

**Department of Justice
Executive Office for United States Trustees**

**Final Agency Action
Case No. 2013-01**

**Review of the Decision of the
United States Trustee for Region [Redacted]
Regarding [Redacted]**

[Redacted] (“trustee”), a chapter 7 panel trustee for the [Redacted] District of [Redacted] Division, seeks review of the decision by the Acting United States Trustee for Region [Redacted] (“United States Trustee”)¹ to temporarily suspend the assignment of new cases to her. Based upon the record before me, I affirm the United States Trustee’s decision.

I. COURSE OF THIS PROCEEDING

By letter dated May 7, 2013 (“Notice”), the United States Trustee notified the trustee of his decision to suspend the assignment of chapter 7 cases to her. ARR² 1-50. The primary reason for the suspension was the April 18, 2013, audit report (“Audit Report”) issued by Mayer Hoffman McCann, P.C. (“MHM”). ARR 1. The Audit Report, which focused on the trustee’s interim report for the period ending December 31, 2012, concluded that the trustee’s accounting and cash management practices and procedures were inadequate to safeguard estate funds. ARR 10. The Audit Report noted that many of the deficiencies identified were similar to those identified in prior reviews of the trustee’s operations. ARR 10-15.

By letter dated May 23, 2013 (“Request for Review”), the trustee requested review of the United States Trustee’s decision. ARR 51-144. By memorandum dated June 7, 2013 (“UST Response”), the United States Trustee responded to the trustee’s Request for Review. ARR 145-478. Accordingly, the administrative record in this matter consists of the Notice, the Request for Review, and the UST Response, along with their respective supporting exhibits and attachments.

II. STANDARD OF REVIEW

In conducting this review, I must consider two questions:

1. Was the United States Trustee’s decision to suspend the trustee supported by the record?

¹ United States Trustees are officials of the Department of Justice who are appointed by the Attorney General. 28 U.S.C. § 581(a). The Director of the Executive Office for United States Trustees is a Department of Justice official who acts under authority delegated by the Attorney General. 28 U.S.C. §§ 509, 510; *see also* 5 U.S.C. § 301 (head of an executive agency may prescribe regulations for the governance and operations of his or her department).

² ARR refers to the administrative review record pertaining to this matter.

2. Did the United States Trustee’s decision constitute an appropriate exercise of discretion?

28 C.F.R. § 58.6(i) (specifying the scope of the Director’s review). I may “adopt, modify or reject the United States Trustee’s decision to suspend . . . the assignment of future cases to the trustee.” *Id.*

III. ANALYSIS

A. Duties of the United States Trustee and Panel Trustee.

United States Trustees work to effectuate the goals of the United States Trustee Program (“USTP” or “Program”). Pursuant to its Mission Statement, “[t]he mission of the United States Trustee Program is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public.” http://www.justice.gov/ust/eo/ust_org/mission.htm (last visited September 13, 2013). United States Trustees establish, maintain, and supervise panel trustees in cases commenced under the liquidation provisions in chapter 7 of the United States Bankruptcy Code, 28 U.S.C. § 586(a)(1). United States Trustees “monitor the performance of panel members . . . to determine whether they should be continued in or removed from panel membership or office.” H.R. Rep. No. 95-595, at 102 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6063, 1977 WL 9628. “The United States Trustee is permitted to conduct his own investigation into the existence of facts that should spur the private trustee to action. Such periodic examinations will be necessary for the United States Trustee to exercise effective supervision and make effective evaluation of the performance of the private trustees on the panel.” *Id.* at 6071.

Chapter 7 panel trustees are fiduciaries with wide-ranging responsibilities to implement the goals of chapter 7 of the Bankruptcy Code. As fiduciaries, trustees are held to high standards of conduct. *See generally* *Mosser v. Darrow*, 341 U.S. 267 (1951); *Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 278 (1941). *See also* *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.). Trustees must be both eligible and qualified to serve under 11 U.S.C. § 321 and 28 C.F.R. § 58.3. They are subject to suspension or removal by United States Trustees under the procedures set forth in 28 C.F.R. § 58.6, based upon a non-exhaustive list of fourteen grounds specified in section 58.6(a).

Key among trustees’ statutory duties is the duty to be accountable for all property received. *See* 11 U.S.C. § 704(a)(2). In order to properly and effectively fulfill this statutory duty, trustees must establish and maintain appropriate accounting systems and financial records for their cases. The Program has established a mandatory record keeping and reporting system for this purpose, which consists of three primary records: (1) Individual Estate Property Record and Report (Form 1); (2) Cash Receipts and Disbursements Record (Form 2); and (3) Summary Interim Asset Report (Form 3). *See Handbook for Chapter 7 Panel Trustees*, effective October 1, 2012 (“Chapter 7 Handbook”) at 5-1, available at http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/ch7hb2012/Handbook_for

[Chapter 7 Trustees.pdf](#) (last visited September 10, 2013).³ Trustees also must retain a Cash Receipts Log to track receipts and verify deposits, a Receivables Ledger to track collections and balances, a Receipt Book to provide receipts, and Bank Reconciliation Reports/Records to track estate accounts. Chapter 7 Handbook at 5-1 to 5-2.

Trustees submit Forms 1, 2, and 3 to United States Trustees in the Trustee Interim Report (“TIR”). Trustees must submit TIRs at least annually. *See General Instructions for Interim Reports (TIRs)*, available at http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/ch7hb2012/General_Instructions_for_Interim_Reports_TIRs.pdf (last visited September 13, 2013). The review of TIRs by Program personnel allows United States Trustees to assess the progress of trustees’ cases and asset administration and to identify potential issues regarding their record-keeping practices.

