxpayer filing as married filing separately. (For example, the filing threshold for 2000 is \$6,475.) The trustee also must file state income tax returns if the estate of an individual debtor has net taxable income for the entire period after the order for relief during which the case is pending. § 728(b).

The trustee files a return for an individual's estate using Form 1041 (U.S. Income Tax Return for Estates and Trusts) as a transmittal form with a Form 1040 (U.S. Individual Income Tax Return) together with appropriate forms and schedules. The tax to the estate is computed generally in the same manner as for an individual and the rate schedules used are those for married individuals filing separate returns under 26 U.S.C. § 1(d), pursuant to 26 U.S.C. § 1398(c). For joint debtors, a separate Form 1041 and the related attachments are filed for each spouse's estate.

The gain on the sale of an individual chapter 7 debtor's residence is excluded from gross income of the debtor's bankruptcy estate to the extent provided by 26 U.S.C. § 121. The estate succeeds to the holding period and character of the property under 26 U.S.C. § 1398(g)(6), and the estate is treated as the debtor with respect to such asset under 26 U.S.C. § 1398(f)(1). See In re Bradley, 222 B.R. 313, 318 (Bankr. M.D. Tenn. 1998); In re Popa, 218 B.R. 420, 428 (Bankr. N.D. Ill. 1998), aff'd sub nom. Popa v. Peterson, 238 B.R. 395 (N.D. Ill. 1999).

The estate is entitled to deduct administrative expenses allowed under § 503 and any fees and charges assessed by the court to the extent such deductions are not otherwise disallowed by other provisions of the Internal Revenue Code. 26 U.S.C. § 1398(h).

Generally, the debtor's tax attributes are transferred to the estate upon commencement of the case. The attributes are determined as of the first day of the taxable year in which the petition is filed, generally this is January 1<sup>st</sup> of the year of filing, but if the debtor makes a short-year election, the attributes are determined as of the date of filing. The debtor's discharge may affect the use of tax attributes by the estate. Consideration should be given to the effects of 26 U.S.C. § 108 on the debtor's tax attributes.

The debtor in an asset case can make a short-year election which terminates the debtor's taxable year on the date before the petition is filed and begins a second taxable year on the date of filing. 26 U.S.C. § 1398(g)(2). If the debtor makes this election, any tax owing for the pre-petition short year is treated as a priority tax claim against the estate.

The trustee has the option to follow the individual debtor's taxable year (usually the calendar year) or adopt a fiscal taxable year. 26 U.S.C. § 1398(j)(1). The trustee also is permitted to change the estate's annual accounting period once without the approval of the Secretary of the Treasury, as otherwise required. These options enable the trustee to do some tax planning to minimize any tax liability and to expedite closure of the case.

The trustee must disclose to the debtor all information contained in the estate tax returns that can affect the debtor's future or past returns since the debtor acquires the tax attributes of the estate upon its closing.

### **Partnership and Corporate Chapter 7 Debtors**

**(Note: Limited liability corporations (LLCs) and limited liability partnerships (LLPs) are treated the same as partnerships.)**

The filing of a bankruptcy petition by a partnership or corporation does not create a separate taxable entity. There is no break in the accounting period of the partnership or corporation and the return, filed under the debtor's tax identification number, must reflect the pre- and post-petition income and deductions. The trustee files a corporate income tax return using Form 1120 (U.S. Corporate Income Tax Return) or Form 1120S (U.S. Income Tax Return for an S Corporation) and a partnership tax return on Form 1065 (U.S. Partnership Income Tax Return), with appropriate forms and schedules attached to each.

Unless a corporation is exempt from income tax under 26 U.S.C § 501(a), corporate returns must be filed by the trustee regardless of whether the corporation has income. 26 U.S.C. 6012(a). The trustee must file state income tax returns for a corporation unless the corporate debtor lacks post-petition net taxable income for the entire period after the order for relief during which the case is pending. § 728(b). Upon application to the IRS District Director, the IRS may waive the requirement to file federal returns if the corporate debtor has ceased business operations and has neither assets nor income. See Rev. Rul. 84-123, 1984-2 Cum. Bull. 244 and Rev. Proc. 84-59, 1984-2 Cum. Bull. 504.

For partnership cases, the chapter 7 trustee must file the federal and state tax returns regardless of the amount of gross income.

## **Employment Taxes and Other Tax Forms**

If the debtor was an employer, the trustee must file any Form 941 (Employer's Quarterly Federal Tax Return), for withheld federal income and FICA taxes, or Form 940 (Employer's Annual Federal Unemployment Tax Return), for unemployment taxes, that was not filed by the debtor before commencement of the bankruptcy case. A failure to file these returns may lead to the imposition of penalties against the trustee or the estate.

In addition, the trustee must withhold all applicable federal and state income, social security, and medicare taxes from any wage claims paid by the estate. The taxes must be properly and timely deposited with a financial institution or paid with the return. Further, depending upon the business the debtor conducted, the trustee may need to file sales, excise and other tax returns in order to establish the amount of the taxing authority's claim.

The trustee may also have to file information returns (Form 1099 series) if certain payments are made. For example, Form 1099-INT must be supplied to the payee and to the IRS when a trustee makes a payment of interest aggregating \$10 or more. 26 U.S.C. § 6049. Similarly, the trustee may be required to file Form 1099-MISC when \$600 or more in fees are paid to attorneys, accountants and other professionals for their work in assisting in the administration of the estate. Payments made to an attorney where the attorney's fee cannot be determined (such as payment of a settlement) must be reported to the IRS and the attorney without application of the \$600 limitation.

## **Employee W-2 Forms**

If the trustee pays wages, including pre-petition wage claims, the trustee is responsible for preparing and filing W-2 forms for the wages paid and for sending copies to the employees. For those cases in which the trustee does not pay any wages, but wages were paid by the debtor during the calendar year of the bankruptcy petition, the trustee will receive requests from the employees for wage withholding information in order to complete their personal income tax returns. In these circumstances the trustee may complete W-2 forms to give to the employees based on the corporate records or may make those records available to the former employer or former employees to assist them in reconstructing the information. In any event, if an employee is unable to obtain Form W-2 for wages paid by the debtor pre-petition, the employee should be instructed to secure Form 4852 from the IRS and attach it to Form 1040 in order to obtain credit for the estimated amount of taxes withheld. For further information, the trustee may consult IRS Circular E (The Employer's Tax Guide).

## **Sales and Abandonments**

When estate property is sold, the estate recognizes a taxable gain or loss. Any resulting tax liability is treated as an administrative expense. As previously noted, the gain on the sale of an individual chapter 7 debtor's residence is excluded from gross income of the debtor's bankruptcy estate to the extent provided by 26 U.S.C. § 121. The estate succeeds to the holding period and character of the property under 26 U.S.C. § 1398(g)(6), and the estate is treated as the debtor with respect to such asset under 26 U.S.C. § 1398(f)(1). See the discussion above under Individual Chapter 7 Debtors.

The trustee should abandon assets that will not generate net proceeds sufficient to pay any tax liability generated by the sale. For example, the estate is liable for any taxable gain upon the sale of property, even if the proceeds are abandoned. See, In re Bentley, 916 F.2d 431 (8<sup>th</sup> Cir. 1990). In an individual case, the estate also may be liable for any taxable gain from foreclosure after relief from the automatic stay is granted if the property is not abandoned before the foreclosure sale. Compare In re Nebel, 175 B.R. 306, 311-12 (Bankr. D. Neb. 1994) (automatic stay relief not an abandonment), with Catalano v. Commissioner, 79 T.C.M. (CCH) 1632 (Mar. 9, 2000) (automatic stay relief equals abandonment).

Some courts have held that when a trustee abandons property of an individual's chapter 7 estate, whether during the bankruptcy under § 554(a) or at the close of the case under § 554(c), the abandonment is a tax-free transaction and any tax liabilities resulting from the subsequent disposition of the property are borne by the individual. Thus, if an asset is sold or foreclosed upon after abandonment, any tax liabilities as a result of the sale or foreclosure are the responsibility of the debtor, not the trustee. For the minority view, see, In re A.J. Lane & Co., Inc. 133 B.R. 264 (Bankr. D. Mass. 1991); In re Rubin, 154 B.R. 897 (Bankr. D. Md. 1992). The abandonment of or failure to abandon property by the trustee in a corporate or partnership case does not affect the tax consequences to the estate of a subsequent sale or foreclosure.

## **Failure to Pay**

The trustee should be mindful of the obligation to file appropriate returns and to pay tax liabilities on behalf of the estate. See generally, Howard, *An Overview of the State and Federal Tax Responsibilities of Bankruptcy Trustees and Debtors*, 93 Com. L.J. 43 (1988). A trustee who fails to comply with the federal withholding provisions runs the risk of being held personally liable for trust fund taxes not collected and paid over to the government. Similarly, the trustee may be held personally liable when an estate does not have sufficient funds to pay the taxes due from the sale of estate assets. See, e.g., In re San Juan Hotel Corp., 847 F.2d 931 (1<sup>st</sup> Cir. 1988) (trustee surcharged interest and penalties incurred by the estate for failing to seek out and pay estate taxes where

sufficient funds existed to pay them); In re Sapphire Steamship Lines, 762 F.2d 13 (2d Cir. 1985) ( non-operating trustee of a corporate debtor's estate required to make estimated quarterly payments).

In some circumstances, the trustee can seek relief under 26 U.S.C. § 6658 from having penalties imposed under 26 U.S.C. §§ 6651, § 6654, or § 6655 for failure to pay certain taxes. Such relief is conditioned on showing that (1) the failure to pay taxes incurred by the estate resulted from a court order finding probable insufficiency of funds or (2) the tax was incurred by the debtor pre-petition, and either the petition was filed prior to the tax return due date or the penalty was imposed after the petition was filed. 26 U.S.C. § 6658(a). However, relief under this section is not available for cases involving the failure to pay employment taxes. 26 U.S.C. § 6658(b).

### **Quick Audits**

Under § 505(b), the trustee may request determination of unpaid estate liabilities for any taxes incurred during the administration of the case by filing the tax return and requesting that determination from the appropriate tax agency. The procedure, which is known as the “quick audit,” allows the trustee to wind-up the administration of the case expeditiously.

In the case of federal taxes, the trustee must file a written application with the IRS District Director for the district where the bankruptcy case is pending. The application must be submitted in duplicate and executed under penalty of perjury. The application must be accompanied with an exact copy of the return(s) filed by the trustee and a statement as to where the original return(s) were filed. Any tax shown owing on the return must have been paid. The envelope should be marked: “For the Personal Attention of the Special Procedures Function. DO NOT OPEN IN MAIL ROOM.”

The agency must give notice within 60 days that the return has been selected for audit and has a total of 180 days to complete the examination unless an extension of time is granted by the court. If the agency does not give notice or complete its examination within the applicable time limits, the trustee is discharged from liability, absent fraud or a material misrepresentation in the return. The trustee also is discharged upon paying the tax determined to be due by the agency or by the court upon completion of the quick audit.

The trustee should consult Revenue Procedure 81-17, 1981-1 Cum. Bull. 688 for the quick audit procedures applicable to federal taxes.

## **F. TURNOVER DEMANDS**

When assets in which there is equity are in the possession or control of the debtor or third parties, the trustee should seek to gain control of those assets as soon as possible. Normally, the assets will be delivered to the trustee voluntarily and without court order. The request for the turnover of property from the debtor can be made on the record at the § 341(a) meeting. In most cases, the trustee should put requests for turnover in writing, designating a time limit for compliance.

If the initial requests do not produce results, the trustee should seek a court ruling requiring the debtor or third party to give up possession to the trustee. An action against the debtor is commenced by motion. An action against a third party proceeds under FRBP 7001(1) as an adversary proceeding. If there is a danger that the assets are wasting in the hands of the debtor or third party, the trustee should request a hearing forthwith or a temporary restraining order.

Sections § 542 and § 543 govern the turnover of property. Subsection 542(a) contains the general requirement that estate property be delivered to the trustee. Subsection 542(e) allows the court to order a person holding papers or other recorded information about the debtor's property or financial affairs to turn over the property rather than just disclose the information. Section 543 addresses the turnover of property by a custodian.

In chapter 11 or chapter 13 cases that are converted to chapter 7, FRBP 1019(4) requires that any debtor or trustee turn over to the chapter 7 trustee all records or property of the estate in his possession or control. See Chapter 8.U. See also Chapter 6.B.1 for a discussion of property of the estate in cases converted from chapter 13 to chapter 7.

## **G. EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Section 365 provides that the trustee may assume or reject unexpired leases or executory contracts. This authority is subject to court approval. It is also subject to limitations set forth in § 365(b), (c), and (d).

A proceeding to assume, reject, or assign an executory contract or unexpired lease is a contested matter. See FRBP 6006(a). The assumption or rejection of an executory contract or unexpired lease must be sought within 60 days of the filing of the petition. An extension may be requested from the court, for cause, but must be obtained within the original 60-day period. The contract or lease is deemed rejected if a motion for assumption is not filed within the time limitations, pursuant to § 365(d)(1).

The trustee should promptly evaluate unexpired leases and executory contracts for potential value or detriment to the estate. The trustee's failure to timely reject may result in the accrual of administrative expense liability to the estate. See, e.g.,



§ 365(d)(3) which requires the trustee to timely perform the obligations of the debtor, such as payment of rent, with respect to an unexpired lease of nonresidential real property up until the time of assumption or rejection.

Assumption of unexpired leases or executory contracts may be desirable for favorable leases or contracts which the trustee can assume and then contemporaneously assign for consideration. The trustee must cure, or provide adequate assurance of a prompt cure of, any default in an unexpired lease or executory contract in order to assume the lease or contract. The trustee also is required to compensate or provide adequate assurance of prompt compensation to non-debtor parties for pecuniary loss resulting from the default and to provide adequate assurance of future performance under such lease or contract.

FRBP 6006 provides for the procedures to be followed in dealing with § 365 motions.

The trustee may encounter a situation in which business property needs to be used for a period of time to secure inventory or provide a sale location. The trustee should negotiate with the landlord for short-term use of the facilities with rental cost to be treated as an administrative expense to be paid from the sale proceeds. This falls short of assuming the debtor's lease or contract for purchase.

The trustee should be alert to any new case law dealing with the definition of "executory contract," because this is a subject on which courts are not in complete agreement.

## **H. AVOIDANCE POWERS**

A fundamental goal of the Bankruptcy Code is to ensure equality of distribution among creditors of the same class. The trustee is provided with various avoiding powers in §§ 544 - 553 as tools to be used to avoid unequal treatment among creditors of the same class or other parties in interest. The trustee should be familiar with these Bankruptcy Code sections and alert to their application in individual cases.

Generally, any action brought by the trustee to recover money or property pursuant to the trustee's avoiding powers must be brought as an adversary proceeding. FRBP 7001. The trustee does not need court approval to prosecute such an action. FRBP 6009.

### **Section 544 - General Power**

This section vests the trustee with the powers of a hypothetical judicial lien creditor or bona fide purchaser of real property under state law. The effect is to empower the trustee to avoid unperfected and secret liens, even if the debtor or trustee has knowledge of these liens. This section also allows a trustee to exercise the rights of actual unsecured creditors to avoid liens under state fraudulent and preferential conveyance

laws, to avoid defective bulk transfers, and to employ state equitable remedies such as the marshaling of assets.

### **Section 545 - Statutory Liens**

This section empowers the trustee to avoid certain statutory liens, such as landlord liens, against the debtor's property within the terms and conditions set out in the section. Note that "statutory lien" is defined in § 101(53).

### **Section 546 - Limitations**

This section places limitations on the trustee's power. Limits are specified as to:

1. statute of limitations, the later of two years after the entry of the order for relief or one year after the appointment or election of the first trustee, or the time the case is closed or dismissed, whichever occurs first;
2. post-petition perfection authorized by non-bankruptcy law;
3. reclamation - statutory or common law;
4. producers of grain or fishermen; and
5. payments regarding settlement or margin accounts, repurchase agreements or swap agreements.

### **Section 547 - Preferences**

This section deals with preferential transfers. It is probably the most important and most frequently used avoiding power of the trustee. The trustee may avoid any transfer of an interest of the debtor in property:

1. to or for the benefit of a creditor;
2. for or on account of an antecedent debt owed by the debtor before the transfer was made;
3. made while the debtor was insolvent;
4. made on or within 90 days of the date the petition was filed; and
5. which enables the creditor to receive more than the creditor would have received if the case was a case under chapter 7 and the transfer had not been made.

All five of the conditions must be present to avoid the transfer. The 90-day time period is extended to one year if the transfer is to an “insider” as defined in § 101(31). The transfer in question can be the granting or perfection of a lien or security interest as to property of the debtor.

The trustee should become familiar with the provisions of § 547(c) which define transfers that the trustee cannot avoid. A transferee will most likely raise a provision of this subsection as a defense to an avoidance action brought by the trustee.

### **Section 548 - Fraudulent Transfers**

This section allows the trustee to avoid transfers that are of a different nature than the preferential transfers described above. While preferential transfers are most often made to creditors, fraudulent transfers are most frequently made to family or friends. The trustee may avoid a transfer or obligation made or incurred within one year before the date of the filing when:

1. the transfer or obligation involved an actual intent to hinder, delay, or defraud creditors, without regard to the solvency or insolvency of the debtor; or
2. the debtor received “less than a reasonable equivalent value” in exchange for the transfer where:
  - a. the debtor was or became insolvent as a result of the transfer;
  - b. the debtor was left with unreasonably small capital for his business; or
  - c. the debtor intended to incur debts beyond his ability to pay them as they mature.

The trustee should be aware of state fraudulent conveyance laws which may allow avoidance of transfers beyond the one year period, through application of § 544(b).

### **Section 549 - Post-Petition Transfers**

This section recognizes the trustee’s right to avoid any transfer of property made after the commencement of the case that is not specifically authorized by the Bankruptcy Code or by the court. If such a transfer was made voluntarily, the trustee should notify the United States Trustee who should make a referral to the United States Attorney if it appears that there may have been a violation of 18 U.S.C. § 152. If the transfer was involuntary, the trustee may bring contempt proceedings against the transferee for violating the automatic stay and request damages for any diminution of estate funds resulting from the unauthorized transfer.

### **Section 553 - Setoff**

This section recognizes the right to offset for mutual, pre-petition, allowed claims and takes such transactions out of the preference category. The section places limits on the right of the offset as to claims to which the creditor became entitled to within 90 days of the filing of the petition.

### **Section 724(a) - Fines, Penalties, or Forfeitures**

This section allows the trustee to avoid liens that secure claims for fines, penalties, forfeitures, or multiple, exemplary, or punitive damages, to the extent such claims are not compensation for actual pecuniary losses.

## **I. CONTESTED MATTERS AND ADVERSARY PROCEEDINGS**

FRBP 9014 provides that, in a “contested matter,” relief shall be requested by motion and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. Unless the court orders otherwise, no response to a motion is required. However, local rules may require a response. In essence, contested matters are disputes not designated as adversary proceedings in FRBP 7001.

Adversary proceedings are lawsuits commenced by a complaint. The types of actions that must be brought as adversary proceedings include:

1. To recover money or property, except a proceeding to compel the debtor to deliver property to the trustee or a proceeding under § 554(b), § 725, or FRBP 2017 or 6002;
2. To determine the validity, priority, and extent of a lien or other interest in property;
3. To approve of the sale of the interest of both the estate and a co-owner in property;
4. To object to or revoke a discharge;
5. To revoke an order of confirmation of a chapter 11, chapter 12 or chapter 13 plan;
6. To determine the dischargeability of a debt;
7. To obtain an injunction or other equitable relief;

8. To subordinate any allowed claim or interest except in chapter 9, chapter 11, chapter 12 or chapter 13 plans;
9. To obtain a declaratory judgment, or
10. To determine a claim or cause of action removed to a bankruptcy court.

FRBP 7001. FRBP 7001-7087 specify the procedures applicable to adversary proceedings. These rules incorporate many of the Federal Rules of Civil Procedure.

## **J. OPERATING THE DEBTOR'S BUSINESS**

Under § 721, the court may authorize a trustee to operate the business of a debtor for a limited period of time. In order for the court to grant such a request, two basic requirements must be met. First, operation of the debtor's business must be in the best interest of the estate. Second, such operation must be consistent with the liquidation of the estate.

Section 721 allows a trustee to sell the business as a going concern. Unlike a chapter 11 case, in a chapter 7, only the trustee and not the debtor may be authorized to operate the debtor's business. Such authorization might be appropriate, for example, for the interim operation of the debtor's business to complete work in process if the final product will realize a net return greater than would be the value of the component parts sold individually. Similarly, continued operation of the debtor's business may be authorized when it appears that the debtor's business can be sold for a greater price as a going concern or when sudden termination of the business would cause great hardship to the general public or innocent third parties, such as patients in a nursing home.

The trustee should consider the following factors in determining whether continued operation is in the best interests of the estate:

1. whether operating the business will result in an operating loss;
2. the tax consequences of operating the business;
3. the costs necessary to bring the business within compliance of local laws to the extent local laws do not conflict with the Bankruptcy Code;
4. potential liabilities and claims against the estate and the trustee which may arise from the operation of the business; and
5. the length of time the business will be operated.

Even when the court finds operation of a business will increase the estate's value without endangering the estate assets, the trustee should seek to operate the business for the shortest practical period. The trustee should either close the case, liquidate the

business, or convert the case to chapter 11 within a reasonable time, normally not to exceed one year from entry of the order authorizing operation of the business.

Pursuant to § 721, the trustee must obtain a court order approving and authorizing operation of the debtor's business. The trustee must consult with the United States Trustee prior to seeking authority to operate the business to discuss the nature of the operation and cash management controls, and to obtain the appropriate monthly operating business report form required pursuant to § 704 (8). Note that the format of the operating report may vary from district to district.

The trustee's blanket bond may not cover the trustee's operation of a business in a chapter 7 case. The trustee should discuss with the United States Trustee whether it is necessary for the trustee to acquire a separate bond.

Having a general duty to maintain and preserve property of the estate, the trustee of an operating business should ensure that the estate's assets are insured against all normal business risks including general liability, property damage, and worker's compensation, as well as all other types of insurance that may be required for a particular operation. A trustee who exceeds his or her granted authority, or is guilty of a breach of his or her fiduciary duty, may be personally liable for any loss to the estate.

The trustee may not use cash collateral to continue the operation without first obtaining an order of the court, unless the creditor consents. When the trustee operates the debtor's business, the ability of the trustee to use, sell, or lease property of the estate in connection therewith, or to obtain credit or incur debt, is governed by §§ 363 and 364. The trustee may, however, sell or lease property in the ordinary course of the business without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or hearing, except that the trustee may not use cash collateral without a court order and the creditor's consent.

The trustee operating a business may obtain unsecured credit and incur unsecured debt in the ordinary course of the business without notice or hearing or other court authority, and the debts incurred become an administrative expense. The trustee may not, however, borrow money or incur unsecured credit other than in the ordinary course of business without court approval after notice and hearing.

If the business has employees, the trustee must withhold income, social security, and other applicable taxes from any wages paid, as well as file employment tax returns and remit the amounts withheld, plus the employer portion of the taxes, to the appropriate taxing authority. For further information, the trustee should consult IRS Circular E (Employer's Tax Guide). See also Chapter 8.E above concerning Tax Considerations.

The trustee also must comply with other laws applicable in the state(s) in which the business operates. See 28 U.S.C. § 959(b).

If it is apparent that the estate would benefit from an extended period of operation, the trustee should consider filing a motion seeking conversion of the case to chapter 11 under § 706(b), and requesting the appointment of a chapter 11 trustee pursuant to § 1104(a). The trustee should determine whether a proposed plan of liquidation could satisfy the requirements of confirmation under § 1129. If the trustee fails to request conversion of the case and the appointment of a chapter 11 trustee, the United States Trustee may take appropriate action to do so.

## **K. SALE OF ASSETS**

### **1. GENERAL STANDARDS**

Section 363(b) permits a trustee to use, sell or lease property of the estate only after notice to creditors and a hearing. The only exception to the notice requirement is when the contemplated transaction is in the ordinary course of the debtor's business. The liquidation of estate assets by a chapter 7 trustee rarely falls within the "ordinary course of business exception" because the debtor's operations cease upon the filing of the chapter 7 case. A trustee, therefore, must comply with the notice and hearing requirements of § 363(b) before liquidating an estate asset.

Generally, the trustee begins liquidating estate assets after the § 341(a) meeting. Exigent circumstances, however, may require liquidation of assets immediately after the case is filed.

A trustee should only sell assets that will generate sufficient proceeds to ensure a distribution to unsecured creditors, priority or general. In evaluating whether an asset has equity, the trustee must determine whether there are valid liens against the asset and whether the value of the asset exceeds the liens. The trustee must also consider whether the cost of administration or tax consequences of any sale would significantly erode or exhaust the estate's equity interest in the asset. If the sale of an asset would result in little or no equity for the estate for the benefit of unsecured creditors, the trustee should abandon the asset. See Chapter 8.D above regarding Abandonments.

It is a violation of federal criminal law for a trustee or officer of the court to purchase directly or indirectly or otherwise deal in property of the estate for which the trustee serves. 18 U.S.C. § 154. While a trustee is not specifically prohibited from purchasing assets from an estate administered by another trustee, the practice should be avoided to eliminate any appearance of impropriety. Similarly, sales to

professionals regularly retained by a trustee should be avoided. A trustee or a professional regularly employed by the case trustee, including the auctioneer, a family member of the trustee or professional, or an employee of the trustee or professional, are not permitted to bid or to buy property at a private sale or at an estate sale conducted by the auctioneer. The United States Trustee will object to any proposed sale of estate property to either a trustee or a professional person regularly employed by the case trustee, a family member of the trustee, or an employee of the trustee. If the trustee becomes aware of any indications of sales to insiders or of collusion in bidding, the sale should immediately be stopped, and the matter reported to the United States Trustee.

Creditors must receive 20 days notice of a proposed sale of estate property. FRBP 2002(a)(2) and 6004(a). The court, for cause, may order a shorter notice period. FRBP 6004(d) provides that when all non-exempt assets of the estate have an aggregate gross value of less than \$2,500, it is sufficient to give a general notice of the trustee's intent to sell. The notice does not have to conform to the requirements of FRBP 2002(c). FRBP 6004(d).

A hearing on the sale or an order authorizing or confirming the sale is not required by FRBP 6004, unless an objection is filed. However, in some jurisdictions, the trustee may be required to file a motion and obtain a court order to sell property.

