**U.S. DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES**

# HANDBOOK FOR CHAPTER 7 TRUSTEES

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# 1. INTRODUCTION

## A. PURPOSE

The United States Trustee appoints and supervises trustees, and monitors and supervises cases under chapter 7 of title 11 of the United States Code (Bankruptcy Code). 28 U.S.C. § 586. This Handbook is intended to establish or clarify the views of the United States Trustee Program (Program) on the duties owed by a chapter 7 trustee to the debtors, creditors, other parties in interest, and the United States Trustee. The Handbook does not present a full and complete statement of the law; it should not be used as a substitute for legal research and analysis.

The Handbook has been updated to incorporate provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Trustees are encouraged to visit the Program's web site and review the Supplementary Materials to this Handbook at http://www.usdoj.gov/ust/eo/private_trustee/ library/ chapter07/ and the bankruptcy reform materials at http://www.usdoj.gov/ust/.

Nothing in this Handbook should be construed to excuse the trustee from complying with all duties imposed by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure (Rules), local rules, and orders of the court. Further, the trustee must be familiar with relevant provisions of the Bankruptcy Code, Rules, any local bankruptcy rules, and case law. 28 U.S.C. § 586(a), 28 C.F.R. § 58.6(a)(3). Whenever the provisions of the Handbook conflict with the local rules or orders of the court, the trustee should notify the United States Trustee. The trustee is accountable for all duties set forth in this Handbook, but need not personally perform any particular duty unless the Handbook so states. The Trustee need not perform any duty set forth in this Handbook that is performed by the Bankruptcy Court or United States Trustee, but the trustee remains accountable and must assume the responsibility for that duty if it is no longer performed by those entities. 28 U.S.C. 586(a). For example, if the Bankruptcy Court discontinues sending notices of the meeting of creditors, the trustee would assume that function.

All statutory references in this Handbook refer to the Bankruptcy Code, 11 U.S.C. § 101 et seq., unless otherwise indicated.

This Handbook does not create additional rights against the trustee or United States Trustee in favor of other parties.

## B. ROLE OF THE UNITED STATES TRUSTEE

The Bankruptcy Reform Act of 1978 removed the bankruptcy judge 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, would not impartially adjudicate their rights as adversaries of that trustee. To address these concerns, judicial and administrative functions within the bankruptcy system were bifurcated.

Many administrative functions formerly performed by the court were placed within the Department of Justice through the creation of the Program. Among the administrative functions assigned to the United States Trustee were the appointment and supervision of chapter 7 trustees. This Handbook is issued under the authority of the Program's enabling statutes.

## C. STATUTORY DUTIES OF A TRUSTEE

Although this Handbook is not intended to be a complete statutory reference, the trustee's primary statutory duties are set forth in part in section 704 of the Bankruptcy Code and are detailed more thoroughly in other parts of this Handbook. A chapter 7 trustee must be personally involved in carrying out the trustee's duties and other fiduciary responsibilities. 28 U.S.C. § 586(a). If the trustee is or becomes unable to be directly involved in the performance of these duties and responsibilities for any time period, the trustee must advise the United States Trustee immediately. 28 U.S.C. § 586(a), 28 C.F.R.§ 58.3(b).

# 2. APPOINTMENT TO THE PANEL OF TRUSTEES

The United States Trustee establishes a panel of individuals qualified to be appointed as trustee in chapter 7 cases. 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.

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, gender, 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.

Upon appointment to the panel, the trustee's name, address, and phone number are posted on the Program's web site at: http://www.usdoj.gov/ust/eo/private_trustee/locator/7.htm.

## A. ELIGIBILITY TO SERVE ON A PANEL

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. Further, panel members must be able to satisfy the eligibility requirements of section 321 of the Bankruptcy Code for serving in a case. 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's appointment to a panel is subject to the successful completion of an initial background investigation, and subsequent background checks conducted every five years. A background investigation includes a Background Questionnaire and a Questionnaire for Public Trustee Positions (Form SF-85P), name and fingerprint checks, a tax check with the Internal Revenue Service (IRS), and a report on credit history (with disclosure authorization), including any subsequent credit reports requested by the United States Trustee. The trustee must provide an Update to the Background Questionnaire annually. The trustee's appointment to the panel or the assignment of cases may be terminated based on unresolved problems discovered during the background investigation or subsequent background checks.