Trustees periodically receive field examinations, case administration reviews (“CARs”), and audits of their activities. Chapter 7 Handbook at 6-3. United States Trustee personnel conduct the field examinations and CARs. Independent certified public accountants conduct the audits. The field examinations, CARs, and audits are designed to assess trustees’ accounting and case administration activities. *Id.*

B. Background Regarding Trustee Appointment, Training, and Supervision.

The United States Trustee appointed the trustee to the panel of chapter 7 trustees on December 16, 2009. ARR 164. The United States Trustee trained the trustee and other new trustees using a comprehensive training protocol that included four orientation seminars and the recruitment of experienced chapter 7 trustees as mentors. *See* ARR 165-268. The United States Trustee distributed resource materials and assigned a supervisory team of Program personnel to provide ongoing training and support. *See, e.g.,* ARR 166, 176-77. Among other things, trustees received the Chapter 7 Handbook. ARR 162. The Chapter 7 Handbook contains guidance and Program expectations with respect to all aspects of chapter 7 case administration and reporting. *Id.* The United States Trustee also distributed PowerPoint presentations on recordkeeping issues prepared by the Executive Office for United States Trustees, ARR 300-59. The United States Trustee also held annual training seminars for chapter 7 trustees, ARR 295-97 (October 15, 2010, annual training agenda), ARR 387-88 (October 14, 2011, annual training agenda), ARR 398-402 (October 19, 2012, annual training agenda and select materials). The United States Trustee also sent periodic emails regarding matters of importance to chapter 7 trustees. *See, e.g.,* ARR 266-68.

The trustee’s first TIR covered the period ending June 30, 2010 (“2010 TIR”). The United States Trustee provided informal instruction and feedback to the trustee in connection with the 2010 TIR. ARR 290, 292-93, 361-62. The United States Trustee encouraged the trustee to proactively correct errors before submitting the next TIR. ARR 361.

³ The Program has published detailed supplementary materials to explain the forms and their use. http://www.justice.gov/ust/eo/private_trustee/library/chapter07/index.htm (last visited September 10, 2013).

The United States Trustee sent the trustee a letter regarding the 2010 TIR review on November 10, 2010 (“2010 TIR Letter”). ARR 365-71. On July 20, 2011, the United States Trustee sent a letter to the trustee regarding the TIR for the period ending December 31, 2010 (“2011 TIR Letter”). ARR 379-82.

The United States Trustee decided to conduct a CAR before the trustee was scheduled to have a formal audit by an outside independent auditor to help her identify possible problems so that she could fix them before the formal audit. ARR 150. The trustee submitted a TIR for the period ending June 30, 2012, that was the focus of the United States Trustee’s CAR.

United States Trustee Bankruptcy Analysts performed the field work for the CAR on September 14, 2012. ARR 23. They orally advised the trustee of their concerns at that time. ARR 150. The United States Trustee then issued a formal report on October 3, 2012 (“CAR Report”). ARR 23-43; *see also* ARR 404 (email transmittal of the CAR Report to the trustee).

The CAR Report noted the following overall problems that are pertinent to this review:

- The trustee’s Forms 1, 2, and 3 had many issues that needed to be addressed;
- Trustee had not filed Reports of Sales for nine sampled asset sales;
- The trustee had difficulty producing copies of checks deposited and was unable to find one of the checks sampled; and
- The trustee had not maintained sufficient records of quarterly file reviews, monthly bank statement reconciliations, timely deposit of checks and entry into the cash receipts log, and domestic support obligation (“DSO”) mailings.

ARR 26-27. The CAR Report detailed the cases and circumstances in which these problems arose. ARR 25-43.

MHM conducted an audit of the trustee’s operations in 2013. The review focused on the trustee’s TIR for the reporting period ending December 31, 2012. ARR 8. CPA [Redacted] [Redacted] conducted the field work from March 18 through March 20, 2013. *Id.*

The audit tested fifteen cases and contained fourteen findings, nine of which were repetitive of actual or similar deficiencies that the United States Trustee had identified in the CAR Report. ARR 9, 20. The auditors issued an Audit Report dated April 18, 2013 (“Audit Report”) that concluded that the trustee’s practices were inadequate to safeguard estate funds. ARR 10. The Audit Report listed seven general reasons for this conclusion:

- Repeat findings;
- Numerous Form 1, Form 2 and Form 3 errors;
- Reports of sale not filed in two cases;
- Report of sale filed late in one case;
- Bank reconciliations not in conformity with the Chapter 7 Handbook;
- Bank statements and copies of checks received not located in file; and

- DSO letters to the state child support agency did not include full Social Security number of debtor.

Id.

The Audit Report also contained details about the cases on which the fourteen findings were based. The findings identified numerous errors on Forms 1 and 2 (Findings 1-3, 5-8); an error on Form 3 (Finding 4); failures to file and/or to timely file reports of sales of estate property (Findings 9 and 10); and failures to comply with banking requirements (Findings 11-13). ARR 20.

The trustee generally does not contest the Audit Report's findings. *See* ARR 131-37. Instead, she refers to them as "real but non-material deficiencies." ARR 51. She concedes the need to implement "robust processes" to correct the deficiencies cited. ARR 52, 59-60.