Objections to the sale must be filed within 15 days from the mailing of the notice or within the time fixed by the court. Unless the court orders otherwise, objections to a sale must be filed and served five days before the date set for the proposed action. FRBP 6004(b). An objection to sale is deemed a request for a hearing and the matter proceeds as a contested matter. FRBP 9014.

Notice of a proposed use, sale, or lease of property of the estate must be provided to the clerk of the bankruptcy court, debtor, United States Trustee, and all creditors. The following information should be included in the notice:

- a. Type of sale (private, auction, etc.);
- b. Location, date, and time of public sale;
- c. Description of assets;
- d. Terms and conditions of sale;
- e. Factors used to establish value (appraisal, book value, etc.) in a private sale;



- f. Procedure and time period for filing objections;
- g. Amount of liens and identity of lien holders; and,
- h. In a private sale, identity of purchaser and relationship, if any, to any creditor or party in interest.

Generally, all sales should be paid for in cash equivalents, such as certified checks, cashier's checks, and money orders. The trustee normally should not accept a promissory note or installment payments. See also Chapter 8.L below regarding Periodic Payments.

## **2. SALE FREE AND CLEAR OF LIENS**

Section 363(f) allows a trustee to sell property of the estate free and clear of an interest of an entity other than the estate, only if:

- a. applicable non-bankruptcy law would permit a sale of such property free of the interest;
- b. the entity consents;
- c. the interest is a lien and the sale price is greater than the aggregate value of all liens on the property;
- d. the interest is in bona fide dispute; or
- e. the entity could be compelled in a legal or equitable proceeding to accept a money satisfaction of its interest.

The bankruptcy court may approve a sale over objections of a lien holder or any entity with an interest in the property, with liens attaching to the proceeds.

A lien holder cannot be charged with general expenses of administration, or the expenses of the case, and preservation of the property, except as incurred for the lien holder's benefit. If the trustee can establish that the sale was necessary to the preservation of the lien holder's interest in the collateral, the trustee may be able to recover sale expenses under § 506(c).

## **3. SALE OF JOINTLY OWNED PROPERTY**

Section 363(h) allows a trustee to sell both the estate's interest and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint

tenant, or tenant by the entireties, if specific conditions are met. An action to obtain approval pursuant to § 363(h) to sell jointly owned property must be brought by the trustee as an adversary proceeding. FRBP 7001.

#### **4. SALE OF SECURED PROPERTY**

Generally, a trustee should not sell property subject to a security interest unless the sale generates funds for the benefit of unsecured creditors. A secured creditor can protect its own interests in the collateral subject to the security interest. In certain limited circumstances, however, a trustee may properly sell secured property that would generate no proceeds for the benefit of unsecured creditors (“fully secured property”). For example, a trustee may be able to satisfy in full a blanket security interest on multiple units of property by selling only one unit. Similarly, a trustee may be able to obtain a higher price from an aggregate sale of assets than from selling the assets individually. In a case with funds otherwise available for unsecured creditors, a trustee also may sell fully secured property to eliminate a deficiency, if the secured creditor agrees to waive any unsecured claim for a deficiency in the event the sale does not fully satisfy the security interest.

In determining whether the sale of secured property is appropriate, the trustee must consider all of the costs associated with the sale, including trustee fees and any possible adverse tax consequences resulting from the sale, and the sale’s effect on the trustee’s ability to otherwise administer and close the case as expeditiously as possible. Administering fully secured property should always be viewed as the exception taking into account the particular circumstances of each case.

When selling fully secured property, the trustee must administer the sale to avoid a diminution of funds otherwise available for unsecured creditors. The trustee should obtain an agreement in writing from the secured creditor to recover the costs of sale from the collateral pursuant to § 506(c). The trustee must disclose the terms of any agreement between the trustee and the secured creditor at the outset, for example, in the notice of proposed sale, and in the trustee’s final report and request for compensation and reimbursement of expenses. Any sums recovered from the collateral under § 506(c) is property of the estate and must be deposited in the estate account.

#### **5. INTERNET AUCTIONS**

A trustee may consider selling assets through an internet auction website. Before conducting a sale on the internet, the trustee should examine the suitability of using the internet to sell a particular asset, review the fees charged by internet

auction providers, and carefully review the Terms and Conditions for use of a particular internet auction website.

An internet auction provider usually does not perform the services of a traditional auctioneer. It usually does not take possession of assets, “call” auctions, collect proceeds of sale, or in any way act as a trustee’s agent. Instead, most sites merely provide an automated “venue” for the trustee to conduct an auction sale. Because of their limited role in a sale, internet auction providers should not be considered “auctioneers” or “other professionals” requiring an order of employment under § 327 unless they specifically contract to perform substantial additional services beyond simply providing a website to market estate assets.

Please note that the law in this area is uncertain, and the trustee should always fully disclose the terms and conditions of the proposed sale and the respective duties and responsibilities of the Internet auction provider in an appropriate sale motion filed with the Court and properly noticed to creditors. The trustee may also consider obtaining guidance from the court regarding the need for Court approval of internet auctioneer employment in doubtful cases. For example, if an internet auction provider collects deposits or sale proceeds, or takes physical possession of the property to be sold, the provider is providing substantial additional services and an order pursuant to § 327 should be obtained.

## **6. CONDUCT OF SALES**

Sales of estate property must conform to the requirements of FRBP 6004. Upon completion of the sale, an itemized statement of the property sold, the names of the purchasers, and the price received for each item should be transmitted to the United States Trustee and filed with the clerk of the bankruptcy court. If the

property is sold by an auctioneer, the auctioneer must file the statement. If the property is not sold by an auctioneer, the trustee must file the statement. FRPB 6004(f)(1).

See also Chapter 8.M.6 below regarding auctioneers.

## **L. PERIODIC PAYMENTS**

Estate assets in the form of periodic, future payments due to extend beyond one year require special consideration. This type of asset may be part of the debtor's estate (e.g., note or mortgage receivable) or may arise when a trustee accepts periodic payments to sell an asset.

Generally, the trustee should avoid sales of estate assets involving buyer payments which will extend beyond one year. However, there may be instances, such as the need for periodic payments which do not delay case closing, when it is in the best interest of the estate to sell an estate asset in this manner. When the purchase price will be paid in installments, the trustee also should obtain and perfect a security interest in the estate assets sold and take other suitable precautions to protect the estate against default.

When an asset comes into the estate that involves future payments, the trustee should attempt to discount the future income stream to an appropriate present value and liquidate the asset as expeditiously as possible. If the discounted payments cannot be liquidated, or the asset cannot otherwise be assigned for the benefit of creditors, the trustee should consider interim distributions to creditors as funds become available, provided that claims are resolved and sufficient funds are reserved to administer the estate.

## **M. EMPLOYMENT AND SUPERVISION OF PROFESSIONALS**

Under § 327, a chapter 7 trustee may employ professionals, including attorneys, accountants, appraisers or auctioneers to “represent or assist the trustee” in performing trustee duties under title 11. Those professionals may be awarded compensation for actual and necessary services and reimbursement for actual and necessary expenses, pursuant to § 330.

The employment of professionals must be approved by the court. Court approval should be sought prior to the rendering of any services. Issues such as disinterestedness and necessity of employment are more appropriately addressed when court approval is sought and obtained prior to work by the professional. Generally, courts do not authorize compensation for services rendered prior to court-ordered employment. However, some courts permit retroactive or *nunc pro tunc* orders of employment in special circumstances, but even where permitted, such orders should be rarely sought.

## **1. DEFINITION OF PROFESSIONALS**

The list of “professional persons” provided by § 327(a) – attorneys, accountants, appraisers, auctioneers – is not exhaustive. The trustee must seek court approval only if the person sought to be employed is a “professional person” within the scope of § 327(a). The trustee may find it necessary to employ brokers, underwriters, farm managers, private investigators, etc. If an issue arises regarding the need to obtain court approval of the employment, the trustee should consider the following:

- Does the person play a central role in the administration of the estate?
- Does the person possess discretion or autonomy over some part of the estate?
- Does the person have special knowledge or skill usually achieved by study and educational attainments?
- Does the person operate under a license or governmental regulation?

When in doubt the trustee should err on the side of caution and seek court approval of the employment. To obtain compensation from the estate, a “professional person” must be employed with court approval.

## **2. EMPLOYMENT STANDARDS**

The threshold question for the employment of any professional is the necessity of employment. Although many trustees may be attorneys or accountants, the allowance of statutory compensation for a trustee does not contemplate the trustee rendering legal or accounting services to the estate. Conversely, professionals are not to do ministerial work or perform the duties of a trustee.

Accounting services normally are required when the debtor is a corporation or an individual engaged in business, or when a trustee liquidates assets which generate tax consequences and require the filing of a tax return on behalf of the estate. Common accounting services include reviewing the debtor’s books and records for preferences and fraudulent transfers, preparing and filing tax returns, and determining whether a tax refund is due to the estate.

The trustee must determine whether the services of a professional are needed and whether the cost is warranted. Further, the trustee should determine at the outset the level of professional work required and the estimated costs and benefits associated with the work.

As a general rule, professional persons employed by a trustee must be disinterested and must not have an interest adverse to the estate. §§ 327(a) and 101(14). There are some exceptions. If a trustee is authorized to operate the debtor's business under § 721, and if the debtor has regularly employed professional persons on salary, the trustee may retain or replace such professional persons. § 327(b). Representation of a creditor does not disqualify a person from representing the trustee, unless there is an objection from another creditor or the United States Trustee and the court finds there is an actual conflict of interest. § 327(c). The trustee may retain an attorney for a "specified special purpose," even though the attorney previously represented the debtor, if the attorney does not hold or represent an adverse interest to the debtor or the estate with respect to the subject matter of the employment. § 327(e).

The employment of a professional with a conflict of interest can result in denial of compensation to the professional under § 328(c) and to the trustee under § 326(d). The trustee may not employ a person who has served as an examiner in the case. § 327(f).

The USTP has embarked on a comprehensive diversity initiative designed to broaden representation of minorities and women in all facets of the bankruptcy system. The success of this initiative depends upon the support and commitment of all participants in the system. To that end, the trustee is encouraged to consider what efforts can be made to achieve greater diversity among the professionals employed.

### **3. EMPLOYMENT PROCEDURES**

Section 327 does not require notice and hearing procedures to hire professionals, only court approval. The trustee must provide a copy of the employment application to the United States Trustee, FRBP 2014(a), and the United States Trustee should review the application and order before they are approved by the court.

The form of applications for employment are governed by FRBP 2014 and 6005. An employment application must state:

- a. the specific facts necessitating employment;
- b. the name of the person employed;
- c. the reasons for selecting the firm or individual;
- d. the professional services to be rendered;

- e. the proposed arrangements for compensation; and
- f. the professional's connections with the trustee, debtor, creditors, and other parties in interest.

FRBP 2014. The application should be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, including the trustee, their respective attorneys and accountants, the United States Trustee, or any person employed by the United States Trustee. FRBP 2014(a).

Fee sharing arrangements are prohibited. § 504.

The trustee and the professional person should discuss and agree upon the terms and conditions of employment, including the manner of compensation, with the understanding that the court will ultimately set the fee for professional persons and may increase or decrease it depending upon the circumstances, even to the extent of recapturing monies paid as interim fees. § 328(a).

#### **4. SUPERVISION OF PROFESSIONALS**

The trustee is a fiduciary and representative of the estate. Trustees cannot avoid or abdicate their responsibilities by employing professionals and delegating to them certain tasks. It is critical that the trustee oversees the work performed by professionals and exercises appropriate business judgment on all key decisions.

The trustee must actively supervise estate professionals to ensure prompt and appropriate execution of duties, compliance with required procedures and reasonable and necessary fees and expenses.

The trustee is advised to pay particular attention to the activities of professionals who are not closely regulated by state authorities or who take physical possession of estate property and funds, such as auctioneers, liquidators, brokers, collection agents and property managers. The general standards for supervising auctioneers (see Chapter 8.M.6 below) apply equally to other professionals who take possession of estate funds and property.

#### **5. TRUSTEE AS ATTORNEY OR ACCOUNTANT FOR THE ESTATE**

A trustee, with court approval, may act as an attorney or accountant for the estate, if such employment is in the best interest of the estate. § 327(d). Routine matters may be handled quickly and economically by this kind of representation. However, a trustee should be sensitive to the best interest of each individual estate and any conflict of interest problems that may be posed by acting as an attorney or

accountant for the estate. The trustee should not be employed as counsel to provide services that a trustee could perform without the assistance of counsel. If there is any question as to the necessity for legal or accounting services, the United States Trustee should be consulted prior to filing the application. The trustee should not submit boilerplate applications to employ the trustee as a professional in every case without specifying the necessity for the services.

If a trustee acts as his own attorney or accountant, detailed time records of the tasks performed as a trustee and as an attorney or accountant must be maintained. A trustee acting as an attorney or accountant under § 327(d) may receive compensation only for services performed in that capacity and not for the performance of regular trustee duties. § 328(b).

The importance of distinguishing trustee duties from attorney or accountant for trustee functions cannot be overemphasized. The demarcation of the roles of the trustee and the professional is made to ensure that an estate incurs only appropriate costs for administration. It also serves to ensure that the trustee and the trustee's attorney or accountant keep to their respective functions in administering a bankruptcy case. The law imposes upon the trustee the primary responsibility to administer the estate and provides a mechanism for compensating the trustee, pursuant to §§ 326 and 330, in return for carrying out these responsibilities. The cost of administration and its financial effect upon creditors demands careful scrutiny of the trustee's application to employ themselves or others. The question of necessity is best addressed *prior* to services being rendered. Applications that do not sufficiently justify employment of an attorney or accountant should prompt objections. Abuses in the process of a trustee serving dually as attorney or accountant may be the basis for suspension or removal from the panel. Requiring a dual capacity trustee to keep time and service entries as professional *and* trustee aids in maintaining the distinction between the trustee and the employed professional.

Attorneys and accountants may not be compensated for performing the statutory duties of the trustee. See § 704, FRBP 2015(a). The following list includes examples of services considered to fall within the duties of a trustee:

- a. preparing for and examining the debtor at the § 341(a) meeting in order to verify factual matters;
- b. examining proofs of claim to eliminate duplicate claims and to identify those that are in addition to or differ in amounts from claims listed on the debtor's schedules;
- c. investigating the financial affairs of the debtor;



- d. furnishing information to parties in interest on factual matters;
- e. collecting and liquidating assets of the estate by employing auctioneers or other agents and soliciting offers;
- f. preparing required reports;
- g. performing banking functions; and
- h. supervising professionals.

The aforementioned trustee duties are not compensable as legal or accounting services unless sufficiently documented to show that special circumstances exist.

## **6. AUCTIONEERS**

### **General Standards**

The trustee may employ auctioneers as professional persons pursuant to §§ 327(a) and 328(a) to sell property of the estate. All auction sales must be noticed pursuant to FRBP 6004(a).

The trustee must actively supervise the activities of the auctioneers to ensure that estate property is protected against loss, that property is sold for reasonable prices to independent buyers, that auction proceeds are promptly and fully remitted, that auctioneers timely submit accurate sale reports, and that auctioneer expenses are actual and necessary and paid in accordance with legal requirements. Methods by which a trustee can supervise auctioneers include personally attending auction sales, thoroughly reviewing auctioneer reports, and independently verifying reported information. The trustee should advise the United States Trustee of concerns with respect to auctioneers and must report situations which could result in a loss to the estate. Failure to appropriately supervise auctioneers may result in claims against the trustee individually.

A representative of the United States Trustee may attend auctions.

## **Compensation**

An auctioneer's compensation must be approved by order of the court. § 328, FRBP 6005. Any buyer's premium<sup>5/</sup> must be fully disclosed in the employment application and considered in determining the reasonableness of the total compensation.

Although auctioneers, outside of a bankruptcy context, usually deduct their commissions and expenses from the sales proceeds and remit a net amount to the seller, this practice may not be employed with regard to bankruptcy estate funds, unless it is specifically authorized by order of the court. However, the order authorizing the employment may specify the percentage fee to be charged by the auctioneer and authorize the deduction of the commission and the costs of sale from the sales proceeds, with the effect of the auctioneer remitting the net sales proceeds to the trustee. In those cases, the auctioneer must present an affidavit or declaration listing all costs and expenses incurred with the report of sale.

## **Bonding and Insurance**

The trustee must ensure that auctioneers are adequately bonded, prior to taking possession of estate property, in an amount that is sufficient to cover all receipts from the sale. The bond should be in favor of the United States of America and is distinct from any other auctioneer's bond required under state law. The amount of the bond will be established by local bankruptcy rule or the United States Trustee. The trustee should confirm that the auctioneer is bonded in an appropriate amount to cover all estates in which the particular auctioneer has been employed. All original bonds should be forwarded to the United States Trustee. The United States Trustee monitors the adequacy of the bond.

The trustee also should determine if the auctioneer maintains insurance for lost or stolen property, since the trustee may wish to make a claim against the insurer for any such losses.

When the auctioneer assumes control over estate property for a period of time prior to sale, the trustee should keep an inventory of the items stored and periodically verify that the assets still exist and are in good condition. Insurance claims for lost or stolen property should be made promptly, and the trustee should inform the United States Trustee of such claims.

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<sup>5/</sup>In some jurisdictions, auctioneers have begun to take part of their compensation in the form of buyer's premiums. A buyer's premium is a percentage of the purchase price paid by the buyer, in addition to the bid price.

### **Turnover of Proceeds**

The auctioneer must not commingle auction proceeds with business, personal or other accounts.

Whenever possible, the auctioneer should immediately turnover auction proceeds to the trustee. In any event, all proceeds must be turned over within thirty (30) days of the auction. The United States Trustee may have additional requirements in this area.

If an auctioneer fails to account for or to turnover auction proceeds within thirty (30) days, the trustee should promptly notify the United States Trustee and take immediate action to recover the funds, including initiating a proceeding against the auctioneer's bond.

### **Auctioneer's Report**

The auctioneer must submit an itemized statement of the property sold, the name of each purchaser, and the price received for each item, lot, or for the property as a whole if sold in bulk. FRBP 6004(f). The trustee must ensure that the auctioneer's report is promptly submitted upon completion of the auction. If the report has not been provided within thirty (30) days after the auction, the trustee should request a copy and ensure that it has been filed with the court and United States Trustee, or as otherwise provided by local rules and practices.

The trustee must compare the auctioneer's report to the initial inventory and obtain an explanation for any discrepancies. The trustee also should scrutinize items marked 'stolen' or 'missing.' As noted earlier, the trustee should attempt to recover the value of lost or stolen items by filing a claim with the auctioneer's insurer or by initiating a proceeding against the auctioneer's bond, as appropriate.

## **7. APPRAISERS**

A trustee may require the services of an appraiser to ascertain the value of property of an estate. For economy of administration, trustees may use alternative means of valuation if feasible, but the basis for the valuation must be documented. Alternative valuation means include the NADA book for automobiles; information acquired from real estate agents, as well as county records regarding recent sales of comparable real property; or advertisements for the sale of like goods.

## **N. COMPENSATION OF TRUSTEES AND PROFESSIONALS**

Pursuant to 28 U.S.C. § 586(a)(3), as amended, applications for compensation and reimbursement of expenses filed by trustees and professionals should be prepared in accordance with the procedural guidelines adopted by the Executive Office for United States Trustees. These “fee guidelines” are included in this Handbook at Appendix C. The trustee should be familiar with the fee guidelines, which state, in part, that “[f]ee applications submitted by trustees are subject to the same standard of review as are applications of other professionals and will be evaluated according to the principles articulated in these Guidelines.” The United States Trustee reviews professional and trustee fee applications and objects to the requested fees and expenses as appropriate.

### **1. COMPENSATION OF TRUSTEES**

Trustee compensation is governed by § 330, subject to the limitations set forth in § 326. The maximum compensation allowable set forth in § 326 consists of varying percentages of all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims. In a joint case consisting of two separate estates, the limitation applies to the entire case, not to each estate separately. In addition, trustee duties performed by a paraprofessional employed by the trustee are also subject to the § 326(a) limit on trustee compensation. Boldt v. United States Trustee (In re Jenkins), 130 F.3d 1335, 1342 (9<sup>th</sup> Cir. 1997).

A court may award a trustee less than the statutory maximum based upon the considerations in § 330, but may not exceed the compensation ceiling in § 326(a). The trustee also receives a portion of the filing fee when administration of the case is complete. The trustee should keep time records in every asset case as evidence of the services performed. However, local rules and practices sometimes provide that time records need not be submitted if the compensation request is under a specified amount.

### **2. INTERIM COMPENSATION OF TRUSTEES**

Section 331 permits a trustee to apply to the court for interim compensation or reimbursement of expenses pursuant to § 330. Section 326(a) provides a cap to the trustee’s compensation based upon all funds disbursed by the trustee. A literal reading of § 326 requires that a trustee receive compensation only after a disbursement to parties in interest. Nonetheless, a line of cases has developed, allowing interim reasonable compensation to trustees in certain circumstances, although distribution may not have been made to any creditor. The United States Trustee carefully examines a trustee’s request for interim compensation and objects as warranted.

The United States Trustee will ordinarily object to a trustee's application for interim compensation, unless the application is linked to an interim distribution to creditors. However, when a trustee is heavily engaged in the administration of a case over an extended period of time and the trustee is providing substantial services to the estate, those factors may present good cause for interim compensation to the trustee.

### **3. COMPENSATION OF PROFESSIONALS**

Section 330(a) authorizes professionals employed by the trustee under § 327(a) to be compensated from the estate for actual services rendered that are necessary to the administration of a case or beneficial at the time at which the service was rendered toward completion of the case. Professionals should not be compensated for performing work that the trustee can do without professional assistance. In re Spungen, 168 B.R. 373 (N.D. Ind. 1993). Particular care must be taken to avoid "double-dipping" when the trustee also serves as an attorney or accountant in a case.

Reasonable and necessary legal services are those which require professional legal skills and expertise beyond the knowledge and skills of a trustee. In re Knapp, 930 F.2d 386 (4<sup>th</sup> Cir. 1991); In re Braswell Motor Freight Lines, Inc., 630 F.2d 348, 350 (5<sup>th</sup> Cir. 1980); In re Meade Land & Dev. Co., 527 F.2d 280 (3d Cir. 1985). See also In re Gary Fairbanks, Inc., 111 B.R. 809, 811 (Bankr. N.D. Iowa 1990); In re King, 88 B.R. 768 (Bankr. E.D. Va. 1988); In re Shades of Beauty, Inc., 56 B.R. (Bankr. E.D.N.Y. 1986).

### **4. APPLICATIONS FOR COMPENSATION**

Pursuant to § 330, after notice and a hearing, and subject to §§ 326, 328, and 329, the court may award the trustee or a professional person employed pursuant to § 327 reasonable compensation for actual, necessary services. Section 330 also allows the recovery of actual, necessary expenses. Overhead expenses of a trustee or professional are not reimbursable from the estate. See Sousa v. Miguel (In re U.S. Trustee) 32 F.3d 1370 (9<sup>th</sup> Cir. 1994).

Unless otherwise permitted by the court, the professional may make application for interim compensation and reimbursement of expenses not more than once every 120 days. § 331. The trustee has a fiduciary obligation to review professional fee applications and to object when appropriate. Applications filed by the professionals employed by the trustee should state whether the trustee has been given an opportunity to review the requested fees and expenses and whether the trustee approved the amounts requested. See the fee guidelines at Appendix C-3.

In determining the amount of reasonable compensation under § 330, the court considers the nature, extent and value of the professional's services, taking into account all relevant factors, including:

1. the time spent on such services;
2. the rates charged for such services;
3. whether the services were necessary to the administration of the case, or beneficial at the time at which the service was rendered toward the completion of the case;
4. whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
5. whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under Title 11.

Pursuant to FRBP 2016, each application for interim or final fees and expenses must include:

1. a detailed statement of services rendered, time expended, and expenses incurred;
2. a statement of the amount of fees and expenses requested;
3. a statement of payments received or promised for services rendered or to be rendered in any capacity in connection with the case;
4. a statement of the source of compensation paid or promised; and
5. a statement of whether an agreement or understanding exists for the sharing of compensation received or to be received.

The fee guidelines at Appendix C have additional requirements which must be met as well.

Unless otherwise ordered by the court, all creditors and parties in interest must receive notice of all fee applications over \$1,000.00.

## **O. REVIEW OF CLAIMS**

A trustee should commence the claims review process after it is certain that there will be a distribution to creditors and as soon as possible following the expiration of the bar date for filing claims. In no event should the final report (TFR) be filed prior to the completion of the claims examination and determination process. (See Chapter 8.S.1 below concerning Final Reports (TFRs).)

### **1. OBJECTIONS TO CLAIMS**

Section 704(5) requires a trustee to examine proofs of claim and object to the allowance of any claim that is improper. The trustee should consider the following issues when reviewing claims:

1. If a claim is filed as secured, there should be appropriate documentation, e.g., security agreement and UCC-1 financing statement. The trustee should review this documentation to determine whether the secured creditor's lien is subject to avoidance pursuant to § 544. The trustee should verify that the claim was properly perfected at least 90 days prior to the filing (one year for insiders). The trustee may be able to avoid a lien perfected within 90 days (or one year) pursuant to § 547. It should be noted that a secured creditor is not required to file a proof of claim. FRBP 3002(a). Therefore, prior to selling estate assets, the trustee ordinarily should perform a lien search to verify that all liens have been identified.
2. Tax claims should be verified. In most instances, a taxing entity will file only one claim which may include liens as well as priority and general unsecured taxes. In some instances, the liens may be subordinated to other classes of claims.
3. Unsecured claims should be reviewed for appropriate documentation, accuracy and timeliness.
4. Judgments and liens listed in the schedules should be compared to claims that are filed.

A trustee should file objections to allowance of claims, if appropriate. FRBP 3007. Possible reasons for objecting to a claim include:

1. Sufficient documentation was not provided;
2. The claim amount is in error;
3. The claim has been previously paid;

4. The claim is not owed;
5. The claim is a duplicate of another claim; or
6. The claim is filed late.

Other grounds for objection may be found in § 502.

The trustee should perform a second review for new, tardy, and/or amended claims prior to distribution. See, especially, § 726(a)(1) regarding tardily filed priority claims. Untimely filed claims are not barred from payment.