## B. QUALIFICATIONS FOR PANEL MEMBERSHIP

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[1] 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 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:

        i. A member of a law school faculty;
        ii. A member of the panel of private trustees;
        iii. 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, Executive Office for United States Trustees, to the United States Trustee for the district in which appointment is

[1] Or as described in materials promulgated by the U.S. Office of Personnel Management available at www.opm.gov.

sought; provided, that this provision may be waived by the United States Trustee on approval of the Director.

## C. APPOINTMENT TO A PANEL

The trustee will receive an appointment to the panel of chapter 7 trustees for the district(s) in which he or she was selected to serve. The appointment may be suspended or terminated at any time pursuant to 28 C.F.R. § 58.6.

## D. ELIGIBILITY TO SERVE IN A CASE

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. 11 U.S.C. § 321.

While corporations are eligible under section 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. § 58.6. In view of the fiduciary duties of the trustee, the responsibility of the individual trustee to preside at meetings of creditors, possible complications as to coverage under blanket or separate bonds, and possible increases in expenses imposed on estates, corporate entities are rarely appointed. 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 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. 11 U.S.C. § 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. More information on bonds is provided later in this chapter.

In addition, the trustee must undergo an initial background investigation and subsequent background checks every five years. 11 U.S.C § 586(a), 28 C.F.R. § 58.3(b)(8).

## E. APPOINTMENT OF PANEL TRUSTEES TO CASES

The United States Trustee appoints a disinterested member of the panel as an interim trustee immediately upon:

1. The entry of an order for relief under chapter 7, pursuant to section 701(a);

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 section 303(g); or

4. The resignation, death or removal of the prior trustee, pursuant to section 703.

A trustee is expected to accept all cases to which the trustee is appointed, unless there is a conflict of interest or other extraordinary circumstance. An in-depth discussion of conflicts of

interest is provided later in this chapter. When a trustee wishes to decline case assignments for a limited period of time, the trustee must submit a Notice of Voluntary Suspension. See Handbook Chapter 6.D.3. Voluntary suspensions are not subject to 28 C.F.R. § 58.6.

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. Fed. R. Bankr. P. 2008.

The interim trustee serves until a trustee is elected under section 702 and qualifies under section 322. Advance notice of an intent to request an election is not required by the Bankruptcy Code and Rules. 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. 28 U.S.C. § 586.

If no trustee is elected at the meeting of creditors, the interim trustee becomes the trustee under section 702(d). The interim trustee has all the duties and powers of a permanent trustee.

## F. METHOD OF CASE ASSIGNMENT

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. 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 or avoid a specific trustee appointed to the case. The United States Trustee periodically reviews the processing of chapter 7 cases 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 system and will make this information available for review upon request.

## G. 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. 11 U.S.C. § 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 described in this Handbook and in Fed. R. Bankr. P. 1019.

## H. 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 section 303(g), the United States Trustee will appoint an interim trustee in accordance section 701.

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, if the court has directed the appointment of an interim trustee, 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 must apply to the court for authority to operate the business and file operating reports as required by the United States Trustee and section 704(8). (See Handbook Chapter 4.I regarding operating a debtor's business.)

Before an order for relief is entered, 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. 11 U.S.C. § 303(g).

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 Fed. R. Bankr. P. 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 Fed. R. Bankr. P. 1007(k).

## I. SUCCESSOR TRUSTEES

When a trustee dies, resigns, fails to qualify under section 322, is removed from a case under section 324, or otherwise ceases to hold office, and until creditors elect a new trustee, the United States Trustee will appoint an interim successor trustee under section 703(b) to preserve or prevent loss to the estate. If creditors do not elect a successor, the United States Trustee will appoint one. The successor trustee must be a disinterested person who is a member of the panel of private trustees. 11 U.S.C. § 703(c)(1). If no member of the panel is willing to serve, the United States Trustee may serve as successor trustee.