C. Grounds for the United States Trustee's Decision to Suspend the Trustee.

The United States Trustee's decision to suspend the trustee was based on the findings in the Audit Report and the similarity of those findings to deficiencies previously communicated to the trustee. ARR 1-5. According to the Notice, the Audit Report indicated that the trustee's suspension was warranted on the following five grounds:

- Failure to safeguard or to account for estate funds and assets. 28 C.F.R. § 58.6(a)(1);
- Failure to perform duties in a timely and consistently satisfactory manner. 28 C.F.R. § 58.6(a)(2);
- Failure to cooperate and comply with instructions and policies of the United States Trustee. 28 C.F.R. § 58.6(a)(4);
- Substandard performance of general duties and case management in comparison to other chapter 7 panel or standing trustees. 28 C.F.R. § 58.6(a)(5); and
- Failure to file timely, accurate reports, including interim reports, final reports, and final accounts. 28 C.F.R. § 58.6(a)(8).

ARR 1-2. For each ground stated in the Notice, the United States Trustee referred to one or more of the fourteen findings in the Audit Report, as well as related requirements of the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the Chapter 7 Handbook. ARR 2-5. The Notice also specified where findings in the Audit Report were the same or similar to deficiencies previously cited in the CAR Report. *Id.*

The Notice advised the trustee that her suspension will remain in place until: (1) the trustee satisfactorily resolves the issues identified in the Audit Report; (2) the trustee adopts procedures designed to prevent a recurrence of the problems; (3) the United States Trustee

conducts a follow-up site visit to verify the necessary corrective action; and (4) the Deputy Director at the Executive Office for United States Trustees approves the trustee's reinstatement. ARR 2.⁴

D. The Record Supports the United States Trustee's Decision to Suspend the Trustee and the Decision Was an Appropriate Exercise of Discretion.

As set forth more fully below, I conclude that the record supports the United States Trustee's decision to suspend the trustee, based on four of the five grounds cited in the Notice. I further conclude that suspension of the trustee pending fulfillment of the conditions stated in the Notice was an appropriate exercise of the United States Trustee's discretion.

1. Failure to Safeguard or to Account for Estate Funds, 28 C.F.R. § 58.6(a)(1).

The Notice states that the trustee failed to safeguard or account for estate assets, referencing the conclusions in Audit Report Findings 8, 9, and 10 and noting that similar findings were made in the CAR Report for two of the findings. ARR 2; *see also* ARR 20 (list of audit findings).

Finding 8 states that the trustee reported "incorrect amounts received . . . on the Form 1 for certain assets." ARR 13. Finding 8 is based on errors made by the trustee in two of the fifteen cases tested. [Redacted] the trustee incorrectly reported on Form 1 that she received rent in the amount of \$203,400,299, rather than the \$15,000 she actually received. *Id.* In [Redacted] the trustee overstated the amount received from a sale by \$2,000 because she failed to account for the return of a deposit in that amount. *Id.*

Finding 9 states that "[i]n two cases tested, Reports of Sale were not filed." *Id.* The two cases were [Redacted] (December 2012 sale of an asset for \$40,000) and [Redacted] (October 2012 sale of an asset for \$10,000). ARR 14. The Audit Report stated that similar issues with respect to Reports of Sale were noted in the CAR Report. ARR 13. My review discloses that the CAR Report identified four cases in which Reports of Sale had not been filed: [Redacted] (sale of business assets on May 15, 2012); [Redacted] (sales of six properties from May 17, 2011, to October 26, 2011); [Redacted] (sale of a business on May 9, 2012); and [Redacted] (sale of a business and Lexus on November 18, 2011). ARR 32.

Finding 10 notes that the trustee did not timely file Reports of Sale in [Redacted] [REDACTED]. ARR 14. As noted above, the assets were sold from May 17, 2011, to October 26, 2011. Reports of Sale were not filed until October 29, 2012, after the CAR Report was issued. I consider this finding in conjunction with Finding 9.

⁴ The Deputy Director for Field Operations would perform this function.

Findings 8, 9, and 10 address significant issues. Reports of Sale and information about receipts are important to the integrity of the bankruptcy system. Reports of Sale publicly disclose the details of transactions so that the court and interested parties can assess the reasonableness of the sale, compare the result obtained to that disclosed in prior notices or hearings, and identify potential improprieties, such as inappropriate buyers, excessive sale expenses, and inconsistencies between the amount reported as received and the amount known to have been paid. Accurate receipt information on Form 1 serves a similar purpose.

Findings 8, 9, and 10 are not the only support for a conclusion that the trustee failed to safeguard or account for estate funds and assets. An independent auditor concluded that the trustee's accounting and cash management practices and procedures were insufficient for safeguarding bankruptcy estate funds and assets. ARR 10. I agree. The trustee's conduct must be viewed in context. This scrutiny requires examination of the deficiencies noted in the Audit Report, the various manners in which the appropriate procedures had been communicated to the trustee, the number and nature of previous deficiencies, and the trustee's failure to adequately address her deficient practices. I also am mindful that while the CAR and audit sampled a limited number of cases (*i.e.*, ten cases for the CAR and fifteen cases for the audit), it is likely that the deficiencies noted therein are repeated in other cases in the trustee's portfolio. When examined as a whole, I determine that the reliability of the trustee's accounting and cash management practices cannot be assured and thus a determination that the trustee failed to safeguard and account for estate assets is appropriate.

Based on the foregoing, I find that there is support in the record for the United States Trustee's determination that the trustee's suspension was warranted under section 58.6(a)(1).

2. Failure to Perform Duties Timely and Satisfactorily, 28 C.F.R. § 58.2(a)(2); Failure to Comply with United States Trustee Instructions and Policies, 28 C.F.R. § 58.2(a)(4).