## **2. UNPAID QUARTERLY FEES**

When a chapter 11 case is converted to a case under chapter 7 there may be unpaid fees due to the United States Trustee pursuant to 28 U.S.C. § 1930(a)(6). The United States Trustee files a proof of claim or request for payment with the clerk of the bankruptcy court for the period(s) when appropriate payments were not made by the debtor. In appropriate cases, the United States Trustee may ask the trustee to review the debtor's books and records to determine the correct amount of unpaid fees.

## **P. SUBORDINATION OF CLAIMS**

The Bankruptcy Code empowers the trustee to obtain a court order subordinating certain claims to other claims for purposes of distribution.

### **Section 510(a) - Agreements**

This section empowers the trustee to enforce subordination agreements to the extent they are enforceable under non-bankruptcy law.

### **Section 510(b) - Purchase or sale of stock**

This section subordinates claims arising from rescission of a purchase or sale of stock, or the purchase or sale of stock, to all claims or interests that are senior or equal to the claim or interest represented by such security.

### **Section 510(c) - Equitable subordination**

This section empowers the trustee to seek subordination of a claim under principles of equitable subordination. Generally, equitable subordination requires misconduct on the



part of the creditor that has injured the debtor or conferred an unfair advantage on the creditor.

### **Section 724(b) - Subordination of tax liens**

This section empowers the trustee to subordinate tax liens to § 507(a)(1)-(7) priority claims up to the amount of the tax liens. Under this section, the proceeds received from property subject to tax liens are distributed as follows:

1. First, to the holders of liens senior to the tax liens;
2. Second, to the holders of unsecured priority claims senior to priority tax claims, but only up to the amount of the tax lien claim;
3. Third, to the holder of the tax lien to the extent that the amount of the tax lien exceeds the amount distributed under the previous paragraph;
4. Fourth, to the holders of liens that are junior to the tax lien;
5. Fifth, to the holder of the tax lien, to the extent the tax lien has not been paid under the third paragraph above; and
6. Sixth, to the estate.

### **Q. REDEMPTION**

Under § 722, an individual debtor may redeem tangible personal property (intended primarily for personal, family, or household use) from a lien securing a consumer debt. “Consumer debt” means debt incurred by an individual primarily for personal, family, or household purposes. § 101(8). Because § 722 applies only to personalty, a consumer debt for purposes of § 722 does not include a debt to the extent that it is secured by real property. The debt secured by the lien must also be dischargeable.

Redemption was intended by Congress to protect debtors against ill-advised reaffirmations and the high replacement cost of consumer goods. Section 722 allows debtors to retain necessary property, such as furniture, clothing, cooking utensils, and other household items, and thereby avoid the high replacement cost that might be required if the secured creditor repossessed the collateral. See H.R.Rep. No. 595, 95th Cong., 1st Sess. 127 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6088. Debtors may redeem collateral securing a debt by paying the creditor the amount of the secured claim or the fair market value of the collateral, whichever is less, in exchange for a release or satisfaction of the lien. Redemption of property cannot be waived and applies only if a debtor’s interest in the property is exempt under § 522 or has been abandoned pursuant to § 554.

FRBP 6008, which implements the provisions of § 722, specifically provides that “the court may authorize redemption of property from a lien or from a sale to enforce a lien in accordance with applicable law” when requested by a debtor, trustee, or debtor in possession. FRBP 6008. Recent cases hold that redemption agreements require bankruptcy court approval under FRBP 6008, notwithstanding the fact that the debtor and secured creditor may agree on the redemption price and value of the collateral. *See, e.g., In re White*, 231 B.R. 551 (Bankr. D. Vt. 1999); *In re Spivey*, 230 B.R. 484 (Bankr. E.D.N.Y. 1999); *In re Lopez*, 224 B.R. 439 (Bankr. C.D. Cal. 1998). Any dispute as to the amount of the claim or value of the collateral must be resolved as a contested matter. FRBP 6008; 9014. The right to redeem extends to the whole of the property, not just the debtor’s exempt interest in it. *In re Fitzgerald*, 20 B.R. 27 (Bankr. N.D.N.Y. 1982). The majority of courts hold that, unless the creditor agrees otherwise, the redemption amount must be paid in a lump sum rather than installments. *See, e.g., In re Bell*, 700 F.2d 1053 (6<sup>th</sup> Cir. 1983); *In re Polk*, 76 B.R. 148 (B.A.P. 9<sup>th</sup> Cir. 1987). Debtors who are unable or unwilling to redeem property under § 722 may, under § 524(c) and (d), negotiate an agreement with the creditor to reaffirm the debt and retain possession of the collateral.

## **R. REAFFIRMATION**

A debt that is properly reaffirmed will not be discharged and, under § 524(c) and (d), may be enforced even after a discharge is granted to the debtor. Reaffirmation agreements are strictly construed to protect a debtor from overreaching by a creditor. To be enforceable, a reaffirmation agreement must: (1) be entered into before the granting of a discharge; (2) contain a clear and conspicuous statement concerning the debtor’s right to rescind the agreement at any time before discharge or within sixty days after the agreement is filed with the court, whichever is later; (3) be filed with the court; and (4) not have been rescinded by the debtor. § 524(c). If applicable, the agreement must be accompanied by a declaration or affidavit of the attorney who represented the debtor during the course of negotiating the agreement. The affidavit or declaration must state that (1) the agreement represents an informed, voluntary agreement by the debtor; (2) it does not impose an undue hardship on the debtor or the debtor’s dependents; and (3) the attorney fully advised the debtor of the legal effect and consequences of the reaffirmation agreement and any default thereunder. § 524(c)(3).

When an individual debtor is not represented by an attorney in the course of negotiating the reaffirmation agreement, the court must hold a hearing, which the debtor must attend, to determine whether the agreement imposes an undue hardship on the debtor and the debtor’s dependents, and whether the agreement is in the debtor’s best interests. §§ 524(c)(6)(A) and (d). Such a hearing is normally triggered by the filing of a motion for approval of the reaffirmation agreement. Section 524(c)(6)(A) does not apply to the extent that a debt is a consumer debt secured by real property. § 524(c)(6)(B).

Only the debtor has standing to seek approval of a reaffirmation agreement. FRBP 4008. A reaffirmation agreement that fails to comply with § 524(c) and (d) is void and unenforceable. Courts have declined to approve reaffirmation agreements where there is evidence that the debtor will not be able to make the payments required by the agreement, the security agreement is invalid, or the secured debt exceeds the value of the collateral. See, e.g., In re Carlos, 215 B.R. 52 (Bankr. C.D. Cal. 1997); In re Bryant, 43 B.R. 189 (Bankr. E.D. Mich. 1984); In re Delano, 7 B.R. 72 (Bankr. D. Me. 1980). Reaffirmation should rarely be recommended by an attorney or approved by the court if the sole reason for the reaffirmation is the debtor's desire to repay a discharged debt. The debtor has an absolute right to voluntarily repay such a debt notwithstanding a discharge of indebtedness. See In re Berkich, 7 B.R. 483 (Bankr. E.D. Pa. 1980).

To combat abuses in the reaffirmation process, the trustee should:

1. Orally examine debtors at creditors' meetings as required by § 341(d) to ensure that debtors are aware of, among other things, the effect of reaffirming a debt and the requirements of § 524(d), and inform the debtor that reaffirmation is not required and that any reaffirmation can be rescinded.
2. Prohibit creditors from soliciting reaffirmations, redemptions or the surrender of property "off the record" in the § 341(a) meeting room. This would not, however, prohibit the trustee from ensuring that the debtor carried out their stated intentions under § 521(2)(B).
3. Seek a disgorgement of fees when debtors' attorneys fail to fulfill their duties under § 524(c).

## **S. ASSET CASE CLOSINGS**

Section 704(9) requires a trustee in a chapter 7 case to make a final report (TFR) and file a final account (TDR) of the administration of the case. The trustee should be familiar with the following basic criteria and with any additional local court rules or policies that apply.

### **1. TRUSTEE'S FINAL REPORT (TFR OR PRE-DISTRIBUTION REPORT)**

When a case is ready to be closed, the trustee must prepare and file a TFR with the United States Trustee for review before filing it with the court. The TFR must be signed by the trustee under penalty of perjury and certify that all assets have been liquidated or properly accounted for and that funds of the estate are available for distribution. AMOU. The TFR must be prepared as soon as all monies have been collected, all claims have been reviewed or determined by the court, and the bar date has expired for creditors to file claims. In addition, any required tax returns should have been filed and resolved. The report must be filed prior to any

distribution of funds to creditors, unless the court has previously ordered an interim distribution. AMOU. In any event, a TFR must be filed before final distribution of all funds in the case. See FRBP 5009; AMOU.

The TFR must consist of the Individual Estate Property Record and Report (Form 1); the Cash Receipt and Disbursement Record (Form 2); and the proposed dividend distribution report. AMOU. The TFR should summarize all actions taken by the trustee to administer the case. Each report must:

1. Describe specifically the disposition of each estate asset (as listed in the debtor's schedules or otherwise discovered). Form 1, the Estate Property Record and Report, meets this requirement. See Chapter 9.B.1 of this Handbook for a description of Form 1.
2. Report all financial transactions by the trustee. Form 2, the Cash Receipt and Disbursement Record, meets this requirement. See Chapter 9.B.2 of this Handbook for further information about Form 2.
3. Request payment of the trustee's compensation and expenses and any unpaid professional fees and expenses.
4. Report the trustee's actions on claims or their disposition.
5. Propose distribution to creditors according to § 507 and § 726.
6. Attach original bank statements and original canceled checks (from estate accounts) received by the trustee during the case.

All outstanding applications for professional compensation and expenses should also be filed along with the TFR. The TFR enables the United States Trustee and any other party in interest to determine how the trustee proposes to disburse the funds.

Generally, estate funds should be maintained in an interest-bearing account until the trustee is ready to distribute the funds to creditors. The difference between the distribution as calculated in the TFR and reported in the TDR should be footnoted in the TDR. No amended TFR should be filed. The trustee may receive a fee on the increase, if authorized by the court (although many trustees waive the extra fee). If the balance of estate funds on hand is less than \$5,000, the trustee has the discretion to move the funds to a non-interest bearing account when the TFR is filed with the United States Trustee. This amount may be adjusted at the United States Trustee's discretion. If there is a substantial delay in approval of the TFR, the trustee is expected to reinvest the funds, in accordance with the trustee's duty to maximize the return to creditors. Funds should not be invested after the final

tax return is prepared if the cost of preparing an additional tax return would exceed the interest earned. Normally, this situation will only be an issue for corporate or partnership cases.

The United States Trustee reviews the TFR to assess whether the trustee has properly and completely administered estate property. The United States Trustee examines exemptions, abandonments, sales or other liquidations; ensures inclusion of all necessary court orders; and verifies the accuracy of calculations. The United States Trustee also determines whether the trustee reviewed and properly dealt with all claims. Deficiencies in the trustee's administration or other problems or mistakes will be brought to the trustee's attention for corrective action. Upon completion of this review, the United States Trustee forwards the TFR to the court. If there is a dispute between the United States Trustee and the trustee concerning the report, the TFR will be filed with an objection and the dispute resolved by hearing before the court.

The TFR must set forth the distributions to be made under § 726. The order of payment is as follows:

1. First, costs of administration allowed under § 503(b), including trustee's fees, professional fees, certain post-petition claims, and costs and fees assessed under chapter 123 of title 28. Administrative expenses incurred in a chapter 11, 12 or 13 case are subordinated upon conversion to chapter 7 to administrative expenses incurred in the chapter 7 case. Quarterly fees from a converted chapter 11 case are paid along with other fees assessed under chapter 123 of title 28 and are not subordinated to chapter 7 administrative expenses.
2. Second, certain expenses incurred in an involuntary bankruptcy case before entry of an order of relief or appointment of a trustee, whichever occurs first.
3. Third, certain wage, salary, or commission claims.
4. Fourth, certain claims for contributions to an employee benefit plan.
5. Fifth, certain claims of farmers and fisherman.
6. Sixth, certain claims arising from purchase, lease, or rental deposits.
7. Seventh, certain claims for alimony, maintenance, or support.
8. Eighth, certain governmental claims for income, property, employment, and excise taxes, and customs duties.

9. Ninth, certain claims by a federal depository institution regulatory agency.
10. Tenth, unsecured claims in which a proof of claim is timely filed or in which a claim is tardily filed but the creditor had no notice or actual knowledge of the case.
11. Eleventh, unsecured claims in which a proof of claim is tardily filed with notice or actual knowledge of the case.
12. Twelfth, claims for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages to the extent the amounts are not for compensation for actual pecuniary losses.
13. Thirteenth, interest on the claims paid above from the date of filing the petition at the legal rate.
14. Fourteenth, to the individual debtor or equity holders of the corporate or partnership debtor pursuant to the articles of incorporation or state law.

Within any class of claims, if insufficient funds exist to pay all claims in full, the balance is prorated among that class of creditors. The prorated amount is determined as follows:

1. Divide the balance on hand by the total dollar amount of claims in the class. The quotient is the dividend percentage.
2. Multiply each claim by the dividend percentage to determine the amount to be paid on that claim.

After the trustee's final report has been reviewed by the United States Trustee and filed with the court, the trustee is required under FRBP 2002(f) to notice all creditors with a summary of the final report before actually making the distribution to the creditors if the net proceeds realized in an estate exceed \$1,500. Essentially, the notice informs creditors that the trustee's final report for the case is on file with the clerk of the bankruptcy court, that the trustee and other professionals have applied for compensation in given amounts, that the money on hand will be distributed to creditors in accordance with the bankruptcy priority laws, and that the creditors have a right to object to the trustee's report. If no objections are lodged to the trustee's notice of intent to distribute or to the report of distribution, then the trustee may make the distribution according to the final report.

## 2. DISTRIBUTION OF FUNDS

The United States Trustee must approve the trustee's proposed distribution of funds. Court orders are necessary prior to payment of trustee and professional fees and expenses and to resolve claims objections, but are not necessary for the general distribution of funds to creditors, absent any other objections to the trustee's final report. If no objections are filed, the trustee should immediately make disbursements upon the entry of any appropriate court order(s) and after any applicable appeal period has expired. FRBP 3009. If the court modifies the fees and expenses, the trustee's revised dividend distribution report must be reviewed by the United States Trustee within 10 days of receipt. The final distribution to creditors must be paid within 30 days of the entry of the final orders on compensation and expenses. AMOU.

Checks should be mailed to the addresses furnished by the creditors on their proofs of claim or on any subsequent change of address information reflected in the court records.

Under FRBP 3010, all dividends of less than \$5 must be turned over to the clerk of the bankruptcy court. The trustee must furnish the name of the creditor, the creditor's last known address, and the amount of the dividend to the clerk. If there is more than one such dividend, only one check made payable to the clerk is necessary, listing the appropriate claim numbers on an accompanying report.

If any checks are not negotiated by creditors within 90 days, the trustee may need to issue a stop payment request on said checks (depending on the procedures established with the trustee's bank).

In addition, the trustee must make a reasonable effort to locate creditors who do not cash their checks within 90 days or whose checks are returned undeliverable. If these efforts fail to locate the creditor, the amounts represented by the checks are treated as unclaimed dividends and deposited with the clerk of the bankruptcy court, according to FRBP 3011, along with a transmittal document to the court indicating the last known address of the creditor.

When a creditor returns funds to the trustee because the creditor has been paid from another source, the trustee should redistribute the funds to other creditors according to the priorities set forth in §§ 507 and 726.

Typically, distributions are made at the end of a case; however, limited circumstances sometimes support an interim distribution to creditors. Interim distributions should occur only after claims are resolved and sufficient assets have been reserved to administer the estate. The United States Trustee must review and approve the trustee's proposed interim distribution of funds. For additional

discussion of interim distributions, see Chapter 8.L and Chapter 8.N (particularly 8.N.2).

### **3. TRUSTEE'S FINAL ACCOUNT (TDR OR POST-DISTRIBUTION REPORT)**

Within 125 days after the entry of an order allowing final compensation and expenses, a trustee must submit to the United States Trustee for review a final account (TDR) signed under penalty of perjury certifying that the estate has been fully administered. FRBP 5009. The original bank statement(s) showing a zero balance and all original canceled checks (except those already submitted with the TFR) must be attached to the TDR. The trustee must certify that all funds have been disbursed consistent with the distribution report and that all checks have been negotiated or any remaining checks have been paid into court and that the estate has been fully administered. Under § 347, if any checks remain outstanding 90 days after the final distribution, the trustee must obtain a stop payment on them and pay the monies into the Bankruptcy Court Registry Fund as unclaimed funds pursuant to FRBP 3011.

The United States Trustee reviews the TDR to ensure that the distributions have been made properly by the trustee and that the TDR is correct. If any problems or discrepancies are detected, follow-up action is taken. Once the reviewer is satisfied, the original of the TDR will be filed with the clerk of the bankruptcy court. The United States Trustee will attach a statement to the TDR which states it has been reviewed and the United States Trustee has no objection to the trustee's certification of full administration. See AMOU. If there is no timely objection by the United States Trustee or other party in interest, there shall be a presumption that the estate has been fully administered and the court may close the case.

Unless the clerk of the bankruptcy court requires custody, the canceled checks and zero bank statement may be retained by the United States Trustee or returned to the trustee. The bank statements and canceled checks must be retained for the two-year period specified in § 322(d), or as otherwise required by the Internal Revenue Service, whichever period is longer.

Once the TDR has been filed with the clerk of the bankruptcy court, the case can be closed by the United States Trustee in the United States Trustee's Automated Case Management System (ACMS). In addition, the trustee can be discharged and the case closed by the court, unless other matters not affecting the administration of assets are pending.

The trustee may encounter a situation in which a creditor refuses a dividend payment because the debt was previously paid. Depending on the amount of any



returned payments, the number of other creditors otherwise receiving distributions, and local court policy or procedure, the trustee may be required to redistribute returned funds to the other creditors. Because a supplemental distribution normally will occur prior to the submission of the trustee's TDR, the supplemental distribution will be included as part of the United States Trustee's review of the trustee's TDR.

#### **4. DISTRIBUTION REPORT FOR CLOSED ASSET CASES (FORM 4)**

Trustees are required to attach Form 4 to the TDRs for cases filed or converted on or after July 1, 1999. Form 4 also must be filed electronically commencing April 1, 2000. Form 4 is not required for asset cases open as of June 30, 1999, as long as the TDR is submitted on or before June 30, 2002. See the Forms and Instructions section for the Form 4 and related instructions.

All trustees are expected to submit Form 4. Compliance may be waived only on a case-by-case basis. For example, compliance may be waived for a very large, older case that cannot be closed by July 1, 2002, due to exigent circumstances, such as pending litigation. In addition, non-panel trustees, who are winding down their caseloads, are exempt. However, if a non-panel trustee is elected or appointed to serve in a case filed or converted on or after July 1, 1999, the trustee will be expected to provide a Form 4 with the TDR.

As part of the TDR review process, the United States Trustee will review Form 4 to ensure it accurately reflects the distributions made by the trustee. This information will be accumulated for all cases and all trustees for periodic reporting to interested parties.

### **T. CASE PROGRESS**

Section 704(1) provides that a trustee shall close an estate as expeditiously as is compatible with the best interests of the estate. Delays in case closure diminish the return to creditors, undermine the creditors' and public's confidence in the bankruptcy system, increase the trustee's exposure to liability, raise the costs of administration, and, in cases involving non-dischargeable pre-petition tax liabilities, expose the debtor to increased penalties and interest. Delays also give rise to public criticism of the bankruptcy process.

To ensure compliance with § 704(1), the United States Trustee monitors the number and age of open cases and the reasons they remain open. The United States Trustee gives heightened scrutiny to a trustee's administration of older cases and may request additional information from the trustee regarding the status of administration.

## **U. DISMISSALS AND CONVERSIONS**

### **1. DISMISSALS OR CONVERSIONS OF A CHAPTER 7 CASE**

Chapter 7 cases may be dismissed pursuant to § 707. The trustee should review proposed dismissals and object to dismissals which would not be in the best interest of creditors. Unless the court orders otherwise, the trustee in a dismissed case must pay any funds on hand in the case and return any property to the person or entity from whom the funds and property were obtained. See § 349(b). Generally, this will mean that the trustee will return the funds and property to the debtor, unless the court directs that the funds and property be distributed to creditors.

Chapter 7 cases also may be converted to a different chapter pursuant to § 706. The court may not convert a chapter 7 case to a chapter 12 or chapter 13 case unless the debtor requests the conversion. § 706(c). While the right of a chapter 7 debtor to convert to another chapter is generally viewed as absolute absent prior conversion of the case, see § 706(a), a trustee may be able to challenge conversion if the debtor has engaged in fraudulent conduct. Upon conversion of a chapter 7 case to another chapter, the trustee should pay any funds on hand and deliver any property to the successor trustee or debtor, as appropriate.

The trustee must file a final report after a case has been dismissed, converted, or reassigned. See § 704(9). If the case was an asset case or the trustee collected any funds, the trustee must attach Forms 1 and 2 to the final report and transmit any original bank statements and cancelled checks to the United States Trustee with the final report. The final report should be submitted after a zero bank balance is attained.

### **2. CONVERSION OF CASES FROM ANOTHER CHAPTER TO CHAPTER 7**

Cases filed under chapters 11, 12, or 13 may be converted to chapter 7. The former debtor-in-possession or trustee must, forthwith, turnover to the chapter 7 trustee all records and property of the estate, unless the court orders otherwise. FRBP 1019(4). The lists, inventories, schedules, and statements of financial affairs filed in the previous case are deemed filed in the chapter 7 case unless the court orders otherwise. FRBP 1019(1). New time periods for filing claims and objecting to discharge are established if the case was not previously a chapter 7 case. FRBP 1019(2).

Unless the court orders otherwise, the debtor-in-possession or former trustee must file a schedule of unpaid debts within 15 days and a final report within 30 days following conversion. FRBP 1019(5). Generally, the United States Trustee will

schedule a § 341(a) meeting when a case converts to chapter 7 from another chapter. §§ 341 and 348.

Appointment of the chapter 11 trustee to the chapter 7 case does not relieve the trustee of the reporting obligations under FRBP 1019. The chapter 11 trustee must file a final report within 30 days of conversion pursuant to FRBP 1019(5) and promptly turnover the records and property of the estate to the successor trustee, unless otherwise ordered. FRBP 1019(4). The chapter 11 books and records must be closed as of the conversion date, and new books and records must be opened for chapter 7. These requirements apply even in the event that the chapter 11 trustee serves as the chapter 7 trustee.

Section 348 addresses the effects of case conversion. See also Chapter 6.B.1 regarding property of the estate upon conversion of a chapter 13 case.

The trustee should be aware of the limitations on bringing avoidance actions in converted cases. § 546. See Chapter 8.H.

## **V. REOPENING CLOSED CASES**

Occasions may arise when a closed case has to be reopened to administer unreported or recently discovered assets. The filing of a final report (TFR) or a final account (TDR) by a trustee does not close a case; it can only be closed by court order. If a new asset is discovered before a case is closed, the trustee may notify the United States Trustee and the clerk of the bankruptcy court and amend the TFR and the TDR. However, if the court has officially closed a case, the trustee, United States Trustee, or other party in interest, will have to file a motion to reopen the case, state the reasons for reopening, and pay any required filing fee.

If a case is reopened, a trustee is appointed only upon order of the bankruptcy court. FRBP 5010. If the court orders appointment of a trustee, the United States Trustee may or may not reappoint the original trustee to the case.

Once administration is completed, a new TFR and a new TDR will be required from the trustee.

## **W. REFERRAL OF POTENTIAL BANKRUPTCY CRIMES**

### **1. DETECTING CRIMINAL ACTIVITY**

The trustee is often in the best position to initially identify fraud or criminal activity in chapter 7 cases. When criminal activity is suspected, the trustee should notify the United States Trustee immediately.

The initial review of bankruptcy schedules may alert the trustee to potential crimes. Schedules and statements may indicate sham or fraudulent transactions, such as creation of false secured creditors, gross undervaluation of assets, sudden depletion of inventory, fraudulent transfers to fictitious entities (e.g., affiliates), or incurrence of significant trade debt shortly before the filing.

Creditors and other parties may contact the trustee with allegations of fraud. For example, former employees may have knowledge of undisclosed assets that the debtor failed to list on the schedules (e.g., assets transferred on the eve of bankruptcy). Ex-spouses or trade creditors may disclose information about assets which the debtor failed to list on the bankruptcy schedules.

The § 341(a) examination of the debtor is an important opportunity to discover potential criminal activity. During this meeting, and while the debtor is under oath, the trustee may acquire or develop facts that may indicate a potential bankruptcy related crime. For example, debtors may lie during questioning on recent repayments of debts, gifts or transfers to insiders. In all cases where the trustee suspects criminal activity after questioning at the § 341(a) meeting, the trustee should immediately notify the United States Trustee so that the § 341(a) meeting tape may be properly secured and stored to preserve its later use in a criminal proceeding.

The trustee may also discover potential criminal violations through the review of records such as financial statements and records, UCC filings and title searches, insurance records, divorce files, bank loan files, proofs of claim and tax returns. It is not infrequent to discover gross discrepancies between assets identified in these documents and the debtor's documentation on the bankruptcy schedules and statements.

## **2. TYPES OF CRIMINAL CONDUCT**

The most common bankruptcy crimes are set forth in § 152 of title 18. Section 152 makes it a crime for any individual to “knowingly and fraudulently”:

- 1) conceal property of the estate;
- 2) make a false oath or account in relation to a bankruptcy case;
- 3) make a false declaration, certification, verification or statement in relation to a bankruptcy case;
- 4) make a false proof of claim;
- 5) receive a material amount of property from the debtor with intent to defeat the Bankruptcy Code;
- 6) give, offer, receive or attempt to obtain money, property, reward or advantage for acting or forbearing to act in a bankruptcy case;
- 7) transfer or conceal property with the intent to defeat the Bankruptcy Code;
- 8) conceal, destroy, mutilate or falsify documents relating to the debtor's property or affairs; or
- 9) withhold documents related to the debtor's property or financial affairs from a trustee or other officer of the court.

Persons other than the debtor may commit bankruptcy crimes. During the course of the administration of the estate, the trustee also may become aware of potential theft or embezzlement by professionals (e.g., appraisers, auctioneers, attorneys) or by trustee employees.