Fed. R. Bankr. P. 2012(b) requires a successor trustee to file and transmit to the United States Trustee an accounting of the prior trustee's administration of the estate. This accounting must be a separate and distinct record of the activities which were solely within the control of the prior trustee. See Forms and Instructions under Supplementary Materials on the Program's web site.

## J. RESIGNATION OF A TRUSTEE

A trustee may voluntarily resign from a pending case or from the trustee panel. The procedures for suspension and termination, 28 C.F.R. § 58.6 (described at Handbook Chapter 6.D.2), do not apply. A resignation must be submitted to the United States Trustee in writing to be effective. 28 U.S.C. § 586. Local rules or practice may also prescribe a form or notice to be filed with the Court.

A trustee must take reasonable steps to ensure that a resignation from a pending case does not unduly impede its administration. 28 U.S.C. § 586.

## K. TRUSTEE PROFESSIONALISM AND ETHICS

### 1) CONFLICTS OF INTEREST

A trustee must be knowledgeable of sections 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. The trustee must have in place a procedure to screen new cases for possible conflicts of interest or lack of disinterestedness upon being appointed. 28 U.S.C. § 586.

If a trustee discovers a conflict of interest or a lack of disinterestedness after accepting the appointment, the trustee shall immediately resign from the case. Conflict waivers by either the debtor or creditor do not 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 meeting of creditors, or both. The trustee also must advise the United States Trustee upon discovery of any circumstances which might give rise to the appearance of impropriety. 28 U.S.C. § 586.

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:

a. The trustee represents or has represented the debtor, a creditor, an equity security holder, or an insider in other matters;

b. The debtor or creditor is an employee of the trustee or of a professional providing services to the trustee in the case;

c. 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;

d. 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;

e. The trustee was an officer, director, or employee of the debtor within two years before the commencement of the case; or

f. The trustee is a creditor or an equity security holder 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 needs to disclose to the United States Trustee all situations presenting an actual or potential conflict of interest or lack of disinterestedness for the trustee's partners or law firm.

Fed. R. Bankr. P. 2009 allows the appointment of one trustee in jointly administered cases. The trustee should be aware of the existence of inter-debtor claims and must monitor them because conflicts can develop and require the appointment of separate trustees.

## 2) USE OF TRUSTEE DESIGNATION

Care must be taken to avoid confusion in the public's mind between the trustee who is a private individual and a fiduciary for bankruptcy estates and the Program, its officials and employees, and other government personnel.

The trustee may not use on business cards, stationery, advertising, publications, offices, and web sites any likeness of the Great Seal of the United States, the Department of Justice seal, or any other government-like seal, emblem, logo, insignia, words, or phrase from which the public might infer that such trustee is a government official or employee. In addition, if the trustee is also a professional such as an attorney or an accountant, the trustee's professional firm's stationery and business cards may not contain references to the additional role as trustee. The phrase "United States Bankruptcy Trustee," or similar text, may appear on letterhead, business cards, and web sites used for the chapter 7 trustee operation.

The Program will issue a photo identification card to the trustee when first appointed to the panel. This Trustee Identification Card is intended to aid the trustee in the performance of official duties and must be surrendered upon expiration, resignation, termination or request of the United States Trustee. The trustee must inform the United States Trustee if the ID card is lost or stolen. 28 U.S.C. § 586. The ID card is considered to be the trustee's primary means of identification as a trustee and may only be used in this capacity.

### 3) SOLICITATION OF GRATUITIES, GIFTS, OR OTHER REMUNERATION OR THING OF VALUE

Neither a trustee nor any of the trustee's employees 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. The incidental receipt of unsolicited advertising and promotional material of a nominal intrinsic value, along with the receipt of food and refreshments in the ordinary course of a business meeting, generally would not create an impermissible conflict or an appearance thereof. For a discussion of the acceptance of computer hardware and software, see Handbook Chapter 5.G.3.b.