Pursuant to section 58.6(a)(2), a trustee may be removed or suspended for “[f]ailure to perform duties in a timely and consistently satisfactory manner[.]” In this regard, the United States Trustee asserts that the trustee failed to keep paper copies of bank statements and checks in the trustee's case or bank files as required by the Chapter 7 Handbook. ARR 2-3. In support of this ground, the United States Trustee refers to Finding 12 (failure to retain bank statements in Redacted) and Finding 13 (failure to retain check copies in banking files). ARR 2-3, 14-15.

Pursuant to section 58.6(a)(4), a trustee may be removed or suspended for “[f]ailure to cooperate and to comply with orders, instructions and policies of . . . the United States Trustee.” The United States Trustee asserts that the trustee failed to satisfactorily comply with the Program's instructions that the trustee prepare and document written reconciliations of bank statements. ARR 3. In this regard, the United States Trustee refers to Finding 11 of the Audit Report. *Id.*; *see also* ARR 14 (failure to document reconciliation of bank statements in accordance with Chapter 7 Handbook requirements).

The Audit Report noted that findings similar to Findings 11 and 13 were made in the CAR Report. ARR 14-15. My review confirms that the CAR Report identified these deficiencies. ARR 32-33.

The trustee does not contest these Audit Report findings, nor does she dispute what the Program's banking requirements are in this regard. ARR 136. Rather, she notes her progress after the CAR Report and disagrees with some of the Program's requirements, although she indicates that she will comply with them. ARR 59-60, 136. These explanations do not excuse the trustee's failure to comply with Program banking requirements despite a three-year history as a panel trustee.

The United States Trustee discusses Findings 12-13 in support of suspension for failure to perform satisfactorily under section 58.6(a)(2), and Finding 11 in support of suspension for failure to comply with Program instructions under section 58.6(a)(4). ARR 2-3. I find, however, that Findings 11-13 support suspension of the trustee under both sections 58.6(a)(2) and (a)(4).

Findings 9 and 10 in the Audit Report also support suspension of the trustee under sections 58.6(a)(2) and (a)(4). These findings indicate that the trustee either did not file or failed to timely file Reports of Sale. ARR 20. I previously discussed the factual basis for these findings and the importance of these reports. I find the trustee's conduct particularly troubling in light of the United States Trustee's thorough training of trustees on this issue and repeated efforts to obtain the trustee's compliance. *See* Chapter 7 Handbook at 4-17 (general instructions on reports of sale); ARR 175, 185 (orientation training agendas noting Reports of Sale/Auction under category of "Problems in Asset Cases"); ARR 244 (noting Report of Sale problems in summary of audit findings chart); ARR 267-68 (email of April 7, 2010, discussing requirement to file reports of sale within 30 days of sale); ARR 45 (2010 TIR Letter discussing Report of Sale that "still needs to be filed"); ARR 297 (October 15, 2010, agenda topic for the annual trustee seminar); ARR 343 (PowerPoint presentation slide discussing auctioneer Reports of Sale); ARR 26, 32, 37-38 (CAR Report findings regarding missing Reports of Sale); ARR 401 (October 19, 2012, seminar materials for annual training that included Report of Sale issues as key audit findings).

Audit Findings 1, 2, 3, 5, 6, and 7 also support suspension under sections 58.6(a)(2) and (a)(4). These findings reflect the trustee's failure to perform her duties satisfactorily and to comply with Program requirements. As described more fully in connection with section 58.6(a)(8) below, they are exacerbated by prior similar conduct.

Based on the foregoing, I find that there is support in the record for the United States Trustee's determination that the trustee's suspension was warranted under sections 58.6(a)(2) and (a)(4).

3. Substandard Performance in Comparison to Other Trustees, 28 C.F.R. § 58.6(a)(5).

Pursuant to 28 C.F.R. § 58.6(a)(5), a trustee may be removed or suspended for "[s]ubstandard performance of general duties and case management in comparison to other members of the chapter 7 panel or other standing trustees." In support of this ground for

suspension, the United States Trustee asserts that the trustee made inaccurate entries on Forms 1 by failing to list scheduled assets, listing assets in duplicate, listing incorrect values for assets, and incorrectly recording amounts received by the estate. ARR 3-4. The United States Trustee further notes that the trustee placed inaccurate Uniform Transaction Codes and omitted transaction descriptions on Forms 2. ARR 4-5. The United States Trustee also notes that the CAR Report contained similar findings with respect to all but one of these deficiencies.

The above-listed deficiencies certainly demonstrate unsatisfactory trustee performance. However, 28 C.F.R. § 58.6(a)(5) requires a demonstration that the trustee's performance is deficient when compared to the performance of other trustees. Such a comparison does not appear in the record. Accordingly, I do not find the trustee's suspension to be warranted under 28 C.F.R. § 58.6(a)(5). However, I have considered the information provided in support of that ground for suspension in connection with the other grounds for suspension of the trustee.

4. Failure to File Timely, Accurate Reports, 28 C.F.R. § 58.6(a)(8).

Section 58.6(a)(8) provides that a trustee may be removed or suspended for failure to comply with the obligation to file "timely, accurate reports, including interim reports, final reports, and final accounts." 28 C.F.R. § 58.6(a)(8). In support of suspension under this section, the United States Trustee notes that nine of the deficiencies reflected in the CAR Report were noted again in the Audit Report. ARR 5. The United States Trustee also notes that the CAR Report and the 2010 TIR Letter gave the trustee ample opportunity to understand Program requirements and to implement appropriate corrective actions. *Id.*

Findings 1, 2, 3, 5, 6, and 7 of the Audit Report describe repetitive inaccuracies that support the United States Trustee's determination to suspend pursuant to this section.