Sections 153 and 154 of title 18 are specifically directed to trustees and other officers of the court. Section 153 relates to the knowing and fraudulent misappropriation, embezzlement or transfer of property, or destruction of any estate document, by the trustee or other officer of the court. The Bankruptcy Reform Act of 1994 broadened the scope of those affected by this statute to include an agent, employee or other person engaged by the trustee or officer of the court. 18 U.S.C. §§ 153, 154.

Section 154 of title 18 prohibits a trustee or other officer of the court from knowingly purchasing, directly or indirectly, any property of the estate of which such person is a trustee or officer; or the knowing refusal to permit a reasonable opportunity for the inspection of estate documents or accounts when directed by the court to do so. It also specifically identifies the United States Trustee as the only party in interest who does not require a court order directing the trustee or court officer to permit a reasonable opportunity for inspection. 18 U.S.C. § 154(3).

Section 155 makes it a crime for any party in interest or its attorney to knowingly and fraudulently enter into an agreement with another party in interest or its attorney, for the purpose of fixing the fee or compensation to be paid to them for services rendered in connection therewith, from assets of the estate. 18 U.S.C. § 155.

The Bankruptcy Reform Act of 1994 added 18 U.S.C. § 156, “Knowing Disregard of Bankruptcy Law or Rule,” and 18 U.S.C. § 157, “Bankruptcy Fraud.” A “bankruptcy petition preparer” is guilty of a misdemeanor if its knowing attempt to disregard in any manner the requirements of the Bankruptcy Code or Rules causes a bankruptcy case or related proceeding to be dismissed. § 156. A bankruptcy petition preparer does not include a debtor’s attorney or an employee of such attorney, but applies to a person who prepares for compensation a document for filing by a debtor in bankruptcy or district court.

Section 157 is similar to the federal mail fraud and wire fraud statutes in that it requires a person to devise or intend to devise a scheme or artifice to defraud. A person, not only a debtor, commits bankruptcy fraud if, for the purpose of executing or concealing this scheme or artifice to defraud, that person:

- a. files a petition under title 11;

- b. files a document in a proceeding under title 11; or
- c. makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title.

18 U.S.C. § 157. If a person falsely claims to be in bankruptcy, this is a violation of § 157.

There are several other criminal statutes that may be relevant to bankruptcy related crimes including those relating to bank fraud, tax fraud, mail and wire fraud, and money laundering. The United States Trustee provides additional information and training on these statutes.

### **3. COMPLIANCE WITH THE TRUSTEE'S DUTY TO REPORT CRIMINAL CONDUCT**

Section 3057 of title 18 of the United States Code requires the trustee to report suspected violations of federal criminal law to the appropriate United States Attorney. Section 586 of title 28 imposes a similar duty on the United States Trustee to refer any matter that may constitute a violation of criminal law to the United States Attorney and, upon request, to assist the United States Attorney in prosecuting the matter.

It is important that the chapter 7 trustee and the United States Trustee coordinate their efforts in the criminal referral process. Upon determining that there are reasonable grounds to believe that a crime has been committed, the trustee is required to refer the matter to the United States Attorney. Depending upon local practice, the trustee should submit the referral through the United States Trustee or furnish a copy to the United States Trustee. The mechanics of this referral should be discussed with the United States Trustee, the Assistant United States Trustee, or the Criminal Referral Coordinator for the particular region, as they may have developed specific procedures with the local offices of the United States Attorney and the Federal Bureau of Investigation.

In making a criminal referral it is important to provide as much specific factual and documentary information as possible. At a minimum, the referral should include:

- 1. the bankruptcy case name, file number and chapter;
- 2. a chronological summary including dates and specific facts related to the who, what, where, when and how of the suspected crime;

3. a brief narrative of what occurred in relation to each allegation referring to copies of relevant documents;
4. an estimate of the amount of loss involved;
5. names, addresses, phone numbers, titles, and descriptions of likely witnesses;
6. a copy of all written documents relevant to the allegations; and
7. a statement of other related referrals made to law enforcement agencies.

## **CHAPTER 9**

# **FINANCIAL POLICIES, PROCEDURES AND REPORTING REQUIREMENTS**



## **CHAPTER 9 – FINANCIAL POLICIES, PROCEDURES AND REPORTING REQUIREMENTS**

### **A. DEPOSIT AND INVESTMENT OF ESTATE FUNDS**

As set out in § 345, the trustee must immediately open a separate account for each estate as soon as funds are received. The accounts must be maintained under the direction and control of the trustee at all times. Accounts may only be maintained at depositories which have agreed to abide by the requirements established by the United States Trustee (see below). The trustee must notify the United States Trustee of the identity of the banking institution in which estate funds are held and thereafter must immediately notify the United States Trustee of an intent to transfer estate accounts to another banking institution.

Generally, a trustee should utilize a single banking institution<sup>6</sup> and should initially deposit funds to an interest-bearing account in order to maximize the return to creditors. Under no circumstances may monies of separate estates be aggregated or commingled. Bankruptcy-related funds may not be deposited to the trustee's business, personal or trust account.

A cash<sup>7</sup> receipts log must be used to track all incoming receipts (except wire transfers). This log must be used exclusively for the chapter 7 operation and not be combined with a law firm or business receipts log. In addition, the log must list the payer, date received, case number or name, amount, purpose<sup>8</sup>, and date deposited (date mailed or taken to the bank). All entries in the log should be handwritten (preferably in pen), and the log should be maintained by the person who opens the mail and endorses the incoming checks. (A computerized cash receipts log is permissible if it has programmed controls to prevent the deletion and modification of previously entered data and to prevent the insertion of transactions out of date sequence.) The trustee should keep copies of the payers' checks (or other instruments), together with supporting documentation (if any) such as transmittal letters, in the appropriate estate files.

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<sup>6</sup>In the interest of diversity, however, the trustee may place investment vehicles in minority-owned banks.

<sup>7</sup>As used herein, the term "cash" may include currency, checks (including money orders), certificates of deposit, treasury bills, and other negotiable instruments.

<sup>8</sup>With the exception of the "purpose," all items should be completed for every receipt. The "purpose" should be filled in when deemed appropriate or useful to the trustee and staff.

Funds are to be deposited to the estate bank account promptly after receipt (generally within two business days) and must not be placed in a file while the trustee waits for subsequent events to occur. In those rare instances where funds cannot or should not be immediately deposited, see Handbook Chapter 9.D.6.

## **1. TYPES OF ACCOUNTS**

### **Interest Bearing**

Section 345(a) provides that a trustee may invest monies of an estate. Estate funds should be deposited or invested in order to provide a maximum, reasonable net return to creditors. Estate accounts generally may be money market accounts or interest-bearing checking accounts. The interest rate should be no less than that available for other similar accounts.

If the trustee currently has estate funds in a non-interest bearing account, the trustee should move the funds to an interest-bearing account, unless the amount is nominal, local rules or court orders provide otherwise, or circumstances such as those listed below apply.

See Chapter 8.S.1 of this Handbook regarding the continued investment of estate funds after the TFR has been filed for an estate.

The trustee may be held personally liable for lost interest. See, In re Charlestown Home Furnishing, 150 B.R. 226, (Bkrtcy.E.D.Mo. 1993).

### **Non-Interest Bearing Accounts**

Under certain circumstances, the trustee may maintain money of the estate in a non-interest bearing account. Some of those circumstances are:

- a. The interest bearing account only allows a limited number of withdrawals each month and the trustee needs to pay administrative expenses in excess of the monthly limit;
- b. The trustee will be making an interim distribution to creditors; or
- c. The trustee is directed by court order to make an immediate distribution.

### **Investment Accounts**

When substantial funds (e.g., \$50,000) are received by the estate which will not be distributed for an extended period of time (e.g., six months), the trustee should

consider higher yield investments such as Certificates of Deposit or Treasury Bills.

In general, investments are to be as risk free as possible. The trustee should exercise care that no withdrawal of funds results in a loss to the estate. The trustee should not make an investment that will predictably delay closing.

Investment vehicles must be opened, issued or purchased in the name of the trustee as trustee of the estate.

### **Prohibited Investment Accounts**

There are certain types of investments that cannot be utilized by a trustee, such as repurchase agreements, reverse repurchase agreements, non-bank money market accounts, mutual funds, stocks, corporate bonds, and commercial paper.

### **Bond Recovery Account**

Some banks offer a concentration account, or “bond recovery account,” to expedite the payment of bond premiums for trustees. This type of account is permitted for this limited purpose, if authorized by the United States Trustee in writing. The trustee must keep detailed records concerning the calculation, allocation, and payment of the premium, and must not let a balance accumulate in the account. In addition, the account should be listed by the bank on its monthly or quarterly bank balance report to the United States Trustee (see below).

## **2. OPENING THE ACCOUNT**

In order to open the account, the bank may require some proof of appointment to the case. The bank also requires a tax identification number for any interest bearing account. When the debtor is a corporation or partnership, the trustee should use the debtor’s tax identification number. However, when the debtor is an individual, the bankruptcy estate is a separate taxable entity and, therefore, the debtor’s personal social security number may not be used to establish the estate bank account. Rather, the trustee must complete an IRS Form SS-4 to obtain a federal identification number for the bankruptcy estate individual debtor. Failure to provide the tax identification number to the bank results in back-up withholding being assessed and remitted to the Internal Revenue Service by the bank institution.

Estate bank accounts should be free of any service charges for maintaining the accounts, supplying check stock, providing monthly bank statements and cancelled checks, and providing computer hardware and software. Subject to

United States Trustee approval, service charges may be assessed under certain circumstances, such as for a chapter 7 operating case.

All bank statements, deposit slips and checks should be captioned with the bankruptcy case and number in the style of: "Estate of Jane Smith, Debtor, John Jones, Trustee, Case Number 98-0000." Pre-numbered checks and deposit slips shall be used for each account. If the trustee uses an automated data processing system to print and issue checks on blank check stock, adequate precautions must be instituted and maintained to ensure that all check stock, including voided checks, is accounted for and that every check in each case is consecutively numbered. See also Chapter 9.C of this Handbook.

The trustee must retain all original bank account statements, deposit slips, and cancelled checks for a period of two years from the closing of the case by the court, unless the original documents are submitted to the court or United States Trustee.

### **Requirements for Depositories Holding Bankruptcy Estate Funds**

The trustee may only use a depository that has agreed to comply with § 345, 31 C.F.R. Part 225, and the requirements of the United States Trustee. The United States Trustee can provide the trustee with a list of depositories that meet these requirements. If a bank wishes to be added to the list, it should contact the appropriate United States Trustee for the current requirements. If a depository fails to comply with the United States Trustee requirements, the trustee should promptly notify the United States Trustee and arrange to move the funds to another depository.

### **Collateralization of the Trustee's Deposits**

It is the responsibility of the trustee to ensure that the banking institution is in compliance with § 345 to the extent of the trustee's deposits. If the aggregate funds on deposit for an estate in a single institution exceed the \$100,000 FDIC insurance limit, the excess funds must be bonded or be collateralized by securities deposited with the appropriate Federal Reserve Bank. The trustee must notify the United States Trustee if the amount on deposit in any individual estate in any single depository exceeds or is expected to exceed \$100,000.

When securities are deposited, a copy of the Federal Reserve document evidencing the deposit must be sent to the United States Trustee. The depository must obtain prior written consent from the United States Trustee to reduce the amount of any collateral posted by the depository. The United States Trustee may, however, allow increases and any substitution of like-kind securities without prior approval.

As required by § 345(b)(2), securities used as collateral must be the kind specified in 31 U.S.C. § 9303, which specifies that government obligations, which are valued at par, may be used as security. A government obligation is defined in 31 U.S.C. § 9301(2) as a public debt obligation of the United States Government and an obligation whose principal and interest is unconditionally guaranteed by the Government. Public debt obligations consist of United States Treasury Bills, Bonds, or Notes. Zero-coupon Treasury Bonds as collateral are not acceptable collateral. While not public debt obligations, banks may also pledge a limited number of other bonds issued or guaranteed by the Government that contain an unconditional guarantee of principal and interest. The United States Trustee may request an opinion from bank counsel or contact the Executive Office before accepting bonds that purportedly contain an unconditional Government guarantee.

If a bond in favor of the United States is filed to protect the deposit of estate funds, § 345 requires the United States Trustee to approve the corporate surety securing the bond. The United States Trustee can only select a surety listed in Treasury Circular 570.

The United States Trustee obtains summaries of the amounts on deposit from each bank being used by a trustee to assist in monitoring trustee accounts and bonding requirements. The United States Trustee also receives a report from the Federal Reserve to review the sufficiency of the collateral posted by the banking institutions. The trustee must assist the United States Trustee in obtaining bank statements or summaries of amounts on deposit. An authorization for the bank's release of information to the United States Trustee may be required from the trustee.

### **Other Depository Requirements**

In addition to the foregoing, these requirements include, but are not limited to:

- a. Providing original canceled checks with the monthly bank statements mailed to the trustee in whose name the account was opened. Only the trustee in whose name the account was opened is authorized to sign checks or make withdrawals unless the bank is otherwise instructed in writing by the United States Trustee.
- b. Certifying annually, and upon request, that the trustee has not and will not receive favorable treatment (e.g., special interest rates or loan terms) from the bank on non-bankruptcy related personal or business accounts because of the trustee's bankruptcy accounts.
- c. Transferring funds between bankruptcy estates or between bankruptcy estate accounts and non-bankruptcy estate accounts only when presented

with an estate check signed by the trustee (except for incoming wire transfers from an independent third party). Verbal or written requests for funds transfers are not acceptable, unless the transfer of funds is between accounts of the same estate. In addition, the United States Trustee must require depository institutions to provide notice by phone of any cash withdrawals and all overdrafts.

- d. Releasing to the United States Trustee, upon request, any and all information pertaining to bank accounts, deposits, instruments, transactions and withdrawals of funds entrusted to or pertaining to the trustee or the United States Trustee or designee in performance of their official duties, and to provide further information including, but not limited to, copies of statements, deposit slips, canceled checks and account agreements as the United States Trustee may from time to time require in the performance of the United States Trustee's official duties at no cost to the United States Trustee.
- e. Waiving all service charges (with the possible exception of chapter 7 operating business accounts) or fees for supplying pre-numbered check and deposit slip stock, computer hardware or software, canceled checks or monthly bank statements.
- f. Implementing adequate controls over on-line banking. Such controls include, but are not limited to: passwords or another method of limiting the ability to open new accounts; periodic verification that the trustee has approved all new accounts; no transfers between estates; no transfers between bankruptcy and non-bankruptcy accounts; no deletion or closure of accounts that have activity; and no changes to an account number if the account has activity.
- g. Complying with any subsequent requirements established by the United States Trustee.

## **B. FINANCIAL REPORTING AND RECORD KEEPING**

To properly perform the trustee's duties and effectively administer an asset case, the trustee must establish an appropriate accounting system and maintain financial records on a contemporaneous basis for each estate. The USTP has developed a uniform record keeping and reporting system that the trustee must use. This system, as illustrated in the Forms and Instructions section at the end of this Handbook, is used throughout the country and should not be altered.

The financial record keeping and reporting system consists of three primary records: the Individual Estate Property Record and Report (Form 1), the Cash Receipts and

Disbursements Record (Form 2), and the Summary Interim Asset Report (Form 3). Utilizing these records, the trustee must provide an interim report (also known as “180-day report” or “semi-annual report”) to the United States Trustee at least every six months in the form prescribed herein.

This financial record keeping and reporting system applies to each chapter 7 asset case. A chapter 7 case is considered an asset case for the purposes of record keeping and reporting requirements when either (1) the trustee is in possession of property or funds, or expects to receive property or funds, or (2) a no-asset report has not been filed with the United States Trustee and the court, and 60 days have passed since the initial examination of the debtor at the § 341(a) meeting.

To summarize:

1. At least every six months, each chapter 7 trustee must submit to the United States Trustee an interim report for each case that is either expected to be or declared to be an asset case by the trustee, for each case in which the trustee has received funds of the estate, and for each case in which a no-asset report has not been filed and 60 days have passed since the initial examination of the debtor at the § 341(a) meeting.
2. The interim report consists of the Form 3, which is a summary listing of all pending asset cases, a Form 1 for each listed case, and a Form 2 for each case with an estate bank account. However, Form 1 and Form 2 do not need to be submitted if 1) a final account (TDR) was filed for an asset case during the current or prior reporting period, 2) a final report was filed for an asset case that was converted, dismissed, or reassigned during the current reporting period, or 3) a no-asset report (NDR) was filed for the case during the current reporting period. Such cases need only be listed on Form 3.
3. If a final report (TFR) was filed for an asset case that was not converted, dismissed or reassigned during the period, Form 1 and Form 2 should continue to be submitted for the current and future reporting periods until the TDR is filed. The United States Trustee will continue to monitor activity in the case after the TFR has been filed.
4. In summary, in each of the following instances, a case is to be listed on the Form 3 for the current reporting period and omitted from future reporting periods. Form 1 and Form 2 (if any) are not required to be submitted.
  - a) A TDR is submitted to the United States Trustee during the current reporting period.

- b) An NDR is filed in a case that has been open longer than 60 days after the initial examination of the debtor at the § 341(a) meeting. (No-asset cases in which an NDR has been filed within 60 days of the initial examination of the debtor at the § 341 (a) meeting are not to be listed on Form 3.)
- c) A case is converted, dismissed or reassigned during the current reporting period.

The interim report must be submitted to the United States Trustee no later than thirty days after the end of the reporting period. If the trustee cannot submit the report by the due date, the trustee should obtain a date specific extension in writing from the United States Trustee prior to the deadline. The United States Trustee reviews the report within sixty days of receipt and provides written notice of any deficiencies to the trustee.

FRBP 2012(b) requires a successor trustee to file with the United States Trustee an accounting of the prior trustee's administration of the estate. This accounting should be a separate and distinct record of the activities which were solely within the control of the prior trustee. The rule does not have a deadline for submission of the accounting. Absent some evidence of defalcation or other harm to the estate, the accounting can be submitted in conjunction with the submission by the successor trustee of the standard reports required by the United States Trustee.

Detailed instructions for completion of the interim report and an illustrative set of completed forms are contained in the Forms and Instructions section of this Handbook. A brief overview of the individual reporting forms is presented below.

## **1. INDIVIDUAL ESTATE PROPERTY RECORD AND REPORT (FORM 1)**

The Individual Estate Property Record and Report (Form 1) provides a blueprint for each asset case. It details all estate assets, both scheduled and unscheduled, and reflects the status of their disposition. It compares the debtor's opinion of each scheduled asset's value, the trustee's estimated net value to the estate for each estate asset, and the actual value realized by the trustee. It also supports the decision regarding administration of each asset. For assets not administered, Form 1 reflects abandonments, whether past or future, formal or informal. For assets administered or to be administered, Form 1 reflects the amounts realized and the anticipated remaining value of assets not completely liquidated.

Form 1 must be prepared for each asset case. All assets of the debtor must be listed from the petition, schedules, and statement of affairs. All unscheduled assets identified by the trustee also must be recorded. In a case converted from chapter 11, assets reported in the final report required by FRBP 1019(5), or in any schedules submitted post-conversion, should be listed. If no such report or schedules are filed, the trustee will list the assets remaining in the case and keep a



record in the estate file which describes how the trustee determined the assets remaining in the case. If the trustee is serving as a successor trustee, Form 1 should list all receipts or deposits turned over by the prior trustee as well as all property of the estate not administered by the prior trustee.

A reference number should be assigned to each asset listed on Form 1.

Form 1 includes the dollar value of each asset, whether assigned by the debtor in the petition, schedules, and statement of affairs, or by the trustee as to unscheduled property. Form 1 also shows the estimated net value determined by the trustee which is the dollar amount of the property less any security interest, the debtor's allowed exemption in the property, and any other appropriate adjustment, such as costs to sell, realtor commission, property taxes, or capital gains tax.

The disposition of assets is recorded by indicating the abandonment of any asset pursuant to § 554, or the gross amount received from the sale or other liquidation of assets.

The status of the liquidation process should be reflected as either (a) the value determined by the trustee prior to liquidation, (b) the remaining value of an asset that has been partially liquidated, or (c) that an asset has been fully administered by the trustee.

Form 1 should reflect other information such as the status of assets not fully administered or abandoned, specific matters pending, dates of hearings or sales, projected date of TFR, and other actions.

A sample Form 1 with instructions is provided in the Forms and Instructions section of this Handbook.

## **2. CASH RECEIPTS AND DISBURSEMENTS RECORD (FORM 2)**

The trustee must prepare a Cash Receipts and Disbursements Record (Form 2) to show all receipts, disbursements, and bank account transfers in each asset case. All receipts are to be identified by the reference number assigned on Form 1, and consecutive check numbers should be listed for each disbursement. Each entry also should include the name of the payer or payee, the date of the transaction, and a description of the transaction. The trustee must maintain a separate Form 2 for each estate bank account, including Certificates of Deposit.

All transactions must be entered on Form 2 in chronological order, as soon as they occur.

If the trustee is serving as a successor trustee, Form 2 should begin with the balance turned over by the previous trustee, thereby remaining consistent with the successor trustee's bank statements.

A sample Form 2 with instructions is provided in the Forms and Instructions section of this Handbook.

### **3. SUMMARY INTERIM ASSET REPORT (FORM 3)**

Form 3 is prepared at least every six months for submission to the United States Trustee as part of the interim report. Most entries on Form 3 can be made from Forms 1 and 2.

Form 3 is a summary list of pending asset cases. This report must list each case that is either expected to be or declared to be an asset case by the trustee, each case in which the trustee has received funds of the estate, and each case in which a no-asset report has not been filed and 60 days have passed since the initial examination of the debtor at the § 341(a) meeting. If the TDR or NDR was approved by the United States Trustee, or the case was converted, dismissed, or reassigned, during the current reporting period, the case is to be listed on Form 3 for that reporting period, but omitted from Form 3 for future reporting periods.

Cases are entered in sequence by case number.

A sample Form 3 with instructions is provided in the Forms and Instructions section of this Handbook.

## **C. SPECIAL CONSIDERATIONS FOR COMPUTER SYSTEMS**

### **1. SELECTION OF A COMPUTER SERVICE PROVIDER**

Many trustees find it helpful to automate the chapter 7 financial reporting, accounting, and case administration systems. There are numerous private companies that offer computer systems capable of producing Forms 1, 2, and 3 and handling the other requirements outlined in this Handbook. Many of these systems are offered in conjunction with the banking services chosen by the trustee. The trustee also may wish to develop an in-house computer system.

The United States Trustee does not endorse or recommend any particular computer system or service provider.

### **2. PROVISION OF COMPUTER HARDWARE AND SOFTWARE**

Some banking institutions have contractual arrangements with computer service providers whereby the bank provides certain computer hardware and software to the chapter 7 trustee for use free of charge in consideration for depositing bankruptcy estate funds with the bank. The trustee's use of computer equipment is not prohibited provided it is reasonable and necessary for, and devoted exclusively to, the trustee's administration of chapter 7 cases. In addition, selection of a banking institution or computer service provider should be based

upon customary business considerations, such as competitive interest rate, quality and service, and not on premiums or personal gain.

### **3. SECURITY**

The integrity and accuracy of computerized systems are critical to the administration of estates. Consequently, there are special internal control considerations that arise in a computerized environment. The trustee must ensure that the computer system used for chapter 7 case administration, financial reporting, and accounting contains the following security and internal control measures, at a minimum:

- a. The trustee should establish unique passwords for each user, which are changed at least annually or when an employee leaves or no longer works on chapter 7 matters. Additional password controls are appropriate for certain functions, such as initiating bank account transfers or generating disbursement checks.
- b. Access to sensitive data fields, such as creditor name and address, distribution amounts, etc., should be further limited by password or data entry controls to only those employees who need access to these fields to perform their assigned job duties.
- c. In systems which enable access via modem to bank accounts, the ability to open and close an account and access or transfer funds should be limited to the trustee and, at most, one authorized employee. In all instances, the system should only allow transfers between accounts within the same estate. Estate bank accounts may be closed electronically (via modem) after the TDR has been filed and the bank account has held zero funds for at least sixty (60) days.
- d. The software should contain a tamper-proof feature that consecutively numbers estate account checks as the checks are created or printed by the computer system. The numbers of voided checks should not be able to be re-used. The number sequence on manual checks should not duplicate the computer-generated numbers. If checks are drawn on more than one account in an estate, the numerical sequence of the checks should be unique for each account (e.g., 101, 102, 103, etc. for the interest bearing checking account; 10001, 10002, 10003, etc., for the money market account).
- e. Blank check stock, if pre-printed with a bank logo, account number, and other identifying information, should contain a control number. The

trustee should maintain a log of these control numbers and account for every check used. At a minimum, the log should indicate the control number and the bankruptcy case number/name. If the blank check stock is completely blank (i.e., the account number, bank logo and other identifying information are printed when the trustee prints the check), a control number is not necessary. The trustee should, however, keep both types of check stock in a limited access, secure area.

- f. The software should prevent any changes to the date, check number, payer/payee, and amount of a transaction, as well as the deletion of a transaction, after the check has been printed, or deposit has been made, or the transaction has appeared on Form 2. If the trustee needs to change the date, check number, payer/payee, or amount, or void a deposit or check, reversing and correcting entries to void the transaction must be made. A "void" transaction reverses the previously entered transaction. By showing the original and void transaction, Form 2 will provide a clear record of what happened.

To clarify, a transaction may not be deleted after it has been saved (or the enter key has been struck). A trustee may change the transaction, including the date, payer/payee, and amount (but not the check number), as long as the transaction is still in a "batch" or "pending" mode. For purposes of this definition, a transaction is considered to be in a "pending" mode until the trustee initiates the transfer, transmits the deposit, and/or prints or attempts to print the check, deposit slip, or the Form 2 (as of a date that includes the date of the transaction). The terms "print" and "attempt to print" include directing the software to initiate an electronic transfer, as well as directing the software to print, attempt to print, or send the document to a computer printer, a fax machine, and an electronic file (ASCII, an e-mail, a diskette, etc.). For example:

- (1) If a transaction has been posted to the wrong estate (e.g., a deposit to the correct estate, but the entry is recorded for the wrong estate), it may not be deleted by the trustee or the software vendor. The trustee must enter a correcting entry to provide the appropriate audit trail.
  - (a) If a deposit was made to the wrong estate, the correction cannot be made electronically or by bank transfer. The trustee must write an estate check equal to the amount deposited in error and deposit the check to the correct estate and the correcting entry must be recorded on Form 2.