### 4) SELF-DEALING AND INSIDER TRANSACTIONS

It is a violation of federal criminal law for a trustee to purchase directly or indirectly or otherwise deal in property of the estate for which the trustee serves. 18 U.S.C. § 154.

The trustee may not purchase assets from an estate administered by another trustee. In addition, the trustee may not knowingly sell estate property to another trustee or a professional regularly employed by the trustee, including the auctioneer, a family member of the trustee or professional, or an employee of the trustee or professional.

If the trustee becomes aware of any indications of sales to insiders or of collusion in bidding, the sale must immediately be stopped, and the matter reported to the United States Trustee. 28 U.S.C. § 586.

## L. TRUSTEE BONDS

As discussed earlier in this chapter, a trustee does not qualify for appointment to a case 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 his or her official duties. 11 U.S.C. § 322(a). The United States Trustee may authorize a blanket bond to cover multiple cases for one or more trustees. Fed. R. Bankr. P. 2010(a).

The trustee is a principal on the bond, and all bonds are written in favor of the United States of America. The bonding company will generally require 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, the trustee may wish to consider obtaining professional liability insurance and employee fidelity coverage.

The United States Trustee determines the amount and terms of the bond and the sufficiency of the surety on each bond. 11 U.S.C. § 322(b)(2). Usually the bond is less costly if acquired in aggregation with similar trustee bonds in a United States Trustee region. Although the United States Trustee sets the amount of the bond, 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. The trustee may not cancel or decrease the amount of the bond without United States Trustee authorization.

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 must 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 approved by the United States Trustee, but the allocations are normally based on the funds on hand as of a particular date. 28 U.S.C. § 586.

A blanket bond might not cover the trustee in a case that involves operating a business in chapter 7. In such instances, the trustee must consult the United States Trustee and bonding company for further information, including whether an individual case bond is appropriate. 28 U.S.C. § 586.

A claim on the trustee's bond is made via an adversary proceeding (Fed. R. Bankr. P. 9025) and may be commenced up to two years after the date on which the trustee is discharged. 11 U.S.C. § 322(d). As soon as the trustee becomes aware of an incident which may give rise to a bond claim, the trustee must notify the United States Trustee and the bonding company. 28 U.S.C. § 586.

# 3. DUTIES OF DEBTORS AND MEETING OF CREDITORS

The trustee must ensure that the debtor complies with the debtor's duties set forth in section 521. 11 U.S.C. § 704. The failure of the debtor to comply with the requirements of section 521 can have significant adverse results for both the debtor and the trustee. If there is no individual who is performing the duties of the corporate or partnership debtor, the trustee may request that the Bankruptcy Court designate a party (officer, director, partner, or person in control) to perform the duties of the debtor. See definition at Fed. R. Bankr. P. 9001(5). The person who is the subject of the designation must be given notice of the trustee's application to the court.

## A. ELIGIBILITY FOR CHAPTER 7 AND VENUE

The trustee must review the schedules in each case to verify that the debtor is eligible to file for relief under the chosen chapter, has filed the credit counseling certificate or a certification of exigent circumstances in support of a waiver, and that the debtor has filed the petition in the proper judicial district. 11 U.S.C. § 704.

If the debtor is not eligible to be a debtor for the reasons stated in section 109, the trustee may move to dismiss or take other appropriate action. If venue is improper, the trustee may move to dismiss or take other appropriate action, which may include referral to the United States Trustee. The trustee may also file a motion to have the debtor's attorney disgorge any compensation received if counsel was responsible for filing the case in an improper venue.

## B. INITIAL DOCUMENTS

The trustee is responsible for reviewing the timeliness and sufficiency of the documents filed by the debtor. The trustee also must review these documents for any evidence of abuse that may provide the basis for a motion to dismiss pursuant to section 707(b). 11 U.S.C. § 704. Such evidence may also arise or be confirmed at the meeting of creditors. Guidelines for determining whether a case involves abuse are provided at Handbook Chapter 4.N.7.