- Finding 1 of the Audit Report identified two cases in which the trustee failed to include assets on Form 1 that are listed on amended Schedules A and B (Real Property and Personal Property, respectively). ARR 10-11. The two cases addressed in Finding 1 are [Redacted] (Form 1 was not updated to reflect receivable valued at \$0 on amended Schedule B) and [Redacted] [Redacted] (two assets on amended Schedule A, valued at \$233,800 and \$157,200, were not listed on Form 1). *Id.*

The Audit Report noted that a similar issue was identified in the CAR Report. ARR 11. My review discloses that similar issues with Form 1 errors were identified in three cases in the CAR Report: [Redacted] ("most" assets not listed on Form 1); [Redacted] (Form 1 missing four assets, another asset erroneously valued); and [Redacted] [Redacted] (Form 1 missing twelve assets; another asset erroneously valued). ARR 30.

The 2011 TIR Letter also identified the same or similar issue concerning assets not listed on the Form 1, noting three cases with this deficiency: [Redacted] [Redacted] (three real properties worth \$1,500,000); [Redacted]

Redacted (three college savings accounts); and Redacted (Form 1 submitted but apparently did not list any assets). ARR 381-82, 474. The 2010 TIR Letter also addressed the Redacted case, noting that the case did not appear on a Summary Interim Asset Report (Form 3) and directing the trustee to submit a Form 1. ARR 44.

- Finding 2 of the Audit Report identified duplicate entries for multiple assets on the Form 1 in each of three cases: Redacted (duplicates of two assets valued at \$40,000 and \$11,000); Redacted (duplicates of several items valued from \$1 to \$115,000); and Redacted (duplicates of real estate valued at \$270,000, and other assets valued from \$0 to \$132,299). ARR 11.

The Audit Report noted that a similar finding was identified in the CAR Report. *Id.* My review confirms CAR Report findings concerning duplicate, and in one case triplicate, entries on the Form 1, in the following cases: Redacted (duplicate and triplicate entries); Redacted (two seemingly duplicate entries); and Redacted (seven duplicate entries). ARR 29.

The duplicate entry issue also was discussed in the 2010 TIR Letter with respect to two cases: Redacted (five duplicate entries); and Redacted (eight duplicate entries). ARR 45-46. Three cases with duplicate entry issues were also discussed in the 2011 TIR Letter: Redacted (six duplicate entries); Redacted (numerous duplicate entries); and Redacted (multiple duplicate entries). ARR 380-82.

- Finding 3 of the Audit Report noted incorrect valuations on Form 1 in five cases: Redacted (amended value on Schedule B resulted in duplicate entries with differing values); Redacted (value of asset amended from \$115,000 to \$155,000 on Schedule B not reflected in Form 1); Redacted (values on Form 1 not updated following amendment to Schedule B with respect to numerous assets); Redacted (asset valued at \$57,617 on Schedule B listed at \$66,577 on Form 1); and Redacted (value of asset amended from \$0 to \$6,209 on Schedule B not reflected on Form 1). ARR 11-12.

The Audit Report stated that a similar issue was identified in the Redacted and Redacted cases in the CAR Report. ARR 11-12. The United States Trustee also indicates that this issue was identified in Redacted in both the Audit Report and the 2011 TIR Letter. ARR 474. My review confirms that

similar problems with Form 1 asset entries were previously reported in the CAR Report in both [Redacted] and [Redacted]⁵ ARR 30.

- Finding 5 in the Audit Report noted the trustee's use of inaccurate Uniform Transaction Codes in four instances on Form 2 in [Redacted] and [Redacted] ARR 12-13. The Audit Report did not reference similar instances of this issue in the CAR Report. *Id.* My review disclosed, however, that this issue had been identified previously in both the 2010 TIR Letter and the 2011 TIR Letter. ARR 46 (noting issues in [Redacted], [Redacted], and [Redacted]; ARR 380 (noting issue in [Redacted], [Redacted], and [Redacted]).
- Finding 6 of the Audit Report noted that the trustee incorrectly entered a receipt on Form 1 in the case of [Redacted], in that the trustee listed the net sale amount of the asset rather than the gross amount. ARR 13. According to the Audit Report, the CAR Report previously identified a similar issue. *Id.* My review of the CAR Report confirms that the trustee incorrectly recorded receipts on Form 1 with regard to property sales in two cases: [Redacted] and [Redacted] ARR 28. In both cases, the trustee incorrectly listed the net sale amount. *Id.* The United States Trustee noted repeated trustee training on this issue. ARR 474, 478.
- Finding 7 of the Audit Report noted that the trustee failed to include a transaction description on Form 2 in [Redacted], and that a similar issue was noted in the CAR Report. ARR 13. My review of the CAR Report confirms that the issue previously had been identified. ARR 31 (listing ten cases and seventeen instances). A similar issue also had been identified in one case in the 2010 TIR Letter. ARR 45 ([Redacted] (more complete transaction description needed)).

The Audit Report reflects significant inaccuracies in the trustee's interim reporting period ending December 31, 2012. These inaccuracies are more disturbing when considered in the context of previous training and guidance provided to the trustee. The United States Trustee summarizes the inaccuracies, repeat findings, guidance, and training at ARR 474-76. I find that the United States Trustee has demonstrated that the trustee's TIRs were not accurate.

As previously discussed, the trustee also failed to file timely Reports of Sale. This failure provides additional grounds for the trustee's suspension under section 58.6(a)(8).