- (b) If the deposit was made to the wrong account, but the correct estate, the trustee may correct the error in the customary way for transferring money between accounts within the same estate (e.g., electronically or by bank transfer).
- (2) If an incorrect account number or case number is entered for an estate (e.g., numbers are transposed), the software may enable the trustee to delete or change the account or case number as long as no

transactions or other activity have been entered. If transactions and other activity have been entered, there are two ways to correct the mistake:

- (a) With the trustee's written authorization, which should explain how the error occurred, the software provider may correct the account number or case number for the trustee, or
- (b) The trustee can void and reverse all of the transactions entered to the incorrect account or case and re-enter the transactions to the correct account or case.

Some changes are permissible. On Form 2, the trustee may change a transaction description, reference number, and transaction code (if used). These changes should be explained in a footnote on the Form.

- g. If an incorrect asset is listed on Form 1, the trustee may not delete the asset and re-use the asset reference number. To correct this error, the trustee should replace the asset's description in Column 1 with the word "void" to indicate that there is no asset associated with the reference number. All reference numbers should continue to print sequentially on Form 1; that is, there should be no gap in the reference number sequence.

Some changes are permissible. On Form 1, the trustee may revise an asset description. The trustee also may divide assets that were originally entered as a group. (The first asset in the group would use the original asset reference number and the other assets would be listed starting with the next available asset reference number.)

- h. A computer user's manual should be maintained. The user's manual provides comprehensive written information about a software system which explains what it does, how it works, how it operates, etc. It enables design problems to be identified and corrected and provides instructions for new users on how to operate the system.
- i. The computer should be safeguarded from unauthorized access and use. Computer hardware and software should be in a secure, limited access area. Only authorized users should be able to gain access to the chapter 7 computer programs and data via the terminal, network or modem.
- j. The system should be backed-up daily; a copy of the back-up should be stored offsite at least weekly, preferably daily. The back-up diskette, tape or other media should be tested or rotated periodically to ensure its continued reliability.

- k. The 180-day reports generated by these systems should not contain transactions after the cut-off date. The trustee should be able to generate the reports as of any date, with the reports containing the appropriate transactions.

#### **4. EMERGING TECHNOLOGICAL ISSUES**

There are a number of exciting technological innovations underway in the manner in which bankruptcy cases are filed and administered. In various jurisdictions throughout the country, local courts and members of the bankruptcy community are testing innovations such as electronic filing of petitions, schedules and statements and sharing information and data via electronic data interface (i.e., the “paperless” office).

The United States Trustee will keep each trustee informed about these emerging technologies and their impact on chapter 7 case administration and reporting. The United States Trustee will consider the benefits of new technologies when evaluating the risks, as paperless administration may make it more difficult to discover irregularities. The trustee should discuss any ideas or concerns regarding electronic data interface and the paperless office with the United States Trustee before implementing any changes. For the present, the United States Trustee requires the trustee to keep hard copy originals of any documents used for case administration, reporting, or accounting.

#### **D. OTHER RECORD KEEPING PROCEDURES AND INTERNAL CONTROLS**

Each trustee must establish and maintain an appropriate system of internal controls to safeguard estate funds and property, to ensure the integrity of financial record keeping and reporting, and to discourage employee theft. In addition to the cash receipts log described on p. 9-1, the trustee should utilize additional record keeping tools which include, but are not limited to, an accounts receivable ledger and a numbered, duplicate receipt book. An accounts receivable ledger is used for tracking collections from customers or other third parties. It identifies the customer or payer, the balance due, amounts collected, and the status of collection efforts. The accounts receivable ledger provides a convenient and concise method to monitor the collection of numerous accounts receivable. It also can be used to track preference actions and other collection efforts. The numbered, duplicate receipt book is utilized when a payer requests a receipt. A numbered, duplicate receipt must be provided for currency payments.



A strong internal control environment includes, but is not limited to, the components described below:

## **1. SEGREGATION OF DUTIES**

- a. The trustee shall oversee the entire trustee operation and shall actively supervise employees in the performance of their cash management and accounting duties. The trustee operation is normally conducted in a single location (e.g., at the trustee's business office) to facilitate adequate trustee supervision, to maintain strong internal controls, and for ease of case administration.
- b. At a minimum, the trustee must: (1) verify, on a test basis, that incoming receipts are promptly and properly deposited by comparing the cash receipts log to the deposit slips and bank statements (the trustee should initial the receipts log to document this review); (2) review and sign all checks, (3) authorize stop payment requests and cancellations in writing; and (4) review and initial the monthly reconciliation of Form 2 to the bank statements. In addition, the trustee should receive the monthly bank statements, unopened, and review the statements and canceled checks for unusual transfers and endorsements, alterations, and forged signatures.
- c. Wherever possible, cash handling duties should be separated from the record keeping functions. In other words, the person who maintains Forms 1 and 2 should not also have access to cash receipts and disbursements. Internal controls are strengthened when the following duties are divided among the trustee and several employees: receiving and logging receipts in the cash receipts log; restrictively endorsing checks; preparing deposit slips; making deposits; reconciling bank statements; maintaining Forms 1 and 2; reconciling the cash receipts log to bank statements and Form 2; preparing semi-annual reports, and having custody of check stock. When small staff size precludes segregating duties, the trustee must be more actively involved. Suggestions for segregating duties in a small office are included in Appendix D.
- d. Documenting routine staff procedures and developing written job descriptions are good internal control measures that help ensure consistent staff performance.

## **2. MONITORING BANK ACCOUNTS AND CHECK STOCK**

- a. All bankruptcy estate accounts should be reconciled monthly. Both the preparer and reviewer should initial and date the reconciliations. Any unusual entries on the bank statements should be investigated. The trustee

should timely ask the bank to reverse any service charges that appear on the statements.

- b. Check stock and deposit slips should be kept in a secure location to prevent unauthorized access and use. Checks should be consecutively numbered either by the bank or by the trustee's automated data processing (ADP) system.
- c. Generally, voided checks should be maintained in the estate files. However, checks that are used for printer alignment, damaged, or rendered useless during the check printing process should be voided and retained with the check control log (if the checks contain a control number – if no control number and other identifying information, the useless check paper should be torn up and thrown away). The numbers of voided checks may not be re-used.
- d. Checks that have been outstanding for more than 90 days or checks returned by the post office (i.e., for inadequate address or some other reason) should be processed by an individual uninvolved with initial check preparation and authorization. The checks should be voided and the cause of the problem researched and corrected before the checks are re-issued. Documentation should be maintained to verify the efforts undertaken.
- e. Stop payment requests and cancellations thereof must be approved by the trustee. Either the trustee or an employee may initiate the telephonic or electronic request regarding a stop payment, but the request must be followed up in writing either by: (1) the trustee's written confirmation to the bank (with a copy maintained in the estate file), or (2) by the trustee initialing and dating the computer system's transmission log (which serves as evidence of the electronic transmittal of the stop payment or cancellation request).

### **3. RECEIPTS**

- a. Immediately upon receipt, currency and checks are to be recorded in the cash receipts log. Checks should be restrictively endorsed in writing or by stamping "For deposit only to the Estate of \_\_\_\_\_".
- b. Payers should be instructed to makes checks payable to "Jane Doe, Trustee" or to the "Estate of \_\_\_\_\_."
- c. Currency and checks must be kept in a safe or locked cabinet until deposited.

- d. Funds are to be deposited as soon as possible after receipt (generally within two business days).
- e. NSF checks should be formally recorded and monitored until resolved.
- f. Supporting documentation for receipts, such as transmittal letters, sale orders or notices, and reports of sale, must be kept in the estate file.

#### **4. HANDLING CURRENCY**

(See also Appendix G.)

- a. The trustee should discourage payments in currency.
- b. When a trustee cannot avoid accepting currency, the following procedures apply:
  - (1) Provide a duplicate, numbered receipt to the payer and immediately deposit the funds in the estate account. Both the payer and trustee should keep a copy of the receipt.
  - (2) If it is not possible to deposit funds immediately, either because the trustee uses a remote bank or because an estate account has not been opened, immediately convert the currency to a cashier's check or money order and place it in a secure location until deposited. When possible, the trustee should attempt to obtain the cashier's check or money order free of charge. If this is not possible, the service charge may be deducted from the funds received, with the cashier's check or money order issued for the net amount. The service charge is a cost of administering the estate. The trustee should record the gross amount received and the amount of the service charge in the transaction description column on Form 2 and in the receipts log.
  - (3) If currency is received late in the day and it is impossible or impractical to follow the above procedures, secure the funds in a safe or locked drawer until the next business day when these procedures can be carried out. The trustee also may want to investigate the possibility of using the bank's night depository or 24 hour services if the bank is not in a remote location.
- c. All supporting documentation in connection with handling currency should be kept together in the estate file to provide an audit trail. When an employee handles currency, the trustee needs to verify that the amount of the check or money order matches the amount of funds initially turned over to the employee, less any applicable service charge.

## **5. EARNEST MONIES**

(See also Appendix G.)

- a. In connection with the sale of estate assets, the trustee may occasionally receive and hold earnest monies. These funds are held in trust until the sale is consummated in accordance with applicable bankruptcy law. The funds must be deposited to the estate account immediately upon receipt. They may not be held, undeposited, in the trustee's office or commingled with a law firm's trust account.
- b. As an alternative, the trustee may, upon approval of the United States Trustee, deposit earnest monies to a separate trust account established specifically for this purpose. A separate account for each estate is necessary. Specific accounting and record keeping requirements have been established for these accounts. See Appendix G. The trustee should discuss this option and obtain approval from the United States Trustee prior to opening such an account.

## **6. HANDLING OF FUNDS WHICH CANNOT, OR SHOULD NOT, BE DEPOSITED IMMEDIATELY**

- a. Funds are to be deposited to the estate bank account promptly after receipt (generally within two business days) and must not be placed in a file while the trustee waits for subsequent events to occur. However, in a rare instance funds may be received which cannot or should not be immediately deposited. Such instances may include, but are not limited to: (1) receipt of a settlement offer, the acceptance of which will be deemed acceptance of the terms of the proposed settlement; (2) garnished funds received from court clerks or employers in cases with nominal or no other assets; and (3) funds paid in settlement of sanctions imposed in petition preparer cases.
- b. When a trustee cannot immediately deposit funds received, the following procedures apply:
  - (1) Note receipt of the funds in the cash receipts log and place the funds in a safe place until deposited or turned over to the debtor or other party.
  - (2) Immediately convert any currency received to a cashier's check or money order (any charge to purchase the cashier's check or money order is treated as a cost of administration).

- (3) Dispose of the funds within 30 days after receipt of the funds or, in cases requiring a court order for disposition, 21 days after entry of a final order.
- (4) If a court order for disposition of the funds is required, the trustee must obtain such order without undue delay.
- (5) Record the final disposition of the funds in the cash receipts log.
- (6) If the funds are turned over to the debtor or another party and the case will not be administered as an asset case, keep a copy of the check with the cash receipts log. If the NDR has already been filed, keep a copy of the check with the cash receipts log or in a separate file.

## **7. ACCOUNTS RECEIVABLE**

- a. An accounts receivable ledger should be maintained when multiple accounts are being collected. The ledger shows a running balance of amounts owed and is updated as payments are received.
- b. If the trustee intends to turnover the accounts receivable to a third party for collection, the initial demand letter should be sent by the trustee. In addition, the trustee should retain a control copy of the accounts turned over and should request a periodic status report and accounting of the collection efforts undertaken, monies collected, and remaining balances due.

## **8. DISBURSEMENTS**

- a. All disbursements should be made by estate checks drawn on the estate account. The trustee should review all supporting documentation and personally sign all checks. No signature stamp may be used. Checks may not be pre-signed by the trustee (i.e., checks may not be signed before the date, payee, and amount are written in). Checks must be made payable to a specific payee and not payable to “cash,” “bearer,” or “currency.”
- b. If an automated system is not used, estate checks must be pre-printed and pre-numbered by the bank. The “starter” checks should only be used when absolutely necessary and should be hand-numbered by the trustee upon receipt. Starter checks should be voided and maintained in the estate file upon receipt of bank-numbered checks.

- c. Cashier's checks and wire transfers may only be used under extraordinary circumstances, upon approval of the United States Trustee. "Extraordinary circumstances" can include, but are not limited to: (1) an immediate payment by a trustee is necessary to prevent loss to the estate or injury to a person or property and the service provider will not accept an estate check, or (2) a wire transfer is required by applicable law or regulation (e.g., tax deposits in excess of \$50,000 per 26 C.F.R. Parts 1, 31, and 40). A copy of the cashier's check or wire transfer bank advice and related documentation must be maintained in the estate file.
- d. Counter checks may never be used.
- e. All checks must be captioned with the bankruptcy case name and number in the style of "Estate of Jane Smith, Debtor, John Jones, Trustee, Case Number 98-00000". The checks also must include a statement that the check will be void if not cashed within 90 days.
- f. Supporting documentation for disbursements, such as invoices, fee applications, and court orders, must be kept in the estate file. Supporting documentation should contain indicate both the trustee's initials and date to indicate review and approval, as well as an indication of payment, such as a "PAID" stamp or an attached copy of the check, to prevent duplicate payment.
- g. As an additional control, the trustee should consider asking the bank to obtain verbal approval from the trustee when checks over an established dollar amount (e.g., \$50,000) are presented for payment.

## **9. MAINTAINING ESTATE RECORDS**

- a. The trustee should maintain an estate file for each individual estate. The files should be kept in a neat and well-organized manner. One part of the file should contain pleadings and related documents. All financial records, such as the following, should be readily accessible and segregated in the estate files:
  - (1) All documents relating to the financial transactions of the estate (cancelled checks, bank account statements, deposit slips, bills or invoices for estate expenses, other documents received as to estate investments, tax returns or waivers, etc.).
  - (2) All documents relating to the possession and maintenance of assets (receipts for property turned over to trustee, appraisals, inventories, casualty insurance, etc.);

- (3) All documents relating to the disposition of assets (lien documentation, collection letters, notices or advertisements of sales or abandonments, court orders as to the disposition of assets and the payment of expenses, offers received, auctioneer's reports, etc);
- b. All cases, files, paper and computer accounting records, as well as the computer, should be stored in secure facilities, not accessible to the public. Savings certificates, savings account books, cash, blank checks, and estate checks should be kept in a safe or locked cabinet.
  - c. The trustee should develop and maintain a written business interruption/disaster recovery plan for the estate financial and administrative records, as well as for the computer system and data.
  - d. Depending on the type of automated data processing software utilized, the trustee should request that the case records be made available in an ASCII format. If this is not possible, the trustee should find out if the vendor will provide an electronic copy of the trustee's case records. Either of these features enables a trustee to more easily transfer their data to another software product should the need arise.
  - e. For an asset case, the trustee is required to retain case files and estate accounting records for a period of at least two years after the case is closed during which the trustee may be sued on the bond (§ 322(d)) or as otherwise required by the IRS.
  - f. For a no-asset case, the trustee should retain in the estate file all documentation that supports the independent investigation and determination that the case is a no-asset case, for a period of at least two years after the case is closed during which the trustee may be sued on the bond (§ 322(d)). Such documentation may include: payoff letters, lien search results, appraisals, blue book values, § 341(a) meetings notes, etc. After the case is closed by the court, the trustee may discard the petition, schedules, and statement of affairs, unless these documents contain the trustee's notes regarding the no-asset determination.

## **E. AUDITS, EXAMINATIONS, AND REVIEWS<sup>9/</sup>**

Audits, examinations, and reviews of each chapter 7 trustee's accounting and case administration activities are conducted periodically. The audits are performed by the Office of Inspector General (an "OIG audit"). The examinations and reviews are performed by United States Trustee personnel (a "UST Field Examination" or "Case Administration Review").

The trustee will be advised approximately two weeks in advance of when the audit, examination, or review will be conducted. The trustee must have all records available and make every effort to ensure that all appropriate employees are on hand.

An audit or an examination lasts approximately one week; a review is more flexible, but generally will not exceed three (3) days. The auditor or reviewer will examine case files and accounting records and conduct interviews with the trustee and employees.

The auditor/reviewer, trustee, and a UST representative (in the case of OIG audits) participate in an exit conference at the conclusion of the audit, examination, or review. The auditor/reviewer will explain the results of the examination and may make recommendations to improve internal controls, record keeping, and, if applicable, case administration procedures.

### **1. RESOLUTION OF OIG AUDITS AND UST FIELD EXAMINATIONS**

A written report on the results of the audit or examination is issued usually within 30 days of the exit conference. The United States Trustee forwards the report to the trustee. The trustee must provide a written response to the United States Trustee within 45 days of the date of the written report describing and documenting the corrective actions taken and the procedural changes implemented.

The United States Trustee may arrange a follow-up visit to verify the implementation of the corrective actions described in the trustee's response.

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<sup>9/</sup>The terms "audit," "examination," and "review" also are terms of art used by the accounting profession. As used by the USTP, an "audit" is performed by the Department of Justice's Office of Inspector General or by independent accountants in accordance with generally accepted government auditing standards (GAGAS) for performance audits, except as noted in their audit reports. The "examination" and "review" are performed by United States Trustee staff for internal use and are not intended to be in conformity with the accounting profession's Statements on Auditing Standards (SAS), generally accepted auditing standards (GAAS), or GAGAS.



If an inadequate audit opinion or examination conclusion is issued, the trustee will be suspended from the active rotation for receiving new cases in accordance with the procedures described in 28 C.F.R. § 58.6. An inadequate opinion or conclusion means that the quality of the trustee's accounting and cash management practices and procedures was inadequate for the safeguarding of bankruptcy estate funds. The trustee will receive written notice of the suspension pursuant to 28 C.F.R. § 58.6, and an interim directive requiring immediate suspension of case assignments may be issued, if the circumstances under § 58.6(d) exist. Implementation of corrective actions, a follow-up visit by the United States Trustee, and the approval of the Deputy Director, Executive Office for United States Trustees, are required in order for case assignments to resume.

## **2. RESOLUTION OF CASE ADMINISTRATION REVIEWS**

When applicable, the trustee will receive a written notice of deficiencies with deadlines for implementing corrective actions. The trustee should provide a written response to the United States Trustee within 45 days of the date of the written notice.

The United States Trustee may arrange a follow-up visit or accept documentation to verify implementation of the corrective actions described in the trustee's response.

# **CHAPTER 10**

## **COMPLIANCE MEASURES**

## CHAPTER 10 – COMPLIANCE MEASURES

### A. REMEDIAL AND ENFORCEMENT ACTIONS

The United States Trustee is responsible for supervising trustees. 28 U.S.C. § 586. Trustees are fiduciaries who are held to very high standards of honesty and loyalty. Trustees who fail to maintain this high standard or who are otherwise deficient in their administration of cases will be subject to a wide range of corrective action by the United States Trustee or the court.

If the nature of the trustee's actions reflect dishonesty, deceit, fraud, or serious mishandling of estate funds, a single substantiated incident justifies immediate action by the United States Trustee to protect the bankruptcy estates. The remedies considered by the United States Trustee include motions to remove the trustee from his case(s), temporary restraining orders, orders for turnover of books and records, and referral to the United States Attorney and state licensing authorities.

Trustee conduct that does not rise to the level of dishonesty, fraud, or immediate asset risk merits the use of progressive or cumulative remedies that range in severity from meetings with the trustee to filing motions to compel, seeking disgorgement or surcharge, temporarily suspending the trustee from rotation, not reappointing the trustee to the panel, or seeking to permanently remove the trustee from all cases. Imposition of these remedies is at the discretion of the United States Trustee. The types of conduct that may warrant one or more of these remedies include substandard reporting or asset investigation efforts, repeated instances of underbonding, inadequate internal controls, or weak case administration. For example, if a trustee has a large number of older cases that appear ready for closure, the United States Trustee may address the situation by meeting with the trustee to discuss why the cases have not been closed. Depending upon the results of the meeting and the trustee's subsequent efforts to close older cases, the United States Trustee may find it necessary to file motions to compel the filing of final reports (TFRs) or to temporarily suspend the trustee from panel rotation until the older caseload is reduced. If these remedies do not produce the desired results, the United States Trustee may decide not to renew the trustee's appointment to the panel and also may seek the trustee's removal from the case(s).

There may be circumstances when a trustee voluntarily seeks temporary suspension from case assignments. In this event, the trustee should submit a Notice of Voluntary Suspension. See Appendix F. Voluntary suspensions usually result under three scenarios. The first scenario is the situation where the trustee requests a suspension for personal reasons. For example, the trustee may have health concerns, wish to take maternity leave or need to care for a family member. In the second scenario, the trustee requests suspension for case administration reasons. For instance, the trustee has a temporarily large caseload or an unusually large, complex case. In the third scenario, the trustee requests a suspension for the purpose of correcting a deficiency or

deficiencies in the trustee's administration of bankruptcy estates. If the United States Trustee agrees, 28 C.F.R. § 58.6 is not invoked as an enforcement tool. Under this scenario, Appendix F may be modified to delete the time period, so that the United States Trustee determines when the deficiency has been resolved and the suspension may be lifted. If a time period is set and the deficiency has not been remedied, the United States Trustee may need to pursue suspension or non-reappointment.

Suspension from panel rotation is required in the following situations:

- ▶ Failure to timely file 180-day reports.
- ▶ Issuance of an inadequate opinion as a result of an OIG audit or UST field examination.

## **B. PROCEDURES FOR SUSPENSION AND TERMINATION (28 C.F.R. § 58.6)**

The United States Trustee will notify a panel trustee in writing of any decision to suspend the trustee from panel rotation or not renew the trustee's appointment to the panel. The panel trustee will continue to receive cases for the next twenty days, or longer if the panel trustee appeals the United States Trustee's decision to the Director, EOUST. In cases where estate assets are at risk or there appears to be gross misconduct, the United States Trustee may issue an interim directive for the immediate cessation of case assignments. The trustee may seek a stay of the interim directive from the Director if the trustee has timely filed a request for review under 28 C.F.R § 58.6(b). See Appendix E.

# **FORMS AND INSTRUCTIONS**

## GENERAL INSTRUCTIONS FOR INTERIM (180-DAY) REPORTS

This section describes the uniform financial record keeping and reporting system that the trustee must use. The system consists of three primary records: the Individual Estate Property Record and Report (Form 1), the Cash Receipts and Disbursements Record (Form 2), and the Summary Interim Asset Report (Form 3). Utilizing these records, the trustee must provide an interim report (also known as “180-day report” or “semi-annual report”) to the United States Trustee at least every six months in the format prescribed herein.

This financial record keeping and reporting system applies to each chapter 7 asset case. A chapter 7 case is considered an asset case for the purposes of the record keeping and reporting requirements when either (1) the trustee is in possession of property or funds, or expects to receive property or funds, or (2) a no-asset report has not been filed with the United States Trustee and the court, and 60 days have passed since the initial examination of the debtor at the § 341(a) meeting.

To summarize:

1. At least every six months, each chapter 7 trustee must submit to the United States Trustee an interim report for each case that is either expected to be or declared to be an asset case by the trustee, for each case in which the trustee has received funds of the estate, and for each case in which a no-asset report has not been filed and 60 days have passed since the initial examination of the debtor at the § 341(a) meeting.
2. The interim report consists of the Form 3, which is a summary listing of all pending asset cases, a Form 1 for each listed case, and a Form 2 for each case with an estate bank account. However, Form 1 and Form 2 do not need to be submitted if 1) a final account (TDR) was filed for an asset case during the current or prior reporting period, 2) a final report was filed for an asset case that was converted, dismissed, or reassigned during the current reporting period, or 3) a no-asset report (NDR) was filed for the case during the current reporting period. Such cases need only be listed on Form 3.
3. If a final report (TFR) was filed for an asset case that was not converted, dismissed or reassigned during the period, Form 1 and Form 2 should continue to be submitted for the current and future reporting periods until the TDR is filed. The United States Trustee will continue to monitor activity in the case after the TFR has been filed.
4. In summary, in each of the following instances, a case is to be listed on the Form 3 for the current reporting period and omitted from future reporting periods. Form 1 and Form 2 (if any) are not required to be submitted.
  - a) A TDR is submitted to the United States Trustee during the current reporting period.

- b) An NDR is filed in a case that has been open longer than 60 days after the initial examination of the debtor at the § 341(a) meeting. (No-asset cases in which an NDR has been filed within 60 days of the initial examination of the debtor at the § 341 (a) meeting are not to be listed on Form 3.)
- c) A case is converted, dismissed or reassigned during the current reporting period.

The interim report must be submitted to the United States Trustee no later than thirty days after the end of the reporting period. If the trustee cannot submit the report by the due date, the trustee should obtain a date specific extension in writing from the United States Trustee prior to the deadline. The United States Trustee will review the report within sixty days of receipt and provide a written notice of any deficiencies to the trustee. The noted deficiencies should be corrected within the requested time frame.

FRBP 2012(b) requires a successor trustee to file with the United States Trustee an accounting of the prior trustee's administration of the estate. This accounting should be a separate and distinct record of the activities which were solely within the control of the prior trustee. The rule does not have a deadline for submission of the accounting. Absent some evidence of defalcation or other harm to the estate, the accounting can be submitted in conjunction with the submission by the successor trustee of the standard reports required by the United States Trustee.

The trustee is required to use the current version of Forms 1, 2, and 3, as presented in this Handbook. Earlier versions, such as the pre-1992 Form 4, should not be utilized.

# INSTRUCTIONS FOR FORM 1 INDIVIDUAL ESTATE PROPERTY RECORD AND REPORT

## When to Complete Form 1

This record must be maintained for every case that is either expected to be or declared to be an asset case by the trustee, for each case in which the trustee has received funds of the estate, and for each case in which a no-asset report (NDR) has not been filed and 60 days have passed since the initial examination of the debtor at the § 341(a) meeting.

## How to Complete Form 1

### Header Information

The trustee should enter the case number, case name, trustee name, date filed or converted, first date set for the § 341(a) meeting, claims bar date, and the reporting period ending date, as indicated. With respect to the date filed or converted, the trustee should enter the later of the date the case was filed under chapter 7 or the date the case converted to chapter 7. This date should be identified as filed (f) or converted (c), as appropriate.

### Column 1: Asset Description (Scheduled and Unscheduled Property)

Form 1 accounts for all property listed on the debtor's petition, schedules, and statement of affairs, as well as any assets identified by the trustee which were not listed by the debtor.