Ideally, the debtor should file all required documents with the petition. In many circumstances, however, this will not be possible. The Bankruptcy Code and Rules set out several different deadlines by which the debtor must file documents or face dismissal of the bankruptcy case.

1. On the petition date (in addition to the petition), the debtor must file:

    a. The list of creditors to be included on Schedules D, E, F, G and H (Fed. R. Bankr. P. 1007(c));

    b. The certificate of credit counseling, certification of exigent circumstances or request for a waiver of the requirement under section 109(h) (Fed. R. Bankr. P. 1007(c)); and

    c. The statement of Social Security number or that the debtor does not have one (Fed. R. Bankr. P. 1007(f)).

2. On the petition date, or within 15 days of filing the petition, the debtor must file:

   a. Schedules A through J, including: (1) statement of the amount of monthly net income itemized to show how the amount is calculated (at the end of Schedule I); (2) statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the filing of the petition (at the end of Schedule J); and (3) supplements to both Schedules I and J (the Statement of Current Monthly Income and Means Test Calculation Form, Form 22A) (11 U.S.C. §§ 521(a)(1)(B)(i), (v) (vi); 707(b)(2)(C); Fed. R. Bankr. P. 1007(c));

   b. Statement of Financial Affairs (11 U.S.C. § 521(a)(1)(B)(iii); Fed. R. Bankr. P. 1007(c));

   c. Copies of payment advices or other evidence of payment received within 60 days prior to the date the petition was filed from any employer of the debtor. A "payment advice" can be a check stub, payment voucher, or similar document. Payment advices are not required from self-employed debtors (11 U.S.C. § 521(a)(1)(B)(iv); Fed. R. Bankr. P. 1007(c)); and

   d. The debtor's interest in an education individual retirement account or qualified state tuition program (as both are defined by the Internal Revenue Code of 1986) (11 U.S.C. § 521(c); Fed. R. Bankr. P. 1007(f)).

3. Though not specifically identified in the deadlines provided by Fed. R. Bankr. P. 1007, the debtor also must file the following documents:

   a. Notice under section 342. If the debtor is an individual and the debtor's debts are primarily consumer debt, a certificate signed by debtor's attorney or the bankruptcy petition preparer who signed the petition that the required section 342 notice was delivered to the debtor must be filed. Pro se debtors (who do not use the services of a bankruptcy petition preparer) must file a certificate indicating that they received and read the section 342 notice (11 U.S.C. § 521(a)(1)(iii)); and

   b. Within 30 days of the petition date, the debtor must file a statement of intention with respect to debts secured by property of the estate (11 U.S.C. § 521(a)(2)).

Failure of an individual debtor to file documents required by section 521(a)(1) within 45 days may result in automatic dismissal on the 46th day. 11 U.S.C. § 521(i)(1). However, on motion by the debtor, the court may allow the debtor an additional 45 days to file the documents, if the court finds an extension justified.

The court may also decline to dismiss if the debtor attempts to file all of the documents in "good faith," but only on motion of the trustee. The good faith requirement may present problems for a trustee, since some debtors will intentionally fail to perform this duty, so that their cases will be dismissed. To prevent automatic dismissal before the 46th day when assets are available and it is in the best interest of creditors to go forward with a bankruptcy case, the

trustee may move, in the trustee's discretion, under section 521(a)(1)(B) to have the court waive or postpone the filing of the mandatory documents, with the exception of the list of creditors. 11 U.S.C. § 521(a)(1)(A).

In addition, the trustee must be aware of the following issues relating to the commencement of a case:

1. Only an individual and spouse can file a joint petition, pursuant to section 302.

2. In a filing by a corporation, the petition should be accompanied by a copy of the corporate 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 as it may be an involuntary petition under section 303(b)(3) and Fed. R. Bankr. P. 1004.

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, but the debtor in possession or superseded trustee must also file a final report and account and a schedule of post-petition debts. A debtor may also be required to file a new means test form.