Based on the foregoing, I find that there is support in the record for the United States Trustee's determination that the trustee's suspension was warranted under section 58.6(a)(8).

⁵ The CAR Report refers to the case as [Redacted]

E. The Trustee’s Arguments Against Suspension are Unpersuasive.

The trustee generally does not dispute the individual findings of the Audit Report. ARR 131-37. Instead, she makes five arguments as to why suspension is not warranted. First, she argues that the Audit Report’s overall rating of “inadequate” was not appropriate. Second, she argues that the United States Trustee’s suspension determination was not appropriate because it was based on the flawed “inadequate” Audit Report conclusion. Third, she argues that the timing of the audit was unfair and did not allow her sufficient time to address findings from the CAR. Fourth, she argues that she is implementing robust processes to correct the divergence of her practices from the Chapter 7 Handbook. Fifth, she argues that she is respectful, unselfish, and committed to achieving results. ARR 51-52. The trustee’s arguments are not persuasive.

1. The Audit Report’s Conclusion of “Inadequate” Was Appropriate.

The trustee argues that the Audit Report’s overall rating of “inadequate” was not appropriate because that conclusion: (a) is not consistent with [Redacted]’s opinion; (b) is not consistent with other trustee audits; (c) is based on an audit not performed pursuant to the government auditing standards; (d) is not consistent with the requirements for a finding of failure to safeguard assets, as set forth in the government auditing standards; and (e) is not consistent with the findings of the Audit Report. ARR 51.

a. The Contract CPA Was Not Authorized To Comment on the Audit Report’s Conclusion and His Opinion Does Not Undermine the Audit Report’s Conclusion.

The trustee argues that the Audit Report’s conclusion is not supported by the auditor who performed the field work for the Audit Report. ARR 54. The trustee contends that following the completion of his work at her office, [Redacted] informally expressed the opinion that the audit should not result in an inadequate determination. *Id.*

Notwithstanding the trustee’s view, the informal oral opinion of the auditor who performed the field work does not constitute the operative opinion as to the sufficiency of the trustee’s procedures. The controlling opinion is set forth in the Audit Report itself. The Program contracted with MHM to conduct trustee audits in Region 17. ARR 146. Therefore, MHM, not [Redacted] alone, is the responsible party for the audit. Although [Redacted] did the field work for the audit, the final authority to issue the Audit Report rested with MHM’s Managing Partner, [Redacted]. This arrangement is not unusual. Moreover, a May 11, 2012, email from [Redacted] to the trustee belies her claim that [Redacted] had any final authority over the Audit Report’s conclusions. That email states as follows: “The decision was made by those above me after I sent in the report. For a more thorough explanation, it would be best to contact [the Managing Partner [Redacted] at our office or the US Trustee office.” ARR 76.

Based on the foregoing, I find that the trustee’s argument that [Redacted]’s informal expression of opinion invalidates the Audit Report’s conclusion is without merit.

b. The Trustee Has Not Demonstrated That the Audit Report’s Conclusion of “Inadequate” is Inconsistent with Other Trustee Audits.

The trustee also argues that Audit Report’s conclusion is inconsistent with a Program document entitled “Findings Most Likely to Result in an Inadequate Audit Opinion or Field Exam Conclusion.” ARR 55 (citing document at Appendix 5, ARR 77). She notes that the Audit Report rated her deficient in only one of the categories listed on that document, that of “Bank accounts not timely or properly reconciled or reviewed.” *Id.* In a chart she created from data in the Program document, the trustee notes that deficient findings in field exams and audits were made in the category concerning reconciling of bank accounts 140 times in FY 10, 160 times in FY 11 and 144 times in FY 12, but that only 8, 7, and 7 inadequate opinions were issued during those years, respectively. *Id.* From this, she concludes that there is no direct correlation between a deficiency finding in this category and an overall inadequate audit. *Id.*

The United States Trustee correctly observes that the Program document referenced by the trustee is not an exhaustive listing of all conditions that might affect the conclusion of an audit. ARR 147. Moreover, the trustee’s focus on one issue to the exclusion of the many that can affect an audit’s outcome is overly narrow. Such reasoning would suggest that the numerous and varied deficiencies discussed above should each be considered in isolation. Further, the trustee’s argument disregards the fact that the majority of the audit findings in her Audit Report were repeats of deficiencies identified in one or more prior reviews, which the trustee was either unable or unwilling to promptly correct.

For the above reasons, I find that the trustee has not demonstrated that the Audit Report is inconsistent with other trustee audits, but rather has presented an incomplete picture of what audit reports properly should consider.

c. The Trustee’s Argument That the Audit Report is Not Consistent with Mandatory Auditing Standards Criteria for the Safeguarding of Assets is Without Merit.

The trustee contends that the Audit Report’s conclusion of “inadequate” fails to meet the standards set forth in the government auditing standards. ARR 54. The trustee is mistaken.

The generally accepted government auditing standards (“GAGAS”)⁶ govern three types of audits: 1) financial audits, 2) attestation audits, and 3) performance audits.⁷ According to the

⁶ All references to the GAGAS are to the most recent version, the 2011 December Revision, which is available on the Internet at <http://www.gao.gov/products/GAO-12-331G> (last visited September 15, 2013).