First, all assets of the debtor from the petition, schedules, and statement of affairs should be listed. Similar types of assets (e.g., household goods) will often be lumped together by the debtor and may be listed as a group on Form 1, particularly if the trustee intends to administer them as a group. However, for ease of administration, most assets should be separately identified where possible. For example, the trustee will find it helpful to separately list each automobile and each piece of real property, even though the individual assets may have been reported together as a group in the petition, schedules, and statement of affairs. When an asset is jointly owned with a non-filing spouse or other party, Form 1 should reflect the debtor's interest (e.g., one-half)<sup>10</sup>. If, for example, the debtor lists the full value of a house and the debtor's interest is one-half, the asset description on Form 1, should state "½ share, 852 Jones Street." Likewise, the values shown in Columns 2, 3, 5, and 6 should reflect the debtor's share.

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<sup>10</sup>In a community property state, the full value of the community property should be listed without any deduction for the non-filing spouse's community property interest.



Second, any assets identified by the trustee, but not included in the petition, schedules, and statement of affairs, should be listed. These uncheduled assets should be identified by a (u) following the asset description.

Third, in a case converted from chapter 11, assets reported in the final report required by FRBP 1019(5), or in any schedules submitted post-conversion, should be listed. If no such report or schedules are filed, the assets remaining in the case are to be listed. If the trustee is serving as a successor trustee, Form 1 should list all receipts or deposits turned over by the prior trustee as well as all property of the estate not administered by the prior trustee. The trustee should maintain a record in the estate file describing how the assets remaining in the case were determined.

Fourth, each type of income of an estate, such as post-petition interest, dividends, or rents, is to be shown as an uncheduled asset, separately from any pre-petition dividends or rents that were reported in the petition, schedules and statement of affairs. Accounting for these items on Form 1 will facilitate both the calculation of trustee compensation and the reconciliation between the Form 1 and Form 2 account balances.

To the left of each asset description, a reference number is inserted (beginning with #1 and following consecutively).

#### Column 2: Petition/Unscheduled Values

Column 2 reflects the dollar value of each asset, whether assigned by the debtor in the petition, schedules, and statement of affairs or by the trustee in the case of uncheduled assets. While scheduled values are often unreliable, they are the only valuation available until the trustee has the opportunity to obtain further information.

If the value assigned by the debtor in the schedules is “0,” the trustee should enter “0” in Column 2. If the scheduled value is “unknown,” the trustee should enter “unknown.” Similarly, if the trustee cannot initially estimate a value for an uncheduled asset, the trustee should enter “unknown.”

These entries should never be changed, even when the value later becomes known, unless the schedules or statement of affairs are amended by the debtor.<sup>11/</sup>

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<sup>11/</sup>If an asset is jointly owned with a non-filing spouse or other party, the Column 2 value should reflect the debtor’s interest (e.g., one-half). If the debtor lists 100% on Schedule A, the trustee should only record the debtor’s interest on Form 1, Column 2. This adjustment to the scheduled value should be explained in a note on Form 1. See Footnote #1, on the previous page, regarding the exception for community property.

### Column 3: Estimated Net Value (Value Determined by Trustee Less Liens, Exemptions and Other Costs)

Column 3 records the value of each asset as determined by the trustee, minus any security interests, the debtor's allowed exemptions in the asset, and any other appropriate adjustment, such as costs to sell (if the value determined by the trustee minus these deductions is less than zero, enter "0"). This value represents the trustee's best estimate of the net sale or liquidation value of the asset. This column will be totaled to reflect the net dollar value determined by the trustee for all assets in the case.

At the beginning of administering a new case, the trustee may not always be able to estimate the value for an asset. When the value for a scheduled or unscheduled asset is unknown, the trustee should enter "unknown" in Column 3. By the end of the next reporting period, the trustee should be able to enter the value, as determined, less any security interests, exemptions, and other appropriate adjustments. Thereafter, the value should not change. The Column 3 value should never be changed to match the amount actually received from the sale or liquidation of the asset (e.g., the amount shown in Column 5).

Post-petition interest, dividends, and rent are exceptions to these requirements. Their Column 3 value may be designated "N/A".

The Column 3 total should equal the sum of all dollar values entered in Column 3.

### Column 4: Property Abandoned

Column 4 is used to report the trustee's decision with respect to administering or abandoning each asset.

If Column 4 is left blank, it means that the trustee 1) intends to administer the asset, 2) has not decided whether to administer the asset or to abandon it pursuant to § 554, or 3) has already liquidated the asset (in which case a value should be reported in Column 5).

The trustee should enter "OA" in Column 4 to indicate property abandoned formally pursuant to § 554(a). A trustee will often formally abandon property that is burdensome to the estate, e.g., uninsured or contaminated property of no value that exposes the estate to potential liability or risk.

If the trustee intends to rely on § 554(c) and the closing of the case to abandon property that will not be administered, the trustee should use "DA" for deemed abandoned at close of case. An example of property that might be "deemed abandoned" is fully secured or exempt property that does not expose the estate to liability or risk.

It is recommended that the trustee add an explanation at the bottom of Form 1 for any entry that would obviously raise a question in the mind of a reviewer. For example, it would be helpful if the trustee would provide such explanations under the following scenarios: 1) an asset that has significant equity based on the schedules will not be administered because, on inspection, it was obviously not sellable, 2) an asset was not administered because the costs of recovery or of liquidation would exceed its value, or 3) the trustee discovered a lien not listed in the schedules which eliminated any equity in the property.

#### Column 5: Sales/Funds Received by the Estate

Column 5 indicates the gross amount of the proceeds from the sale or liquidation of each asset regardless of amounts that will be paid out to secured creditors or for expenses or as exemptions, whether paid out by the trustee directly or through a broker or auctioneer, etc. The amounts in Column 5 should be traceable to Form 2. This is accomplished by using the Form 1 reference number to identify the related transaction(s) on Form 2. For real property or auction sales, the gross proceeds are listed on Form 1, even though the trustee may have actually received the net proceeds, after deduction of costs and expenses.

If estate assets are sold together in a bulk sale, the trustee may receive a lump-sum remittance that does not provide a breakdown of the proceeds attributable to each asset. In this instance, the trustee should enter the gross amount received for one of the assets and explain in a footnote which other assets were included in the sale. See the sample Form for an example of this situation.

#### Column 6: Asset Fully Administered/Gross Value of Remaining Assets

When an asset has been fully administered (e.g., abandoned, sold, liquidated, or totally exempt), "FA" is entered in Column 6.

For assets still being administered by the trustee, Column 6 should reflect the trustee's current best estimate of the gross value remaining to be collected or administered. Guidelines for entries to this column follow:

- a) The Column 6 value is rarely the Column 3 value. The Column 3 value equals the trustee's estimated net value at the beginning of the case or when the asset is discovered. The Column 6 value is the trustee's current estimate of the gross remaining value of the asset. "Gross Remaining Value" means current fair market value without any deduction for liens, exemptions, and other costs.
- b) If "unknown" or "N/A" is entered in Column 3, "unknown" should appear in Column 6.

- c) The difference between Columns 3 and 5 is not intended to necessarily equal the figure recorded in Column 6.

The sum of the dollar figures in Column 6 is the Gross Value of Remaining Assets. This total is to be carried forward and reported on Form 3, Column 6.

#### Other Information

Additional information is required at the bottom of Form 1. Under “Major Activities Affecting Case Closing,” the trustee should provide information about matters pending in the case, such as:

- 1) Assets that will be abandoned and why;
- 2) Status of liquidation efforts: pending sales, hearing or auction dates, etc.;
- 3) Status of adversary actions and appeals;
- 4) Status of claims objections/claims review and tax returns; and
- 5) Any other actions necessary to complete administration of the case.

For the case’s first reporting period, the trustee must disclose under “Initial Projected Date of Final Report (TFR),” a realistic estimate of when the TFR will be filed. For subsequent reporting periods, the trustee should enter both the initial and current projected dates for filing the TFR. The initial date should remain the same throughout the administration of the case.

## **INSTRUCTIONS FOR FORM 2 ESTATE CASH RECEIPTS AND DISBURSEMENTS RECORD**

### **When to Complete Form 2**

The estate Cash Receipts and Disbursements Record (Form 2) is a combination checkbook-journal. A separate Form 2 should be maintained for each checking account, savings account, or Certificate of Deposit. No Form 2 is necessary until the bank account is opened.

Rollovers of individual Certificate of Deposits should be reported on the same Form 2. Should the trustee choose to keep any other type of account or investment vehicle, such choice should be discussed in advance of implementation with the United States Trustee and arrangements should be made for record keeping and reporting.

All transactions must be entered on Form 2, in chronological order, as soon as they occur. The trustee should not wait and enter transactions from the monthly bank statements.

Form 2 submissions should contain all transactions from the beginning of the case until the end of the reporting period. However, the trustee may seek approval from the United States Trustee to limit the transactions in a Form 2 submission involving a very large or older case to the semi-annual reporting period. Such approval would only be granted on a report-by-report basis.

If the trustee is serving as a successor trustee, Form 2 should begin with the balance turned over by the previous trustee, thereby remaining consistent with the successor trustee's bank statements.

### **How to Complete Form 2**

#### Header Information

The trustee should enter the case number, case name, tax identification number, period ending date, trustee name, bank name, account number and bond amount (per case limit if blanket bond and amount of separate bond, if applicable). Individual debtor social security numbers should not be listed as the estate tax identification number.

#### Column 1: Transaction Date

Column 1 is the date that the transaction occurred. For deposits, it is the date that the funds were sent or taken to the bank for deposit, rather than the date that the funds were received by the trustee or the date that the deposit cleared the bank. For disbursements, it is the date the trustee wrote (or printed) the check, rather than the date that the check cleared the bank.

### Column 2: Check or Reference Number

Column 2 is the check number if the entry is for a payment made from estate funds or the reference number entered on Form 1, if the entry is for a deposit or an item returned for insufficient funds (“NSF”).

### Column 3: Paid to/Received From

Column 3 is the name of the payer or payee.

### Column 4: Description of Transaction

Column 4 is a complete description of the transaction, for example: “payment to auctioneer per 3/2/98 order,” “sale of 1995 Dodge Intrepid subject to National Bank security interest per 4/15/98 notice,” or “transfer of funds to savings account #09-43-02.”

If the trustee receives a “net” check, that is, one which represents the gross sale price minus such deductions as lien pay-offs, exemptions or expenses, Column 4 should list the gross amount of the sale and all individual deductions. In that way, Column 4 will contain the information needed to reconcile the net amount received by the trustee with the gross sales price shown on Form 1. This situation most often arises when a broker or attorney receives the gross proceeds of sale and makes distributions for liens and expenses prior to presenting a net check to the trustee. In this type of situation, do not enter the gross amount in Column 5 Deposit because the amount shown as being deposited will not correspond to any bank statement. The net amount received by the trustee should be entered in Column 5.

For Certificates of Deposit, if the CD number changes when the CD is renewed or rolled over, the new CD number is recorded in Column 4.

### Column 5: Deposit

Column 5 records the deposits received in the case.

Certificate of Deposit interest should only be recorded on Form 2 when earned and deposited in the bank account. It should not be estimated and recorded on Form 2 when the CD maturity date does not coincide with the reporting cut-off date.

Transfers into the account from another estate account are recorded in Column 5.

If a deposited item is returned for insufficient funds (“NSF”) or an item was deposited in error to the estate, the reversal or correction should be recorded as a negative figure in Column 5 and the entry should be explained in Column 4, Description of Transaction.

### Column 6: Disbursement

Column 6 records the disbursements made in the case. Transfers out of the account to another

estate account are also recorded in Column 6.

If it is necessary to void a disbursement check, the reversal/correction should be recorded as a negative amount in Column 6 and the entry should be explained in Column 4, Description of Transaction.

#### Column 7: Checking, Savings, or Certificate of Deposit Balance

Column 7 is the running balance in the checking, savings or certificate of deposit account.

#### Other Information

At the end of the Form 2 for each account, the trustee should enter subtotals for Columns 5 and 6 and then show the deduction of bank transfers and payments to debtors to arrive at the net receipts and net disbursements for the account. On the last page of all Form 2s, the trustee should recap the net receipts, net disbursements, and account balances for all estate accounts in the case. These calculations will assist in determining trustee compensation and bonding requirements. The computations are illustrated in the sample Form 2s.

## **INSTRUCTIONS FOR FORM 3 SUMMARY INTERIM ASSET REPORT**

### **When to Complete Form 3**

Trustees are required to file a Summary Interim Asset Report (Form 3) at least every 180 days, unless the United States Trustee requires that it be filed more frequently. Form 3 is a summary listing of pending asset cases. It lists each case that is either expected to be or declared to be an asset case by the trustee, each case in which the trustee has received funds of the estate, and each case in which a no-asset report has not been filed and 60 days have passed since the initial examination of the debtor at the § 341(a) meeting. If the final account (TDR) or no-asset report was approved by the United States Trustee, or the case was converted, dismissed, or reassigned, during the current reporting period, the case is to be listed on Form 3 for that reporting period, but omitted from Form 3 for future reporting periods. Cases are entered in sequence by case number.

Many of the entries on Form 3 are made from the Individual Estate Property Record and Report (Form 1) and the Estate Cash Receipts and Disbursements Record (Form 2). The key to preparing an accurate Form 3 is to make sure that Forms 1 and 2 are accurate and up-to-date for each case that is required to be included on Form 3. These Forms should be carefully reviewed and updated before Form 3 is prepared.

### **How to Complete Form 3**

#### Header Information

The trustee should enter the trustee's name, period ending date, blanket bond amount, and per case limit. The dollar amount of the blanket bond should be entered in the heading and not the word "blanket."

#### Column 1: Case No.

Column 1 records the bankruptcy case number.

#### Column 2: Case Name

Column 2 records the complete name of each debtor, including a DBA or AKA, if needed to identify the debtor.



Column 3: Date Filed (f) or Converted (c) to Chapter 7

Column 3 records the later of the date the case was filed under chapter 7 or the date the case converted to chapter 7. The letter (f) for the filing date or the letter (c) for the conversion date is to be entered beside the appropriate date in Column 3.

Column 4: Total Funds on Deposit or Invested (from Form 2)

Column 4 contains the balance of funds on hand in all estate bank accounts as of the end of the reporting period. This total is obtained from the last page of all Form 2s.

Column 5: Amount of Separate Bond (if any)

Column 5 should list the amount of any separate/additional bond obtained in a case.

Column 6: Gross Value of Remaining Assets (from Form 1)

Column 6 should list the gross value of all remaining assets in each estate. This value is obtained from Column 6 on Form 1.

Column 7: Date of Estimated (e) or Actual Disposition

Column 7 contains the order entry date if the case was converted (C), dismissed (D), or reassigned (R). Otherwise, Column 7 contains the date of submission of the final report (TFR), final account (TDR), or no-asset report (report of no distribution or NDR). If the TFR has not been submitted, the estimated (e) TFR date should be shown.

**INSTRUCTIONS AND Q's AND A's FOR FORM 4**

3/1/01

**Part A**

**SAMPLE FORM 4  
Distribution Report for Closed Asset Cases**

Case No. 399-123456  
Case Name: John L. & Sally B. Doe

Trustee Name: Jenny Ward  
Date Closed: \_\_\_\_\_

	<b>\$ AMOUNT RECEIVED</b>	<b>% OF RECEIPTS</b>
GROSS RECEIPTS	\$1,000,000.00	100.00%
Less:		
Funds Paid to Debtor		
Exemptions	3,400.00	0.34%
Excess Funds	0.00	0.00%
Non-Estate Funds Paid to 3 <sup>rd</sup> Parties	0.00	0.00%
<b>NET RECEIPTS</b>	<b>\$996,600.00</b>	<b>99.66%</b>

	<b>\$ CLAIMS</b>	<b>\$ AMOUNT PAID</b>	<b>% OF RECEIPTS</b>
SECURED CLAIMS:			
Real Estate	\$400,000.00	\$400,000.00	40.00%
Personal Property & Intangibles	33,000.00	33,000.00	3.30%
Internal Revenue Service Tax Liens	0.00	0.00	0.00%
Other Governmental Tax Liens	3,000.00	3,000.00	0.30%
<b>TOTAL SECURED CLAIMS</b>	<b>\$436,000.00</b>	<b>\$436,000.00</b>	<b>43.60%</b>

PRIORITY CLAIMS:

CHAPTER 7 ADMINISTRATIVE FEES § 507(a)(1) and

CHARGES under Title 28, Chapter 123:

Trustee Fees	47,330.00	47,330.00	4.73%
Trustee Expenses	2,000.00	2,000.00	0.20%
Legal Fees & Expenses:			
Trustee's Firm Legal Fees	0.00	0.00	0.00%
Trustee's Firm Legal Expenses	0.00	0.00	0.00%
Other Firm's Legal Fees	25,000.00	25,000.00	2.50%
Other Firm's Legal Expenses	1,500.00	1,500.00	0.15%
Accounting Fees and Expenses			
Trustee's Firm Accounting Fees	0.00	0.00	0.00%
Trustee's Firm Accounting Expenses	0.00	0.00	0.00%
Other Firm's Accounting Fees	4,000.00	4,000.00	0.40%
Other Firm's Accounting Expenses	0.00	0.00	0.00%
Real Estate Commissions	25,000.00	25,000.00	2.50%
Auctioneer/Liquidator Fees	20,000.00	20,000.00	2.00%
Auctioneer/Liquidator Expenses	10,000.00	10,000.00	1.00%
Other Professional Fees/Expenses	1,000.00	1,000.00	0.10%
Expenses of Operating Business in Chapter 7	0.00	0.00	0.00%
Other Expenses	5,700.00	5,700.00	0.57%
Income Taxes - Internal Revenue Service	5,000.00	5,000.00	0.50%
Other State or Local Taxes	0.00	0.00	0.00%

U.S. Trustee Fees	0.00	0.00	0.00%
Court Costs	800.00	800.00	0.08%
<b>TOTAL CHAPTER 7 ADMINISTRATIVE FEES &amp; CHARGES</b>	<b>\$147,330.00</b>	<b>\$147,330.00</b>	<b>14.73%</b>
<b>TOTAL PRIOR CHAPTER ADMINISTRATIVE FEES</b>			
§ 507(a)(1) (From attached Part B)	0.00	0.00	0.00%
WAGES § 507(a)(3)	9,200.00	9,200.00	0.92%
CONTRIBUTIONS: EMPLOYEE BENEFIT PLANS § 507(a)(4)	900.00	900.00	0.09%
ALIMONY & CHILD SUPPORT § 507(a)(7)	4,600.00	4,600.00	0.46%
CLAIMS OF GOVERNMENTAL UNITS § 507(a)(8)	25,000.00	25,000.00	2.50%
OTHER § 507 (a)(2), (5), (6), & (9)	0.00	0.00	0.00%
<b>TOTAL PRIORITY CLAIMS: WAGES § 507(a)(3) through</b>			
<b>OTHER § 507(a)(2), (5), (6) &amp; (9)</b>	<b>\$39,700.00</b>	<b>\$39,700.00</b>	<b>3.97%</b>
<b>GENERAL UNSECURED CLAIMS</b>	<b>\$1,200,000.00</b>	<b>\$373,570.00</b>	<b>37.36%</b>
<b>TOTAL DISBURSEMENTS</b>	<b>\$1,823,030.00</b>	<b>\$996,600.00</b>	<b>99.66%</b>

3/1/01

**Part B**

**SAMPLE FORM 4  
Distribution Report for Closed Asset Cases**

Case No.      399-123456  
Case Name:   John L. & Sally B. Doe

Trustee Name: Jenny Ward  
Date Closed:   \_\_\_\_\_

	<b>\$ CLAIMS</b>	<b>\$ AMOUNT PAID</b>	<b>% OF RECEIPTS</b>
PRIOR CHAPTER ADMINISTRATIVE FEES § 507(a)(1)			
Trustee Fees	\$0.00	\$0.00	0.00%
Trustee Expenses	0.00	0.00	0.00%
Legal Fees & Expenses:			
Trustee's Firm Legal Fees	0.00	0.00	0.00%
Trustee's Firm Legal Expenses	0.00	0.00	0.00%
Other Firm's Legal Fees	0.00	0.00	0.00%
Other Firm's Legal Expenses	0.00	0.00	0.00%
Accounting Fees and Expenses			
Trustee's Firm Accounting Fees	0.00	0.00	0.00%
Trustee's Firm Accounting Expenses	0.00	0.00	0.00%
Other Firm's Accounting Fees	0.00	0.00	0.00%
Other Firm's Accounting Expenses	0.00	0.00	0.00%
Real Estate Commissions	0.00	0.00	0.00%
Auctioneer/Liquidator Fees	0.00	0.00	0.00%
Auctioneer/Liquidator Expenses	0.00	0.00	0.00%
Other Professional Fees/Expenses	0.00	0.00	0.00%
Income Taxes - Internal Revenue Service	0.00	0.00	0.00%
Other State or Local Taxes	0.00	0.00	0.00%
Operating Expenses	0.00	0.00	0.00%
Other Expenses	0.00	0.00	0.00%
<b>TOTAL PRIOR CHAPTER ADMINISTRATIVE FEES</b>	<b>\$0.00</b>	<b>\$0.00</b>	<b>0.00%</b>

**INSTRUCTIONS REGARDING  
DISTRIBUTION REPORT FOR CLOSED ASSET CASES (FORM 4)  
(INCLUDING QUESTIONS & ANSWERS AT THE END)**

**GENERAL INSTRUCTIONS**

CASES COVERED BY FORM 4	Form 4 is required for chapter 7 cases filed or converted on or after 7/1/99. It is submitted with the final account or TDR. Form 4 should not be submitted for cases dismissed or converted to another chapter.  Commencing 4/1/2000, Form 4 must be filed electronically, unless the United States Trustee grants a waiver of this requirement.
HEADER INFORMATION	Enter the case number, case name, trustee name, and date. The date entered is the date Form 4 was prepared by the trustee.
CLAIMS	Allowed claims for which a distribution was made. Zeroes (0's) would be inserted under "Claims" and "\$ Amount Paid" for each claim category in which no amount was paid. (For example, if there is only sufficient funds to pay administrative and priority unsecured claims, the amount of each allowed administrative and priority unsecured claim would be shown under "Claims," and the amount of funds distributed on account of such claims would be shown under "\$ Amount Paid." Zeroes (0's) would be inserted under "Claims" and "\$ Amount Paid" for General Unsecured Claims.)
% OF RECEIPTS	The formula for this column is:  $\frac{\text{"\$ Amount Received" or "\$ Amount Paid" (whichever applies)}}{\text{Gross Receipts}}$ <p>All percentages under "% of Receipts" should be based on this formula. The percentages for totals and subtotals (e.g., Total Secured Claims) may not equal the sum of the individual component percentages, due to rounding.</p>

## LINE-BY-LINE INSTRUCTIONS

### **PART A**

**GROSS RECEIPTS:** All funds received by trustee<sup>12</sup>, except for funds deposited to the estate in error and refunds of trustee overpayments (an example is a refund of excess bond premium which should be netted against the applicable expense line item).

Funds Paid to Debtor:

Exemptions: Funds disbursed to debtor(s) pursuant to exemptions permitted under Federal or State law.

Excess Funds: Funds disbursed to debtor(s), if any, after all other disbursements made.

Non-Estate Funds Paid to 3<sup>rd</sup> Parties:

Examples include payments to co-owners from sales of property in which a co-owner has an interest, escrow deposit refunds, PACA trust funds (Perishable Agricultural Commodities Act), and other similar trust funds.

**NET RECEIPTS:** The sum of gross receipts less funds paid to debtor and non-estate funds paid to 3<sup>rd</sup> parties. The amount of net receipts equals total disbursements, which may be the basis for computing the maximum trustee fee.

**SECURED CLAIMS<sup>13</sup>:**

Real Estate: Funds disbursed to all pre-petition lien holders, except for tax liens.

Personal Property & Intangibles: Funds disbursed to all pre-petition lien holders, except for tax liens.

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<sup>12</sup>In some instances (e.g, real estate sales), the trustee may receive a “net” check (i.e., the gross sales price less payments to secured creditors, real estate commissions, closing costs, etc.). The gross sales price is to be reported under Gross Receipts and the deductions are to be reported in the appropriate categories for the claims and the administrative expenses, as applicable.

<sup>13</sup>Secured claims do not include liens for administrative expenses for purposes of this form.

Internal Revenue Service  
Tax Liens:

Funds disbursed to all pre-petition lien holders. (Do not include payment of tax claims which became due after petition date. Said tax payments should be included in Chapter 11 or Chapter 7 tax categories, depending on the date the taxes became due.)

Other Governmental  
Tax Liens:

Funds disbursed to all pre-petition lien holders.(Do not include payment of tax claims which became due after petition date. Said tax payments should be included in Chapter 11 or Chapter 7 tax categories, depending on the date the taxes became due.)

**TOTAL SECURED CLAIMS:**

The sum of total secured claims by column.

**PRIORITY CLAIMS:**

**CHAPTER 7  
ADMINISTRATIVE FEES  
507(a)(1) and CHARGES  
under Title 28, Chapter 123:**

Trustee Fees:

Total fees paid to trustee pursuant to § 330(a).

Trustee Expenses:

Total interim and final expense reimbursements paid directly to the trustee pursuant to § 330(a).

Legal Fees & Expenses:

Trustee's Firm Legal  
Fees:

All legal fees paid to trustee or trustee's firm.

Trustee's Firm Legal  
Expenses:

All legal expenses paid to trustee or trustee's firm.

Other Firm's Legal  
Fees:

All legal fees paid to other firms.

Other Firm's Legal  
Expenses:

All legal expenses paid to other firms.

Accounting Fees & Expenses:

Trustee's Firm  
Accounting Fees:

All accounting fees paid to trustee or trustee's firm.

Trustee's Firm  
Accounting Expenses:

All accounting expenses paid to trustee or trustee's firm.