5. In a case converted from chapter 13, an individual debtor must also file a statement of intention. See Handbook Chapter 4.D regarding the trustee's duty to review the debtor's statement of intention.

6. Within seven days prior to the date first set for the meeting of creditors, the debtor must provide to the trustee a copy of the debtor's most recently filed federal income tax return or a transcript thereof. The trustee must ensure the debtor's compliance. 11 U.S.C. § 521(e)(2)(A). (See Handbook Chapter 5.G.5.d. for the access and control procedures required to safeguard debtor tax returns.)

7. If the United States Trustee or the trustee requests it, debtors must provide a document that establishes the identity of the debtor, including driver's license, passport or other document that contains a photograph of the debtor or such other personal identifying information that establishes the identity of the debtor. 11 U.S.C. § 521(h). The trustee will review the debtor identity documents at the meeting of creditors. See Handbook Chapter 3.D.5 for further information.

Subject to certain exceptions, an individual may not be a debtor unless within 180 days preceding the filing of the petition the debtor receives credit counseling and files with the court a certificate from an approved credit counselor. 11 U.S.C. §§ 521(b) and 109(h).

The trustee must refer complaints regarding credit counseling agencies or credit counselors received by trustees or problems noted by the trustee to the United States Trustee. Trustees may also be asked to assist in monitoring the quality of the credit counseling services by making specific inquiry at the meeting of creditors of a random sampling of debtors.

## C. FINANCIAL DOCUMENTS

The trustee must ensure that individual debtors bring the following information to the meeting of creditors, per Fed. R. Bankr. P. 4002(b)(2):

1. Personal photo identification and evidence of Social Security number (or a written statement that the debtor has no Social Security number);

2. Evidence of current income such as most recent payment advice;

3. Statements for the period that includes the petition date for all bank, investment, and other financial accounts; and

4. Documentation of certain monthly expenses, as required by sections 707(b)(2)(A) or (B). These include additional food and clothing expense up to 5 percent of the IRS National Standard allowance for those categories; education expenses for dependent children less than 18 years of age; home energy costs that exceed the IRS Local Standard allowance; and expenses that support a claim of special circumstances.

## D. MEETING OF CREDITORS

The meeting of creditors provided for in section 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.

### 1) PRESIDING OFFICER

The trustee, as designee of the United States Trustee, is the presiding officer at the meeting of creditors. The trustee may not delegate the duty to preside at the meetings. However, the trustee may seek prior approval, confirmed in writing, from the United States Trustee for a substitute if the trustee is unable to preside at a scheduled meeting. If the United States Trustee designates another to serve as the presiding officer, the trustee is responsible to ensure that the designated substitute presiding officer is qualified and trained to conduct the meeting. The designated substitute presiding officer must have conducted meetings in the presence of the trustee prior to presiding at meetings without the trustee, unless the substitute is also a panel trustee. 28 U.S.C. § 586.

### 2) SCHEDULING, NOTICING, RESCHEDULING, AND CONTINUANCES

If the meeting docket regularly lasts longer than the scheduled time or routinely requires lengthy waits by debtors and creditors, the trustee must consult with the United States Trustee to explore improved scheduling options. 28 U.S.C. § 586.

The trustee may not routinely continue[2] meetings, unless the trustee states a reason particular to an individual case for not concluding the meeting. The trustee should

[2] References to "continue" in this Handbook shall have the same meaning as "adjourn." See Fed. R. Bankr. P. 2003(e).

rarely continue a meeting in advance once the notice of the meeting has been issued. If the trustee must continue the meeting, however, the trustee must announce the continued date to all parties present at the initial meeting, advise the United States Trustee, if requested, and ensure that notice of the continued date is given. Fed. R. Bankr. P. 2003(e) and 28 U.S.C. § 586. If creditors are present, and if debtor's counsel is present, the trustee should permit creditors to ask questions of the debtor before continuing the meeting. The trustee must be aware of and comply with the local rules and practices governing rescheduling requests and continuances. 28 U.S.C. § 586.