⁷ GAGAS at 14, ¶ 2.05. Pursuant to the GAGAS, a financial audit provides an “independent assessment of whether an entity’s reported financial information (*e.g.*, financial condition, results, and use of resources) are presented fairly in accordance with recognized criteria.” *Id.* at 14, ¶ 2.07. Attestation audits “cover a broad range of financial or nonfinancial objectives about the subject matter or assertion depending on the users’ needs.” *Id.* at 16, ¶ 2.09. Performance audits provide “objective analysis to assist management and those charged with governance and oversight in using the information to improve program performance and operations” *Id.* at 17, ¶ 2.10.

Chapter 7 Handbook, a chapter 7 trustee audit is performed in accordance with the standards for *performance audits*, except as noted in the audit report. Chapter 7 Handbook, at 6-3, note 14 (emphasis supplied). Consistent with the Chapter 7 Handbook, the Audit Report states that it was conducted in accordance with government audit standards for performance audits, except that: 1) it is issued to the United States Trustee rather than to the trustee; 2) it contains no recommendations and is issued closed, and; 3) it makes findings only as to the identification of criteria and conditions. ARR 8. The Audit Report further states the auditor’s opinion that “these departures from government audit standards have no adverse effects on the audit results.” *Id.*

The trustee argues that the Audit Report’s conclusion that her practices and procedures are inadequate to safeguard estate assets is inappropriate because the Audit Report failed to make findings required under Paragraphs 4.26, 4.27, 4.28, and 6.20 of the GAGAS. ARR 54. However, three of the four paragraphs cited (4.26, 4.27, and 4.28) do not apply to performance audits. *See* GAGAS at 14, ¶ 2.05 (stating that requirements and guidance for performance audits are set forth in chapters 1- 3, 6, and 7, while chapters 1-4 apply to financial audits, and chapters 1-3 and 5 apply to attestation engagements).

The trustee argues that paragraph 6.20, the only cited section of the GAGAS applicable here, requires a conclusion of “inadequate” to be supported by “[d]etection of unauthorized acquisition, use, or disposition of the entity’s assets that could have a material effect on the financial statements.” ARR 54. Stated differently, the trustee appears to argue the untenable position that paragraph 6.20 requires a finding of theft or conversion before an auditor can conclude that a trustee’s practices and procedures are inadequate to safeguard estate assets. An examination of the language of paragraph 6.20 refutes this argument.

Rather than requiring a finding that assets have been stolen or converted, paragraph 6.20 merely describes the internal control objectives the audited entity must have in place to safeguard assets. GAGAS at 135, ¶ 6.20. Specifically, it requires internal controls that “include policies and procedures that the audited entity has implemented to reasonably prevent or promptly detect unauthorized acquisition, use, or disposition of assets and resources.” *Id.* The next paragraph, 6.21, indicates that a deficiency in internal controls exists if the audited entity’s policies and procedures do not enable management or employees of to prevent, or to detect and correct: 1) impairments of the efficiency and effectiveness of operations; 2) misstatements in financial or performance information, or 3) failures to comply with laws and regulations on a timely basis. Nowhere does the GAGAS indicate that a theft or conversion of assets is required to support an “inadequate” finding with respect to the failure to safeguard assets.

As discussed above, the Audit Report identified numerous deficiencies in the trustee’s reporting of assets sufficient to support an “inadequate” conclusion, including: scheduled assets missing from Form 1 (Finding 1); assets entered multiple times on Form 1 (Finding 2); incorrect valuations on Form 1 (Finding 3); errors in recording receipts (Findings 6 and 8); Reports of Sale not filed or untimely filed (Findings 10 and 11); and failures to adhere to the Chapter 7 Handbook requirements concerning reconciliation of checking account statements and retention of monthly bank statements and checks (Findings 11-13). ARR 20. These findings are consistent with the standards set forth in the GAGAS at paragraphs 6.20 and 6.21.

d. The Trustee’s Argument that the Audit was not Performed in Accordance with Government Auditing Standards Because the Auditors Lacked Independence is Without Merit.

The trustee argues that the auditors lacked the independence required by paragraph 3.40 of the GAGAS. That paragraph provides as follows: “Auditors and audit organizations maintain independence so that their opinions, findings, conclusions, judgments, and recommendations will be impartial and viewed as impartial by reasonable and informed third parties.” GAGAS at 27-28, ¶ 3.04.

The trustee cites [Redacted]’s May 11, 2012, email as support for a lack of independence. ARR 57. As previously discussed, [Redacted] advised the trustee in that email that she should contact [Redacted] (*i.e.*, MHM) or the United States Trustee’s office for a more thorough explanation and indicated that he understood the trustee’s concern. ARR 76. The trustee infers from this email that the United States Trustee inappropriately influenced MHM concerning the Audit Report’s conclusion. ARR 57. Such an inference is not warranted.

The United States Trustee states that during the audit exit conference, Bankruptcy Analyst [Redacted] asked [Redacted] to include notes regarding repeat findings from the CAR Report in the audit report. ARR 147. When MHM provided a draft report that did not reference the repeat problems, the United States Trustee again requested that they be included in the final report. *Id.*

I find that the United States Trustee’s actions in asking for the inclusion of relevant facts relating to repeat findings in the Audit Report does not violate the concerns set forth in paragraph 3.04 of the GAGAS. Such a request is an appropriate effort by the United States Trustee to ensure that the audit captures a complete and accurate picture of the trustee’s performance over time. Indeed, there is no evidence that the United States Trustee lobbied for an inadequate conclusion. The trustee’s reliance on [Redacted] email is unpersuasive.

e. The Audit Report’s Conclusion of “Inadequate” for the Safeguarding of Estates Assets is Consistent with the Discussion of the Trustee’s Performance in Each of the Six Subject Areas of the Audit Report.