Other Firm's Accounting Fees:	All accounting fees paid to other firms.
Other Firm's Accounting Expenses:	All accounting expenses paid to other firms.
Real Estate Commissions:	All commissions and expenses paid to professionals for the sale of real property.
Auctioneer/Liquidator Fees:	All fees paid to auctioneer or liquidator of personal property.
Auctioneer/Liquidator Expenses:	All expenses paid to auctioneer or liquidator of personal property.
Other Professional Fees/ Expenses:	All other professional fees and expenses paid. (In order to be included in this category, fees and expenses must be paid only to professional employed pursuant to § 327 of the Code, and not be included in one of the other fee and expense categories. For example, professional fees and expenses for appraisers and expert witnesses should be included in this category.)
Expenses of Operating Business in Chapter 7:	All costs of operating a business pursuant to Bankruptcy Court order, except professional fees and expenses specifically listed above. Includes payroll taxes paid in connection with operating a business in chapter 7.
Other Expenses:	All other allowed expenses not otherwise included under Trustee Expenses, including bond premiums and other costs paid directly by the estate, but not including taxes, court costs, and unpaid United States Trustee fees.
Income Taxes - Internal Revenue Service:	All income taxes which first become due to the IRS after the bankruptcy petition filing date.
Other State or Local Taxes:	Other state or local taxes which first become due after the bankruptcy petition filing date.
United States Trustee Fees:	All U.S. Trustee Chapter 11 fees paid by the trustee in chapter 7 proceeding.
Court Costs:	All costs paid by the trustee to the Bankruptcy Court, including noticing fees, filing fees, etc.

TOTAL CHAPTER 7  
ADMINISTRATIVE FEES

& CHARGES:	The sum of chapter 7 administrative fees and charges by column.
TOTAL PRIOR CHAPTER ADMINISTRATIVE FEES 507(a)(1):	See Part B below.
WAGES §507(a)(3):	Wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual. (See Code for specific requirements)
CONTRIBUTIONS: EMPLOYEE BENEFIT PLANS §507(a)(4):	Payments to an employee benefit plan. (See Code for specific requirements.)
ALIMONY & CHILD SUPPORT§507(a)(7):	Payments to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child. (See Code for specific requirements)
CLAIMS OF GOVERNMENTAL UNITS §507(a)(8):	Payments to governmental units, only to the extent that such claims are for – (a) a tax on or measured by income or gross receipts; (b) a property tax; (c) a tax required to be collected or withheld for which the debtor is liable; (d) an employment tax; (e) an excise tax; (f) a customs duty arising out of the importation of merchandise; or (g) a penalty related to a claim specified in §507(a)(8). (See Code for specific requirements.)
OTHER §507(a)(2), (5), (6), & (9):	(See Code)
<b>TOTAL PRIORITY CLAIMS:</b>	The sum of total priority claims by column.



**GENERAL UNSECURED  
CLAIMS:**

All unsecured claims paid.

**TOTAL DISBURSEMENTS:**

The sum of total secured, priority, and unsecured claims by column.

**PART B**

PRIOR CHAPTER  
ADMINISTRATIVE FEES  
§507(a)(1):

PART B (Prior Chapter Administrative) instructions are essentially the same as the PART A (Chapter 7 Administrative) instructions. Note that chapter 11 payroll taxes paid during the pendency of chapter 7 should be reported under "Operating Expenses" in Part B.

**DISTRIBUTION REPORT FOR CLOSED ASSET CASES (FORM 4)  
QUESTIONS AND ANSWERS**

- 1) **Where should the chapter 11 payroll taxes (e.g., 941 taxes) paid during the pendency of chapter 7 appear on the Form 4 for a converted case?**

These payroll taxes should be reported under “Operating Expenses” in the section titled “Prior Chapter Administrative Fees.”

- 2) **What about payroll taxes paid in connection with an operating chapter 7 case?**

If payroll taxes are paid in connection with operating a business in chapter 7, the taxes should be reported under “Expenses of Operating Business in Chapter 7.”

- 3) **An attorney is alleging a claim on all funds pursuant to an attorney’s charging lien. If the attorney is successful, he will never have formally filed a claim and yet will have funds disbursed to him. How is this situation reported on Form 4?**

The distribution to the attorney should be reported as though the attorney had filed a claim. The amount allowed is included under “Claims” and the amount distributed is included under “\$ Amount Paid.”

- 4) **Which date should be inserted in the Form 4 header?**

The date prepared by the trustee.

- 5) **Where should the trustee report the interest paid to each type of claim as provided in § 726(a)(5).**

The amounts reported under “\$ Amount Paid” should include any interest paid to the creditor.

**6) Would a § 506(c) expense allowed to a trustee fall under “Other Expenses”?**

Not necessarily. The fact that a creditor reimburses the expense does not make any difference. A § 506(c) expense should be categorized the same as any other expense on Form 4. This may be “Other Expenses” much of the time, but if the expense is for professionals, it should be classified under the appropriate category.

**7) What is the difference between “Trustee Expenses” and “Other Expenses”?**

“Trustee Expenses” consists of expenses originally incurred out-of-pocket by the trustee for which the trustee received reimbursement under § 330(a).

“Other Expenses” covers allowed expenses not otherwise included in the other categories on Form 4. It includes the cost of storage, insurance, locks, etc., paid directly to the provider by the estate. It specifically excludes fees and expenses paid to the trustee pursuant to § 330(a), attorney and professional fees and expenses, expenses of operating a business in a chapter 7 case, taxes, court costs, and United States Trustee fees.

**DISTRIBUTION REPORT FOR CLOSED ASSET CASES (FORM 4)  
QUESTIONS AND ANSWERS**

- 8) **With respect to sales of real estate and other transactions where a “net” check is remitted to the trustee, how are the gross receipts and deductions (e.g., constructive disbursements) to be reported on Form 4?**

The gross proceeds from the sale (e.g., real estate sale, auction) are to be reported under Gross Receipts, regardless of the amount actually remitted to the trustee. The deductions (e.g., payments to secured creditors, commissions, closing costs) are to be reported in the applicable claims or administrative expense categories. See page 1 of the Form 4 Instructions.

- 9) **With respect to submission of the electronic Form 4, we understand that trustees will be able to submit the data files on diskette or by e-mail. Does there need to be a separate data file for each Form 4, or may the trustee combine several Form 4s in a single data file? (Since trustees sometimes submit Trustee Distribution Reports (TDRs) in batches, it would be helpful if a single data file could contain the Form 4 that goes with each TDR included in the batch.)**

The Program will be able to handle either situation. Trustees have the choice of submitting a separate electronic file for each Form 4, or they may include several Form 4s in one electronic file.

- 10) **The sample Form 4 does not show the dollar amounts with cents (e.g., 1.23). However, the electronic Form 4 specifications require that each dollar data field be reported to two decimal places. Please clarify this apparent inconsistency.**

The sample Form 4 was for illustrative purposes. Effective January 1, 2000, the dollar amounts on both the hard copy and electronic versions of Form 4 must include the cents, so that the amounts exactly match the TDR amounts.

- 11) **Please provide further clarification in regard to Q and A #5. In many jurisdictions, it appears to be an accepted and prevalent practice to treat interest separately from the claim itself. In this situation, the software vendor plans to tell its customers to treat all interest paid as unsecured interest reportable under “General Unsecured Claims.” Otherwise, it would cause a serious programming problem because the software cannot categorize interest one way for the courts and another way for Form 4. Is this vendor’s plan acceptable?**

Yes. Both reporting methods are acceptable, pending further review by the Chapter 7 Subcommittee.

- 12) **Please clarify how the trustee’s name must appear in the electronically transmitted Form 4.**

Field #5 (Last Name)      Field #6 (First Initial, with period)      BOTH UPPERCASE  
WARD                      J.

- 13) **Please clarify how the Version Number must appear in the electronically transmitted Form 4.**

Field #1 (Version) This is a text field, with a length of 3 spaces. The version number 1 is a left-justified single digit.

- 14) **Please indicate where the following types of distributions would be reported on Form 4:**

<u>Question</u>	<u>Answer</u>
<b>Accountant for the Debtor</b>	Ch. 7 Admin: Other Professional Fees/Expenses
<b>Chapter 11 Wage Claims</b>	Prior Ch. Admin: Operating Expenses
<b>Subordinated General Unsecured &amp; Late Filed Claims</b>	General Unsecured Claims
<b>Chapter 7 Wage Claims</b>	Wages 507(a)(3) if pre-petition wages Expenses of Operating Business in Chapter 7 if post-petition wages

**15) Please define the term “liquidator.” Is a liquidator a professional?**

The liquidator is a professional who may be hired to settle the affairs of a business by selling its assets to pay creditors. These professionals may advertise their services as “auctioneers/liquidators.” In a bankruptcy case, the liquidator essentially performs the same functions as an auctioneer and should be treated as such for purposes of reporting the chapter 7 distribution statistics.

**16) Is an “agent” or “administrative assistant” hired by the trustee to sell an asset a “liquidator?”**

Such a person could be a liquidator. It depends on the tasks assigned. If the person is an employee of the trustee’s office, full or part-time, payment for duties performed which are not overhead will be a trustee expense and, if allowed, reimbursed to the trustee. If the agent or administrative assistant is hired pursuant to court order and will be paid pursuant to court order from assets of the estate, such payments should be recorded as “Other Expenses,” unless the person falls within the definition of professional or liquidator (as described in Q and A #15). In those instances, the payment will be recorded in the appropriate specific category.

**17) Where should real property taxes be reported?**

Pre-petition real property tax claims are reported under “Secured Claims: Other Governmental Tax Liens.” Post-petition real property taxes are reported under “Ch. 7 Admin.: Other State or Local Taxes.”

**SAMPLE CHAPTER 7 CASE AND  
ILLUSTRATIVE FORMS 1, 2, AND 3**

## SAMPLE CHAPTER 7 CASE AND ILLUSTRATIVE FORMS 1, 2 AND 3

Sam Martin, dba Martin Cards, filed bankruptcy on November 20, 1996, in a non-community property state and Jenny Ward (“Ward”) was appointed the chapter 7 trustee. Ward’s semi-annual reporting period ends June 30, 1997. Ward submitted the attached Forms 1 and 2 showing the activity in the case from November 20, 1996, through June 30, 1997. This is the second reporting period for this case.

Ward obtained the following information regarding the Debtor’s assets from an analysis of the petition, schedules and statement of financial affairs, the Debtor’s testimony at the § 341(a) meeting, and information received from creditors and other parties-in-interest.

**Checking Account (Asset #1)** - Debtor listed a checking account balance of \$500 in Schedule B. Cash is not exempt in the state in which the Debtor filed bankruptcy. Ward recovers the \$500 on December 10, 1996. Ward then promptly obtains a federal tax identification number, opens an estate checking account, and deposits the \$500 into the account.

**123 Ocean View – Rental Property (Asset #2) and Ocean View Rent Receivable (Asset #8)** - Debtor listed a rental house located at 123 Ocean View in Schedule A valued at \$100,000 encumbered by a valid and perfected lien securing a debt of \$30,000. At the time the petition was filed on November 20, 1996, the Debtor had not yet received the November rent in the amount of \$500 from the tenant, Steve James. The Debtor listed the \$500 as rent receivable in Schedule B.

Ward determines the value of the rental property to be \$63,000 (\$100,000 scheduled value minus \$30,000 lien minus \$7,000 (7%) for estimated costs of sale, including realtor’s commission, taxes and closing costs). Ward records this amount in Form 1, Column 3.

Ward collects the November rent on December 15, 1996, and posts the payment to the Ocean View rent receivable on Form 1, Column 5. She notes “FA” in Column 6 to indicate that the asset has been fully administered. The cash receipt of \$500 is also posted on Form 2.

Because there is equity for the estate in the rental property, Ward decides to continue the lease and collect rent until the property is sold. Ward records post-petition rents as an “unscheduled” asset on Form 1 (Asset #12), lists the petition value as “unknown” in Column 2 and the Estimated Net Value as “N/A” in Column 3, and documents the rents in Column 5, Form 1 and on Form 2 as they are received.

On March 1, 1997, Ward obtains court authority to sell the rental property to Joe Fish for \$90,000, and to pay the following amounts through escrow upon closing of the sale: (a) \$30,000 lien encumbering the property; (b) \$5,400 realtor’s fee, and (c) \$1,800 property taxes and costs of sale. No capital gains tax is incurred upon the sale. Form 2 illustrates the correct way to record the \$52,800 in net proceeds from the sale. Ward records the gross sale price of \$90,000 on Form 1, Column 5 and notes “FA” in Column 6 to indicate that the asset has been fully administered.



### Accounts Receivable (Asset #3), 1994 Chevy Van (Asset #6) & Office Equipment (Asset #7)

National Bank claims a valid and perfected blanket lien against the accounts receivable, 1994 Chevy van, and office equipment as security for its loan of \$10,000. As discussed below, Ward estimates that she can collect approximately \$9,000 of the accounts receivable, sell the van and the office equipment, payoff the bank's lien, and realize a \$9,700 net benefit for the estate from the administration of these assets.

#### Analysis of Net Benefit to Estate:

	Accounts Receivable	Van	Office Equipment	Total
Estimated fair market value	\$9,000	\$9,000	\$4,000	\$22,000
Estimated costs of sale (10%)	0	(900)	(400)	(1,300)
Allocation of payoff to bank <sup>14</sup>	(9,000)	(1,000)	0	(10,000)
Estimated tax consequences <sup>15</sup>	0	0	0	0
Debtor's exemption	0	(1,000)	0	(1,000)
Net benefit to the estate <sup>16</sup>	\$0	\$6,100	\$3,600	\$9,700

**Accounts Receivable.** Debtor listed accounts receivable of \$30,000 in Schedule B generated from his business, Martin Cards. Ward sends demand letters immediately after the § 341(a) meeting. Based on the results of her collection efforts, Ward estimates that only \$9,000 of the receivables are collectible. She allocates \$9,000 of the National Bank lien to the receivables (as shown above) and records a -0- value to the estate on Form 1, Column 3.

During the reporting period, Ward collects \$5,000 from three customers: Hall Cards, Card Enterprises, and Excel Corporation. She records the receipts in the Accounts Receivable Ledger and posts them on Form 1, Column 5 and on Form 2. On February 28, 1997, Ward disburses the sum of \$5,000 to National Bank in partial payment of its lien and documents the disbursement on Form 2. Ward estimates the gross value of the remaining accounts receivable to be \$4,000, and

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<sup>14</sup>Allocated to the assets in the order they were listed on Schedule B.

<sup>15</sup>Due to losses from the card business, Ward estimates that no taxes will be due as a result of these transactions.

<sup>16</sup>The trustee's compensation is also a consideration in determining whether or not to administer an asset.

discloses this amount on Form 1, Column 6. Ward also discloses as Note 1 on Form 1 that National Bank's lien encumbers Asset Nos. 3, 6 and 7.

**1994 Chevy Van.** Debtor listed a 1994 Chevy Van in Schedule B valued at \$5,000, and claimed a \$1,000 exemption in the vehicle in Schedule C. Ward checks the NADA book and determines that the van is worth \$8,000 to \$10,000. Ward attributes the remaining National Bank lien to the van (see above) and lists the value of the van on Form 1, Column 3 as \$6,100 (\$9,000 less \$1,000 lien, \$1,000 exemption, and \$900 estimated costs of sale).

**Office Equipment.** Debtor also listed miscellaneous office equipment in Schedule B valued at \$5,000. Ward determines that the fair market value of the office equipment is only \$4,000. Ward lists the petition value of the office equipment as \$5,000 in Form 1, Column 2, and discloses the net benefit to the estate of \$3,600 (\$4,000 fair market value less \$400 estimated costs of sale) in Form 1, Column 3.

**Sale of 1994 Chevy Van and Office Equipment.** On May 2, 1997, Ward obtains court authorization to hire an auctioneer to sell the van and office equipment. On June 15, 1997, the van and office equipment are sold in bulk to Susan Taylor, who also is in the card business, for the sum of \$8,000. The auctioneer remits the gross proceeds of \$8,000 on June 17, 1997. Ward deposits the funds in the estate checking account and disburses \$5,000 for the balance due to National Bank for the lien against the receivables, van and office equipment, and \$1,200 for auctioneer fees and expenses. These transactions are shown on Form 2.

Ward records the gross proceeds from the bulk sale of the van and office equipment on Form 1. Since the auctioneer did not provide a breakdown of the gross proceeds allocable to each asset, Ward posts the full amount next to the van (Asset #6) on Form 1, Column 5, and adds a note at the bottom of Form 1 to explain that the sale proceeds include the office equipment (Asset #7). Ward also posts the deposit of \$8,000 on Form 2 and explains under "Description of Transaction" that both assets were included in a bulk auction sale of Assets #6 and #7.

On June 25, 1997, after the National Bank lien has been paid, Ward sends a check to the Debtor for the \$1,000 exemption claimed for the van.

**Household Goods (Asset #4)** - Debtor listed household goods in Schedule B valued at \$2,000, and properly claimed them as exempt in Schedule C. Ward records the value of the household goods to the estate as -0- (\$2,000 value less \$2,000 exemption) on Form 1, Column 3. Ward also notes on Form 1, Column 4 that the asset is deemed abandoned (DA) pursuant to 554(c) and in Column 6 that the asset is fully administered (FA).

**Artwork (Asset #5)** - Debtor listed artwork in Schedule B valued at \$10,000. Ward obtains court authorization on February 26, 1997, to employ Lily Spence, an appraiser, to perform an appraisal of the artwork for \$1,000. Based upon the appraisal, Ward determines that the artwork

is worth \$15,000. On Form 1, Column 3, Ward records \$12,500 as the estimated net value to the estate (\$15,000 value less \$1,000 appraisal fee, \$1,500 costs to sell, and -0- taxes).

Ward pays the court-approved fee of \$1,000 to the appraiser on March 31, 1997, and records the payment in Form 2.

The Debtor, who is interested in retaining some of the artwork, reaches an agreement with Ward for a private sale of \$5,000 worth of the artwork back to the Debtor, payable in five monthly installments of \$1,000 each, commencing April 12, 1997. The sale is approved by the court on March 31, 1997 (or properly noticed to creditors by the court and no objections are filed). The remaining artwork is consigned to an art gallery. Ward records the Debtor's April 12, 1997 payment on Form 1, Column 5, and on Form 2. Ward also notes the value of the remaining artwork to be collected/sold on Form 1, Column 6.

On April 20, 1997, Debtor's check for the first payment is returned to Ward marked "NSF." Ward redeposits the check and it is paid. Ward records the "NSF" check and the redeposit on Form 2. Debtor then fails to make the payments due in May and June. Ward notes on Form 1 as a "major activity affecting case closing" that collection efforts are pending against the Debtor to collect the delinquent payments. Ward further notes that a public auction of the remaining artwork is set for August 15, 1997.

**One-Half Interest in Homestead (Asset #9)** - Debtor listed a residence at 55 Lake Drive in Schedule A which he owned and occupied with his non-debtor spouse (not community property). The total value of the Debtor's interest plus that of the non-debtor spouse was listed in Schedule A at \$75,000. The debtor's share of the Schedule A value ( $\frac{1}{2}$  - \$37,500) is recorded on Form 1, Column 2. The house is encumbered by a lien of \$20,000. Ward determines that the value to the estate is \$7125.

**Analysis of Net Benefit to Estate:**

	<u><math>\frac{1}{2}</math> Interest in Homestead</u>
Estimated fair market value (100%)	\$75,000
Lien (100%)	(20,000)
Real estate commission (5%)	(3,750)
Closing costs	<u>(3,000)</u>
Net	48,250
$\frac{1}{2}$ to debtor's spouse	(24,125)
Estimated estate capital gain tax	(2,000)
Debtor's state law homestead exemption	<u>(15,000)</u>
Net benefit to the estate	\$7,125

Ward lists the house for sale and obtains an offer of \$100,000. Ward then files a motion under

§ 363(h) to sell both the Debtor's interest and the non-debtor's interest in the property, and sends notice of the proposed sale to creditors. The Debtor's spouse objects to the sale, but the objection is overruled and the sale is approved. Ward reflects the gross proceeds realized by the estate as \$50,000 in Form 1, Column 5. The net proceeds of \$35,500 (\$50,000 value less \$10,000 [½ lien] less \$2,500 [½ real estate fee] less \$2,000 [½ costs to sell]) are recorded in Form 2, Column 5. In Column 4, Ward explains the difference between the gross and net proceeds.

On May 15, 1997, Ward sends a \$15,000 check to the Debtor for the state homestead exemption.

**1993 Ford Truck (Asset #10)** - Debtor listed a 1993 Ford Truck in Schedule B valued at \$8,000. The truck is fully secured. Ward confirms through the NADA book that the value of the truck to the estate (less liens) is -0-. Ward cannot determine if the truck is covered by casualty insurance and, therefore, files a motion to abandon the truck pursuant to § 554(a) to protect the estate from any liability. No objections are filed. Ward posts the value of the truck as -0- on Form 1, Column 3. Ward also notes in Column 4 that the asset has been abandoned by court order (OA) and in Column 6 that it is fully administered (FA).

**ABC Preference (Asset #11)** - Debtor disclosed in response to Statement of Financial Affairs, Question #3, that numerous payments were made to ABC Supply Company within 90 days prior to bankruptcy. Ward's investigation reveals that approximately \$5,000 was paid by the Debtor to ABC Supply Company on account of an antecedent debt within the preference period. Ward lists the preference action as a scheduled asset with an "unknown" value in Form 1, Column 2, and discloses the estimated net value as \$5,000 in Form 1, Column 3.

Ward commences an adversary proceeding to recover the preference under § 547(b). In its answer, ABC Supply Company alleges that the transfer constituted a contemporaneous exchange for new value to the Debtor which cannot be avoided under § 547(c)(4). Because negotiations to settle the preference action for \$2,000 are pending, Ward records the remaining value of the preference action to be administered as \$2,000 in Form 1, Column 6. Ward explains this new valuation<sup>17/</sup> in a note on Form 1, and further notes as a "major activity affecting case closing" that settlement negotiations are pending in the case.

**Personal Injury Suit (Asset #13)** - Late in June 1997, the Debtor's attorney notified Ward concerning the pendency of a lawsuit in state court involving a pre-petition personal injury claim that the Debtor failed to list in Schedule B or disclose at the § 341(a) meeting. Having insufficient time to determine the value of the asset to the estate, Ward lists the value of the unsecured personal injury claim as "unknown" in Form 1, Columns 2, 3, and 6. Ward notes on Form 1 as a "major activity affecting case closing" that a meeting with special counsel

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<sup>17/</sup>The costs to file and settle the adversary are negligible.

concerning the case is set on August 2, 1997, and that trial is anticipated during the month of January 1998.

**Fraudulent Transfer to Sister (Asset #14)** - Ward learns that the Debtor transferred a substantial amount of jewelry to his sister within 12 months prior to bankruptcy. The jewelry was not disclosed in Schedule B nor was the transfer disclosed in the statement of financial affairs. Ward retains the Jones Law Firm as counsel and commences a fraudulent transfer action against the Debtor's sister for recovery of the jewelry. The litigation is still pending. Ward's counsel is awarded interim fees of \$2,000 on May 12, 1997. Ward lists the value of the unscheduled fraudulent transfer action as \$20,000 in Form 1, Columns 2, 3, and 6. Ward records the disbursement of interim attorney's fees to the Jones Law Firm in Form 2, and notes on Form 1 as a "major activity affecting case closing" that settlement negotiations are pending in the case.

**Interest Earned (Asset #15)** - To maximize the return to creditors, Ward periodically invests estate funds exceeding her day-to-day requirements in certificates of deposit (CDs) and interest-bearing accounts. The total amount of interest to be earned is designated as "N/A" in Form 1, Column 3. Ward posts the amount of interest actually collected on Form 1, Column 5 and Form 2, and the amount of interest remaining to be collected as "unknown" on Form 1, Column 6.

**Mistaken Deposit** - Ward mistakenly deposits \$500,000 into this estate account rather than in the estate account in the unrelated case of In re Steve Martin. Ward quickly realizes her error and writes a check to the correct account. The check is posted as a negative receipt on Form 2, Column 5 so that the column totals are not overstated.

**Bond Premium** - On May 1, 1997, Ward makes a disbursement of \$100 to Green Bond Co. in payment of the bond premium attributable to this estate. Ward records the disbursement for the bond premium on Form 2.

Because the case is still open at the end of the semi-annual reporting period, Ward completes the bottom section of Form 1 detailing the matters still pending in the case and provides an updated estimate as to when a final report (TFR) will be filed for this estate.

# **APPENDICES**

**APPENDIX A    SECTION 341(a) MEETING OF CREDITORS**

**REQUIRED STATEMENTS/QUESTIONS**

1. State your name, social security number, and current address for the record.
2. Have you read the Bankruptcy Information Sheet provided by the United States Trustee?
3. Did you sign the petition, schedules, statements, and related documents you filed with the court?
4. Did you read the petition, schedules, statements, and related documents before you signed them?
5. Are you personally familiar with the information contained in the petition, schedules, statements and related documents?
6. To the best of your knowledge, is the information contained in the petition, schedules, statements, and related documents true and correct?
7. Are there any errors or omissions to bring to my, or the court's, attention at this time?
8. Are all of your assets identified on the schedules?
9. Have you listed all of your creditors on the schedules?
10. Have you filed bankruptcy before? (If so, the trustee must obtain the case number and the discharge information to determine the debtor(s) discharge eligibility.)

**SAMPLE GENERAL QUESTIONS**

(To be asked when deemed appropriate.)

1. Do you own or have any interest whatsoever in any real estate?

If owned: When did you purchase the property? How much did the property cost? What are the mortgages encumbering it? What do you estimate the present value of the property to be? Is that the whole value or your share? How did you arrive at that value?

If renting: Have you ever owned the property in which you live and/or is its owner in any way related to you?

2. Have you made any transfers of any property or given any property away within the last one year period (or such longer period as applicable under state law)?  
If yes: What did you transfer? To whom was it transferred? What did you receive in exchange? What did you do with the funds?
3. Does anyone hold property belonging to you?  
If yes: Who holds the property and what is it? What is its value?
4. Do you have a claim against anyone or any business?  
If there are large medical debts, are the medical bills from injury?  
Are you the plaintiff in any lawsuit?  
What is the status of each case and who is representing you?
5. Are you entitled to life insurance proceeds or an inheritance as a result of someone's death?  
If yes: Please explain the details.  
  
If you become a beneficiary of anyone's estate within six months of the date your bankruptcy petition was filed, the trustee must be advised within ten days through your counsel of the nature and extent of the property you will receive. FRBP 1007(h)
6. Does anyone owe you money?  
If yes: Is the money collectible? Why haven't you collected it? Who owes the money and where are they?
7. Have you made any large payments, over \$600, to anyone in the past year?
8. Were federal income tax returns filed on a timely basis? When was the last return filed?  
Do you have copies of the federal income tax returns? At the time of the filing of your petition, were you entitled to a tax refund from the federal or state government ?  
If yes: Inquire as to amounts.
9. Do you have a bank account, either checking or savings?  
If yes: In what banks and what were the balances as of the date you filed your petition?
10. When you filed your petition, did you have:
  - a. any cash on hand?
  - b. any U.S. Savings Bonds?
  - c. any other stocks or bonds?
  - d. any Certificates of Deposit?
  - e. a safe deposit box in your name or in anyone else's name?