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. The debtor should not receive a discharge unless the debtor has been examined at the meeting of creditors.

### 3) MEDIA AND THIRD PARTY RECORDING

Representatives of the media are permitted to be present, but no one is permitted to electronically record the meeting other than the United States Trustee, the trustee or a certified court reporter. No one is to televise, make video tapes, or photograph the debtor or any party at the meeting.

### 4) APPEARANCES

Individuals who represent a creditor but who are not attorneys may be present at the meeting. Generally, the trustee must permit these persons to examine the debtor. The Bankruptcy Code permits non-attorney representation of creditors holding consumer debts at meetings of creditors. The trustee must be guided by controlling legal authority in the jurisdiction as to other appearances. 11 U.S.C. § 341(c) and 28 U.S.C. § 586.

### 5) VERIFICATION OF DEBTOR IDENTITY AND SOCIAL SECURITY NUMBER

At the meeting of creditors, each individual debtor must present original government-issued photo identification and confirmation of the social security number listed in the notice of the meeting of creditors received by the trustee. 11 U.S.C. § 521(h) and Fed. R. Bankr. P. 4002(b)(1). The trustee must not ask the debtor to verbally recite on the record their social security number or address, but should verify both.

Any document used to confirm a debtor's identity and social security number must be an original. 28 U.S.C. § 586. Copies may not be accepted, except that in the discretion of the trustee, a copy of a W-2 Form, an IRS Form 1099, or a recent payroll stub may be accepted. Acceptable forms of picture identification (ID) include: driver's license, U.S. government ID, state ID, student ID, passport (or current visa, if not a U.S. citizen), military ID, resident alien card, and identity card issued by a national government authority.

Acceptable forms of proof of social security number include: social security card, medical insurance card, pay stub, W-2 form, IRS Form 1099, and Social Security Administration (SSA) Statement. When debtors state that they are not eligible for a

social security number, the trustee must inquire further in order to verify identity. In that situation, proof of an Individual Tax Identification Number (ITIN) issued by the IRS for those people not eligible for a social security number is acceptable documentation. 28 U.S.C. § 586.

If a debtor fails to provide the required forms of identification, the trustee may proceed with the normal questioning at the meeting of creditors, but must continue the meeting to the trustee's next scheduled meeting date for production of the identification. At the trustee's discretion, the trustee may allow the debtor to present the required identification before the next scheduled meeting. If the debtor provides the required documentation, the trustee may have the continued meeting deemed concluded, provided that there are no other pending issues that warrant reconvening the meeting. 28 U.S.C. § 586.

If the debtor's identity cannot be confirmed, or the social security number listed on the debtor's bankruptcy documents cannot be confirmed or is incorrect, the trustee must refer the matter to the United States Trustee. 28 U.S.C. § 586. See the Supplementary Materials for the Notice to United States Trustee of Debtor Identity Problem.

## 6) LANGUAGE INTERPRETERS

Individuals with limited English proficiency (LEP) may seek assistance in order to participate in the meeting of creditors. The trustee must advise LEP individuals of free telephone and interpreter services offered by the Program for the purposes of the meeting or that they may choose, at their expense, a qualified interpreter to assist them. 28 U.S.C. § 586. The trustee and the trustee's employees may not serve as interpreters. The LEP individual may not use family members, friends, the debtor's attorney or the attorney's employees, unless the telephone service at the meeting site is not available to reach the interpreter services. Any interpreter must be placed under oath in accordance with Rule 604 of the Federal Rules of Evidence, as incorporated by Fed. R. Bankr. P. 9017. The trustee must complete the Interpreter Usage Form following each section 341 meeting in which the service is utilized (see Supplementary Materials for the current version of the Interpreter Usage Form). 28 U.S.C. § 586.

## 7) DISABILITY

If the trustee becomes aware of a debtor's physical disability, such as a hearing impairment, the trustee notify the United States Trustee immediately. 28 U.S.C. § 586. The United States Trustee, in consultation with the debtor and the trustee, shall determine the reasonable accommodation to be made, if any.