The trustee notes that the Audit Report’s narrative assessed her compliance with the Chapter 7 Handbook using the terms “in compliance,” “generally in compliance, except” and “in compliance, except.” The trustee states that she received two of each of these ratings across the six subject areas of the Audit Report. From this, she argues that the only reasonable overall rating should have been “Adequate, except for” rather than “inadequate.” ARR 57.

The United States Trustee responds by noting that the Audit Report identified numerous significant deficiencies in four of six subject areas addressed by the audit and raised many concerns regarding the performance of a new trustee, a majority of which persisted even after they had been specifically identified in the CAR Report. ARR 149-50.

The trustee’s argument glosses over the facts. As discussed above, the trustee’s practices and procedures did not prevent the many specific deficiencies identified in the Audit Report.

The various United States Trustee reviews and training efforts from 2010 to 2012 put the trustee on notice concerning the problem areas identified in the Audit Report. The trustee, however, failed to take steps to remedy problems previously identified. In light of these considerations, the overall rating of inadequate is fully justified.

2. The Trustee’s Argument that the Suspension is Flawed Because it was based upon an Inappropriate “Inadequate” Audit Conclusion is Erroneous.

The trustee argues that the decision to suspend her was not appropriate because it was based upon the erroneous conclusion of the Audit Report. The trustee is incorrect. First, as discussed above, the conclusion in the Audit Report was not erroneous. Second, for the reasons discussed herein, the United States Trustee’s suspension decision would have been appropriate even if the Audit Report had not concluded that the trustee’s performance was “inadequate.”

3. The Trustee’s Argument Concerning the Timing of the Audit is Without Merit.

The trustee complains about the timing of the audit, citing Program policy that each chapter 7 trustee will undergo an audit or a field examination every four years. ARR 58. Although the trustee does not expressly so state, the inference is that the United States Trustee’s action in scheduling the Audit Report prior to the trustee’s four-year anniversary is not consistent with this policy. The Program’s policy does not restrict the frequency or timing of field examinations and audits. Rather, it establishes a maximum time between such examinations of a trustee’s operation. As the United States Trustee correctly notes, nothing in the policy prevents such reviews from being carried out more frequently. ARR 150.

The trustee also contends that “**it is unfair and ineffective to schedule a CPA audit less than six months from the [CAR Report].**” ARR 58 (emphasis in original). Although the formal, written CAR report was provided to the trustee on October 3, 2012, she was orally informed of each problem that was identified during the field work and at its conclusion so that she might begin corrective actions. ARR 150. I concur with the United States Trustee that the trustee had ample time to make both case specific corrections and to institute changes in her procedures prior to the MHM audit. *Id.*⁸ Moreover, the trustee should have addressed the issues raised in both the CAR Report and the Audit Report well before the end of 2012.

4. The Trustee’s Remaining Arguments are Unavailing.

The trustee argues that she is implementing robust processes to correct the divergence of her practices from the Chapter 7 Handbook and that she is respectful, unselfish, and committed to achieving results. Even if these representations were true, the record as a whole does not convince me that I should reverse the United States Trustee’s suspension decision.

⁸ The trustee criticizes the training she received and characterizes it as inadequate. ARR 60. The record belies any claim that the trustee received inadequate training.

F. Suspension from the Case Assignments Pending Fulfillment of the Conditions of the Notice Was an Appropriate Exercise of the United States Trustee's Discretion.

Because the record in this matter supports the United States Trustee's decision to suspend the trustee, there remains only the issue of whether the United States Trustee appropriately exercised his discretion in conditioning the trustee's return to the active rotation in the manner indicated.

The trustee was appointed to the chapter 7 trustee panel in December 2009. She correctly observes that it can take months or even years for the United States Trustee to evaluate a trustee, alert him or her to problems and attempt to assist him or her in correcting those problems. ARR 58-59 (citing Trustee Suspension and Termination Rule commentary, 62 Fed. Reg. 51740, 51741-51742 (Oct. 2, 1997) (codified at 28 C.F.R. § 58.6)). However, despite the United States Trustee's efforts to assist the trustee, she has yet to resolve a pattern of related problems.

Performance issues similar to those identified in the Audit Report were first identified in the 2010 TIR Letter, again in the 2011 TIR Letter, and yet again in the 2012 CAR Report. The United States Trustee provided the trustee with substantial training and resources. Nevertheless, as the Audit Report demonstrates, the trustee has yet to correct previously cited deficiencies while on the panel and receiving new cases. As a consequence, it is entirely appropriate for the United States Trustee to suspend the trustee's receipt of new cases while the trustee works to correct the problems identified in the Audit Report.

I find that a suspension is reasonable under the circumstances. This determination is supported by the trustee's own offer of a similar suspension, albeit on a voluntary basis and subject to preconditions. *See* ARR 52. The temporary suspension proposed by the United States Trustee will allow the trustee a respite from processing new cases while she corrects the deficiencies cited in the Audit Report and puts in place procedures to prevent a reoccurrence of those problems. ARR 2. Moreover, inasmuch as her return to active panel membership will largely be determined by how quickly she makes the needed changes, the trustee's remedial efforts will have a significant bearing on the duration of the suspension.

IV. CONCLUSION

Based upon my review of the record, and for all of the foregoing reasons, I affirm the United States Trustee's decision to suspend the trustee from active case rotation status on the chapter 7 panel for the Redacted, with her return to rotation conditioned upon the completion of the items set forth in the United States Trustee's Notice.

This decision constitutes final agency action in this matter.

Dated: 9.18.13



Clifford J. White III
Director
Executive Office for United States Trustees