11. Do you own an automobile?  
If yes: What is the year, make, and value? Do you owe any money on it? Is it insured?
12. Are you the owner of any cash value life insurance policies?  
If yes: State the name of the company, face amount of the policy, cash surrender value, if any, and the beneficiaries.
13. Do you have any winning lottery tickets?
14. Do you anticipate that you might realize any property, cash or otherwise, as a result of a divorce or separation proceeding?
15. Regarding any consumer debts secured by your property, have you filed the required Statement of Intention with respect to the exemption, retention, or surrender of that secured property? Please provide a copy of the statement to the trustee. Have you performed that intention?
16. Have you been engaged in any business during the last six years?  
If yes: Where and when? What happened to the assets of the business?

In cases where debtors are engaged in business, the following questions should be considered:

1. Who was responsible for maintaining financial records?
2. Which of the following records were maintained?
  - a. Cash receipts journal
  - b. Cash disbursements journal
  - c. General journal
  - d. Accounts receivable ledger
  - e. Accounts payable ledger
  - f. Payroll ledger
  - g. Fixed asset ledger
  - h. Inventory ledger
  - i. General ledger
  - j. Balance sheet, income statement, and cash flow statements
3. Where are each of the foregoing records now located?
4. Who was responsible for preparing financial statements?
5. How often were financial statements prepared?
6. For what periods are financial statements available?

7. Where are such financial statements now located?
8. Was the business on a calendar year or a fiscal year?
9. Were federal income tax returns filed on a timely basis? When was the last return filed?
10. Do you have copies of the federal income tax returns? Who does have the copies?
11. What outside accountants were employed within the last three years?
12. Do you have copies of the reports of such accountants? Who does have copies?
13. What bank accounts were maintained within the last three years?
14. Where are the bank statements and cancelled checks now located?
15. What insurance policies were in effect within the last year? What kind, and why?
16. From whom can copies of such insurance policies be obtained?
17. If the business is incorporated, where are the corporate minutes?
18. Is the debtor owed any outstanding accounts receivable? From whom? Are they collectible?
19. Is there any inventory, property, or equipment remaining?



**APPENDIX C UNITED STATES TRUSTEE FEE GUIDELINES**

**GUIDELINES FOR REVIEWING APPLICATIONS FOR  
COMPENSATION AND REIMBURSEMENT OF EXPENSES  
FILED UNDER 11 U.S.C. § 330  
(Appendix A to 28 C.F.R. § 58)**

(a) General Information.

(1) The Bankruptcy Reform Act of 1994 amended the responsibilities of the United States Trustees under 28 U.S.C. § 586(a)(3)(A) to provide that, whenever they deem appropriate, United States Trustees will review applications for compensation and reimbursement of expenses under § 330 of the Bankruptcy Code, 11 U.S.C. § 101, et seq. (“Code”), in accordance with procedural guidelines (“Guidelines”) adopted by the Executive Office for United States Trustees (“Executive Office”). The following Guidelines have been adopted by the Executive Office and are to be uniformly applied by the United States Trustees except when circumstances warrant different treatment.

(2) The United States Trustees shall use these Guidelines in all cases commenced on or after October 22, 1994.

(3) The Guidelines are not intended to supersede local rules of court, but should be read as complementing the procedures set forth in local rules.

(4) Nothing in the Guidelines should be construed:

(i) To limit the United States Trustee’s discretion to request additional information necessary for the review of a particular application or type of application or to refer any information provided to the United States Trustee to any investigatory or prosecutorial authority of the United States or a state;

(ii) To limit the United States Trustee’s discretion to determine whether to file comments or objections to applications; or

(iii) To create any private right of action on the part of any person enforceable in litigation with the United States Trustee or the United States.

(5) Recognizing that the final authority to award compensation and reimbursement under § 330 of the Code is vested in the Court, the Guidelines focus on the disclosure of information relevant to a proper award under the law. In evaluating fees for professional services, it is relevant to consider various factors including the following: the time spent; the rates charged; whether the services were necessary to the administration of, or beneficial towards the completion of, the case at the time they were rendered; whether services were performed within a reasonable time commensurate with the complexity, importance, and nature of the

problem, issue, or task addressed; and whether compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases. The Guidelines thus reflect standards and procedures articulated in § 330 of the Code and Rule 2016 of the Federal Rules of Bankruptcy Procedure for awarding compensation to trustees and to professionals employed under §§ 327 or 1103. Applications that contain the information requested in these Guidelines will facilitate review by the Court, the parties, and the United States Trustee.

(6) Fee applications submitted by trustees are subject to the same standard of review as are applications of other professionals and will be evaluated according to the principles articulated in these Guidelines. Each United States Trustee should establish whether and to what extent trustees can deviate from the format specified in these Guidelines without substantially affecting the ability of the United States Trustee to review and comment on their fee applications in a manner consistent with the requirements of the law.

(b) Contents of Applications for Compensation and Reimbursement of Expenses. All applications should include sufficient detail to demonstrate compliance with the standards set forth in 11 U.S.C. § 330. The fee application should also contain sufficient information about the case and the applicant so that the Court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents. The following will facilitate review of the application.

(1) Information about the Applicant and the Application. The following information should be provided in every fee application:

(i) Date the bankruptcy petition was filed, date of the order approving employment, identity of the party represented, date services commenced, and whether the applicant is seeking compensation under a provision of the Bankruptcy Code other than § 330.

(ii) Terms and conditions of employment and compensation, source of compensation, existence and terms controlling use of a retainer, and any budgetary or other limitations on fees.

(iii) Names and hourly rates of all applicant's professionals and paraprofessionals who billed time, explanation of any changes in hourly rates from those previously charged, and statement of whether the compensation is based on the customary compensation charged by comparably skilled practitioners in cases other than cases under title 11.

(iv) Whether the application is interim or final, and the dates of previous orders on interim compensation or reimbursement of expenses along with the amounts requested and the amounts allowed or disallowed, amounts of all previous payments, and amount of any allowed fees and expenses remaining unpaid.

(v) Whether the person on whose behalf the applicant is employed has been given the opportunity to review the application and whether that person has approved the requested amount.

(vi) When an application is filed less than 120 days after the order for relief or after a prior application to the Court, the date and terms of the order allowing leave to file at shortened intervals.

(vii) Time period of the services or expenses covered by the application.

(2) Case Status. The following information should be provided to the extent that it is known to or can be reasonably ascertained by the applicant:

(i) In a chapter 7 case, a summary of the administration of the case including all moneys received and disbursed in the case, when the case is expected to close, and, if applicant is seeking an interim award, whether it is feasible to make an interim distribution to creditors without prejudicing the rights of any creditor holding a claim of equal or higher priority.

(ii) In a chapter 11 case, whether a plan and disclosure statement have been filed and, if not yet filed, when the plan and disclosure statement are expected to be filed; whether all quarterly fees have been paid to the United States Trustee; and whether all monthly operating reports have been filed.

(iii) In every case, the amount of cash on hand or on deposit, the amount and nature of accrued unpaid administrative expenses, and the amount of unencumbered funds in the estate.

(iv) Any material changes in the status of the case that occur after the filing of the fee application should be raised, orally or in writing, at the hearing on the application or, if a hearing is not required, prior to the expiration of the time period for objection.

(3) Summary Sheet. All applications should contain a summary or cover sheet that provides a synopsis of the following information:

(i) Total compensation and expenses requested and any amount(s) previously requested;

(ii) Total compensation and expenses previously awarded by the court;

(iii) Name and applicable billing rate for each person who billed time during the period, and date of bar admission for each attorney;

(iv) Total hours billed and total amount of billing for each person who billed time during billing period; and

(v) Computation of blended hourly rate for persons who billed time during period, excluding paralegal or other paraprofessional time.

#### (4) Project Billing Format.

(i) To facilitate effective review of the application, all time and service entries should be arranged by project categories. The project categories set forth in Exhibit A should be used to the extent applicable. A separate project category should be used for administrative matters and, if payment is requested, for fee application preparation.

(ii) The United States Trustee has discretion to determine that the project billing format is not necessary in a particular case or in a particular class of cases. Applicants should be encouraged to consult with the United States Trustee if there is a question as to the need for project billing in any particular case.

(iii) Each project category should contain a narrative summary of the following information:

(A) a description of the project, its necessity and benefit to the estate, and the status of the project including all pending litigation for which compensation and reimbursement are requested;

(B) identification of each person providing services on the project; and

(C) a statement of the number of hours spent and the amount of compensation requested for each professional and paraprofessional on the project.

(iv) Time and service entries are to be reported in chronological order under the appropriate project category.

(v) Time entries should be kept contemporaneously with the services rendered in time periods of tenths of an hour. Services should be noted in detail and not combined or “lumped” together, with each service showing a separate time entry; however, tasks performed in a project which total a *de minimis* amount of time can be combined or lumped together if they do not

exceed .5 hours on a daily aggregate. Time entries for telephone calls, letters, and other communications should give sufficient detail to identify the parties to and the nature of the communication. Time entries for court hearings and conferences should identify the subject of the hearing or conference. If more than one professional from the applicant firm attends a hearing or conference, the applicant should explain the need for multiple attendees.

(5) Reimbursement for Actual, Necessary Expenses. Any expense for which reimbursement is sought must be actual and necessary and supported by documentation as appropriate. Factors relevant to a determination that the expense is proper include the following:

(i) Whether the expense is reasonable and economical. For example, first class and other luxurious travel mode or accommodations will normally be objectionable.

(ii) Whether the requested expenses are customarily charged to non-bankruptcy clients of the applicant.

(iii) Whether applicant has provided a detailed itemization of all expenses including the date incurred, description of expense (e.g., type of travel, type of fare, rate, destination), method of computation, and, where relevant, name of the person incurring the expense and purpose of the expense. Itemized expenses should be identified by their nature (e.g., long distance telephone, copy costs, messengers, computer research, airline travel, etc.) and by the month incurred. Unusual items require more detailed explanations and should be allocated, where practicable, to specific projects.

(iv) Whether applicant has prorated expenses where appropriate between the estate and other cases (e.g., travel expenses applicable to more than one case) and has adequately explained the basis for any such proration.

(v) Whether expenses incurred by the applicant to third parties are limited to the actual amounts billed to, or paid by, the applicant on behalf of the estate.

(vi) Whether applicant can demonstrate that the amount requested for expenses incurred in-house reflect the actual cost of such expenses to the applicant. The United States Trustee may establish an objection ceiling for any in-house expenses that are routinely incurred and for which the actual cost cannot easily be determined by most professionals (e.g., photocopies, facsimile charges, and mileage).



(vii) Whether the expenses appear to be in the nature of nonreimbursable overhead. Overhead consists of all continuous administrative or general costs incident to the operation of the applicant's office and not particularly attributable to an individual client or case. Overhead includes, but is not limited to, word processing, proofreading, secretarial and other clerical services, rent, utilities, office equipment and furnishings, insurance, taxes, local telephones and monthly car phone charges, lighting, heating and cooling, and library and publication charges.

(viii) Whether applicant has adhered to allowable rates for expenses as fixed by local rule or order of the Court.

## Exhibit A--Project Categories

Here is a list of suggested project categories for use in most bankruptcy cases. Only one category should be used for a given activity. Professionals should make their best effort to be consistent in their use of categories, whether within a particular firm or by different firms working on the same case. It would be appropriate for all professionals to discuss the categories in advance and agree generally on how activities will be categorized. This list is not exclusive. The application may contain additional categories as the case requires. They are generally more applicable to attorneys in chapter 7 and chapter 11, but may be used by all professionals as appropriate.

**Asset Analysis and Recovery:** Identification and review of potential assets including causes of action and non-litigation recoveries.

**Asset Disposition:** Sales, leases (§ 365 matters), abandonment and related transaction work.

**Business Operations:** Issues related to debtor-in-possession operating in chapter 11 such as employee, vendor, tenant issues and other similar problems.

**Case Administration:** Coordination and compliance activities, including preparation of statement of financial affairs; schedules; list of contracts; United States Trustee interim statements and operating reports; contacts with the United States Trustee; general creditor inquiries.

**Claims Administration and Objections:** Specific claim inquiries; bar date motions; analyses, objections and allowances of claims.

**Employee Benefits/Pensions:** Review issues such as severance, retention, 401K coverage and continuance of pension plan.

**Fee/Employment Applicants:** Preparation of employment and fee applications for self or others; motions to establish interim procedures.

**Fee/Employment Objections:** Review of and objections to the employment and fee applications of others.

**Financing:** Matters under §§ 361, 363 and 364 including cash collateral and secured claims; loan document analysis.

**Litigation:** There should be a separate category established for each matter (e.g., XYZ Litigation).

Meetings of Creditors: Preparing for and attending the conference of creditors, the § 341(a) meeting and other creditors' committee meetings.

Plan and Disclosure Statement: Formulation, presentation and confirmation; compliance with the plan confirmation order, related orders and rules; disbursement and case closing activities, except those related to the allowance and objections to allowance of claims.

Relief From Stay Proceedings: Matters relating to termination or continuation of automatic stay under § 362.

The following categories are generally more applicable to accountants and financial advisors, but may be used by all professionals as appropriate.

Accounting/Auditing: Activities related to maintaining and auditing books of account, preparation of financial statements and account analysis.

Business Analysis: Preparation and review of company business plan; development and review of strategies; preparation and review of cash flow forecasts and feasibility studies.

Corporate Finance: Review financial aspects of potential mergers, acquisitions and disposition of company or subsidiaries.

Data Analysis: Management information systems review, installation and analysis, construction, maintenance and reporting of significant case financial data, lease rejection, claims, etc.

Litigation Consulting: Providing consulting and expert witness services relating to various bankruptcy matters such as insolvency, feasibility, avoiding actions, forensic accounting, etc.

Reconstruction Accounting: Reconstructing books and records from past transactions and bringing accounting current.

Tax Issues: Analysis of tax issues and preparation of state and federal tax returns.

Valuation: Appraise or review appraisals of assets.





**APPENDIX D SEGREGATING DUTIES IN A SMALL TRUSTEE OPERATION**

**CHAPTER 7**  
**WAYS TO SEGREGATE DUTIES IN A TWO-PERSON OFFICE**

<b>FUNCTION PERFORMED</b>	<b>PERSON TO PERFORM FUNCTION</b>
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**Estate Receipts**

Opens mail/endorse and logs in checks	Assistant (stronger control if performed by trustee)
Reviews checks	Trustee (M)
Prepares bank deposits	Assistant
Makes bank deposits	Assistant (stronger controls if performed by trustee)
Reconciles log to bank statements	Trustee (M) – sampling permitted

**Estate Disbursements**

Maintains custody of blank check stock (includes maintaining a control log if using computerized checks)	Trustee (S) or assistant
Prepares checks	Assistant
Signs checks	Trustee (M)

**Accounting Records**

Opens bank statements and reviews cancelled checks	Trustee (M)
Reconciles bank statements and compares to Form 2	Assistant
Reviews bank reconciliations and compares to Form 2	Trustee (M)
Prepares Forms 1, 2, and 3	Assistant
Reviews Forms 1, 2, and 3 and signs 180-day report	Trustee (M)

S = Suggested  
M = Mandatory

*Courtesy of Region 18*

**APPENDIX E    PROCEDURES FOR SUSPENSION AND REMOVAL OF PANEL TRUSTEES AND STANDING TRUSTEES**

**28 C.F.R. § 58.6  
(As of November 6, 1997)**

(a) A United States Trustee shall notify a panel trustee or a standing trustee in writing of any decision to suspend or terminate the assignment of cases to the trustee including, where applicable, any decision not to renew the trustee's term appointment. The notice shall state the reason(s) for the decision and should refer to, or be accompanied by copies of, pertinent materials upon which the United States Trustee has relied and any prior communications in which the United States Trustee has advised the trustee of the potential action. The notice shall be sent to the office of the trustee by overnight courier, for delivery the next business day. The reasons may include, but are in no way limited to:

- (1) Failure to safeguard or to account for estate funds and assets;
- (2) Failure to perform duties in a timely and consistently satisfactory manner;
- (3) Failure to comply with the provisions of the Code, the Bankruptcy Rules, and local rules of court;
- (4) Failure to cooperate and to comply with orders, instructions and policies of the court, the bankruptcy clerk or the United States Trustee;
- (5) Substandard performance of general duties and case management in comparison to other members of the chapter 7 panel or other standing trustees;
- (6) Failure to display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee and the general public;
- (7) Failure to adequately monitor the work of professionals or others employed by the trustee to assist in the administration of cases;
- (8) Failure to file timely, accurate reports, including interim reports, final reports, and final accounts;
- (9) Failure to meet the eligibility requirements of 11 U.S.C. § 321 or the qualifications set forth in 28 CFR §§ 58.3 and 58.4 and in 11 U.S.C. § 322;
- (10) Failure to attend in person or appropriately conduct the 11 U.S.C. § 341(a) meeting of creditors;

- (11) Action by or pending before a court or state licensing agency which calls the trustee's competence, financial responsibility or trustworthiness into question;
- (12) Routine inability to accept assigned cases due to conflicts of interest or to the trustee's unwillingness or incapacity to serve;
- (13) Change in the composition of the chapter 7 panel pursuant to a system established by the United States Trustee under 28 CFR § 58.1;
- (14) A determination by the United States Trustee that the interests of efficient case administration or a decline in the number of cases warrant a reduction in the number of panel trustees or standing trustees.

(b) The notice shall advise the trustee that the decision is final and unreviewable unless the trustee requests in writing a review by the Director, Executive Office for United States Trustees, no later than 20 calendar days from the date of issuance of the United States Trustee's notice ("request for review"). In order to be timely, a request for review must be received by the Office of the Director no later than 20 calendar days from the date of the United States Trustee's notice to the trustee.

(c) A decision by a United States Trustee to suspend or terminate the assignment of cases to a trustee shall take effect upon the expiration of a trustee's time to seek review from the Director or, if the trustee timely seeks such review, upon the issuance of a final written decision by the Director.

(d) Notwithstanding paragraph (c) of this section, a United States Trustee's decision to suspend or terminate the assignment of cases to a trustee may include, or may later be supplemented by an interim directive, by which the United States trustee may immediately discontinue assigning cases to a trustee during the review period. A United States Trustee may issue such an interim directive if the United States Trustee specifically finds that:

- (1) A continued assignment of cases to the trustee places the safety of estate assets at risk;
- (2) The trustee appears to be ineligible to serve under applicable law, rule, or regulation;
- (3) The trustee has engaged in conduct that appears to be dishonest, deceitful, fraudulent, or criminal in nature; or
- (4) The trustee appears to have engaged in other gross misconduct that is unbecoming his or her position as trustee or violates the trustee's duties.



(e) If the United States Trustee issues an interim directive, the trustee may seek a stay of the interim directive from the Director if the trustee has timely filed a request for review under paragraph (b) of this section.

(f) The trustee's written request for review shall fully describe why the trustee disagrees with the United States Trustee's decision, and shall be accompanied by all documents and materials that the trustee wants the Director to consider in reviewing the decision. The trustee shall send a copy of the request for review, and the accompanying documents and materials, to the United States Trustee by overnight courier, for delivery the next business day. The trustee may request that specific documents in the possession of the United States Trustee be transmitted to the Director for inclusion in the record.

(g) The United States Trustee shall have 15 calendar days from the date of the trustee's request for review to submit to the Director a written response regarding the matters raised in the trustee's request for review. The United States Trustee shall provide a copy of this response to the trustee. Both copies shall be sent by overnight courier, for delivery the next business day.

(h) The Director may seek additional information from any party in the manner and to the extent the Director deems appropriate.

(i) Unless the trustee and the United States Trustee agree to a longer period of time, the Director shall issue a written decision no later than 30 calendar days from the receipt of the United States Trustee's response to the trustee's request for review. That decision shall determine whether the United States Trustee's decision is supported by the record and the action is an appropriate exercise of the United States Trustee's discretion, and shall adopt, modify or reject the United States Trustee's decision to suspend or terminate the assignment of future cases to the trustee. The Director's decision shall constitute final agency action.

(j) In reaching a determination, the Director may specify a person to act as a reviewing official. The reviewing official shall not be a person who was involved in the United States Trustee's decision or a Program employee who is located within the region of the United States Trustee who made the decision. The reviewing official's duties shall be specified by the Director on a case by case basis, and may include reviewing the record, obtaining additional information from the participants, providing the Director with written recommendations, or such other duties as the Director shall prescribe in a particular case.

(k) This rule does not authorize a trustee to seek review of any decision to increase the size of the chapter 7 panel or to appoint additional standing trustees in the district or region.

(l) A trustee who files a request for review shall bear his or her own costs and expenses, including counsel fees.

**APPENDIX F NOTICE OF VOLUNTARY SUSPENSION**

I, \_\_\_\_\_, a [standing] [panel] trustee in Region [ ], request a voluntary suspension of the assignment of future cases for the following time period [specify]. I request this voluntary suspension for the following reason(s): [specify].

By seeking this Voluntary Suspension, I understand that 28 C.F.R. § 58.6 does not apply.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name

Received:

\_\_\_\_\_

## **APPENDIX G    POLICY STATEMENTS FOR EARNEST MONIES AND HANDLING CASH**

### I.        EARNEST MONIES

In connection with the sale of bankruptcy estate assets, a chapter 7 trustee may occasionally receive and hold earnest monies. These funds are held in trust until the sale is consummated in accordance with applicable bankruptcy law. They may not be held, undeposited, in the trustee’s office nor commingled with a law firm’s trust account<sup>18/</sup>. Trustees should handle earnest monies as follows:

#### Recommended Option

- ▶        The funds may be deposited to the bankruptcy estate account immediately upon receipt. The deposit is recorded on Form 2 and described as “earnest monies.” The description also identifies the related asset. Earnest monies are not recorded on Form 1.
- ▶        When the related asset is sold, the earnest monies paid by the successful bidder become an estate asset. They are then reported on Form 1 under “Sale/Funds Received by the Estate” (column 5) and referenced on Form 2 using the applicable Form 1 reference number.
- ▶        If earnest monies were received from other bidders, refunds to the unsuccessful bidders are made via estate checks<sup>19/</sup>. These checks are recorded on Form 2 and described as “return of earnest monies received in connection with the sale of *x* asset.”
- ▶        If earnest monies are received late in the day and it is impossible or impractical to follow the above procedure, the trustee must ensure that the funds are kept overnight in a safe or locked drawer until the next business day when they can be deposited to the estate account. The trustee may also want to investigate the possibility of using the bank’s night depository or 24 hour services if the bank is not in a remote location.

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<sup>18/</sup>Commingling of bankruptcy-related funds with a law firm’s funds is not sound business practice and exposes the trustee to unnecessary risk. Consequently, depositing bankruptcy-related funds to a law firm’s trust account, even for a short time, should be avoided. Additionally, the Program does not have access rights to the records of the law firm’s accounts because they are not estate accounts, and because such accounts also raise questions of attorney/client privilege and related confidentiality concerns. Indeed, in the past we have had difficulty reconstructing trustee embezzlements due to our inability to gain access to law firm trust accounts, and some courts have even ruled against the Program on this issue.

<sup>19/</sup>Depending upon local rules, the trustee may need to obtain a court order to return earnest monies to the unsuccessful bidders.

## Second Option

The funds may be deposited to a separate trust account established for each individual estate. The trust account is to be opened and the earnest monies deposited immediately upon receipt. Of course, Chapter 7 trustees must comply with applicable state laws and banking or other regulations when depositing bankruptcy-related earnest monies to trust accounts.

The following minimum requirements for trust accounts used to hold bankruptcy-related funds have been established:

- ▶ The account must be in the name of the trustee and clearly designated as a trust account, with pre-printed checks and deposit slips reflecting this status. The trustee shall notify the United States Trustee of the name and address of the financial institution and the account number(s) of the trust account(s).
- ▶ Generally, these trust accounts are not interest bearing due to the short-term nature of the deposits and the difficulty of apportioning interest. Some states, however, require attorneys to utilize interest bearing accounts for funds held in trust (in these instances, the interest is usually remitted to the state). If the trustee deposits earnest monies in an interest-bearing trust account and is not required to remit interest to the state, the trustee must keep sufficiently detailed records to be able to allocate interest to each individual deposit.
- ▶ The trustee shall maintain original or duplicate deposit slips, copies of the checks deposited to the account, original canceled checks, bank statements, and cash receipts/disbursements records that identify the payer/payee, amount, purpose, and date for each deposit to and disbursement from the account. Monthly, the trust accounting records shall be reconciled to the bank statements. These records are subject to audit by the United States Trustee and shall be retained by the trustee for a period of two years after the related bankruptcy estate is closed.
- ▶ Quarterly, the trustee shall report to the United States Trustee all bankruptcy-related deposits and disbursements pertaining to the trust account in a format as from time-to-time prescribed by the Executive Office.
- ▶ The trustee will authorize the financial institution to provide periodic reports, bank statements, and all other records pertaining to the account as may be requested by the United States Trustee.

## II. PROCEDURES FOR HANDLING CASH

Program policy has long discouraged cash payments because, in the vernacular, “cash walks.” Whenever possible, a trustee is to encourage debtors and other parties to convert cash to a money order or cashier’s check before surrendering it to the trustee.

When a trustee cannot avoid accepting cash, they must provide a numbered receipt to the payer and immediately deposit the funds in the estate account. If they are unable to do so, either because the trustee uses a remote bank or because an estate account has not been opened, the trustee or an employee should immediately convert the cash to a cashier's check or money order. All of the supporting documentation should be kept together in the estate file to provide an audit trail. When an employee handles the transaction, the trustee needs to verify that the amount of the check or money order matches the amount of funds initially turned over to the employee.

If cash is received late in the day and it is impossible or impractical to follow the above procedure, the trustee must ensure that the funds are kept overnight in a safe or locked drawer until the next business day when the cash can be deposited to the estate account or converted to a cashier's check or money order. The trustee may also want to investigate the possibility of using the bank's night depository or 24 hour services if the bank is not in a remote location.

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