## 8) OATH

The trustee must administer the oath to each debtor individually by requesting the debtor to raise his or her right hand and respond affirmatively to the presiding officer's questions seeking an oath or affirmation. 11 U.S.C. § 343. The oath shall conform to the following:

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

The trustee shall not administer the oath to debtors collectively. The oath is to be administered to each debtor separately; however, spouses who filed jointly may be sworn together.

Any interpreter must be sworn in accordance with Rule 604 of the Federal Rules of Evidence, as incorporated by Fed. R. Bankr. P. 9017. A suggested oath is:

> "Do you swear or affirm that you will accurately and impartially interpret and translate the oath about to be administered to (debtor), and the questions that may be asked (him/her), and the answers that (he/she) shall give to the best of your ability, under the penalty of perjury?"

The presiding officer at the meeting has the authority to administer oaths. There is no requirement that the trustee be a notary, or bring a notary to the meeting to administer the oath.

## 9) CONDUCTING THE MEETING

The scope of the meeting of creditors is broad. The role of the trustee at these meetings is to conduct the meeting in an orderly, yet flexible manner, and to provide for a wide range of questions to the debtor as to matters affecting the debtor's financial affairs and conduct. The trustee's demeanor toward all parties must be appropriate and professional. 28 C.F.R. § 58.3, 28 U.S.C. § 586. During the course of the meeting, the trustee must exercise control over the demeanor of the debtors, attorneys, and creditors. Uncooperative or recalcitrant debtors may be reminded of their duty to cooperate with the trustee in the administration of the case.

During the meeting, the trustee must not give legal advice to debtors or creditors, and must avoid actions which would result in the perception that the trustee is a judge or has judicial power. 28 U.S.C. § 586.

## 10) QUESTIONING THE DEBTOR

The trustee must examine the debtor to the extent appropriate to verify income, including the current monthly income of a debtor with primarily consumer debts and to determine the existence of assets, the value of property subject to a lien, transfers, exemptions, prior filings, and other matters. 11 U.S.C. § 704. The trustee must ask certain required questions. 28 U.S.C. § 586. The current list of required questions and additional suggested questions can be found in the Supplementary Materials.

At the meeting of creditors, the trustee must verify on the record that the debtor has received the section 341(d) information sheet available from the United States Trustee and that the debtor is aware of the matters set forth therein. 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 continue the meeting to the end of the calendar or another appropriate time. The meeting cannot be concluded until the trustee verifies that the debtor has received and is aware of the information. 11 U.S.C. § 341, 28 U.S.C. § 586.

After the trustee has completed the examination, the trustee must inquire if there are any creditors or parties in interest present who wish to ask questions and permit those persons to do so. 11 U.S.C. § 341(c ). Parties may not be permitted to take more than a reasonable period of time to make inquiries at the meeting because they can use other procedural means to obtain information. For example, parties may use discovery, or examination provided under Fed. R. Bankr. P. 2004, to obtain more detailed information. Cases requiring more time may be continued temporarily in order to finish more routine cases. A lengthy case should be reconvened at the end of the calendar, or, if necessary, continued to another day.

## 11) INVOCATION OF FIFTH AMENDMENT BY THE DEBTOR

If, during the meeting, the debtor asserts the Fifth Amendment privilege against self-incrimination, the trustee should proceed with the questions. The trustee must make a record of each question, even if the debtor asserts the privilege. Fed. R. Bankr. P 2003(c). A debtor may not make a blanket assertion of the privilege, but must refuse to answer each particular question when it is posed, so that the bankruptcy court can determine whether the privilege is justified, or whether the debtor can be compelled to answer one or more of the questions. At the conclusion of the questioning, the trustee must continue the meeting and must inform the United States Trustee. 28 U.S.C. § 586.

The United States Trustee will, if appropriate, advise the United States Attorney of the debtor's assertion of the privilege. Authority to seek immunity on behalf of the debtor rests with the United States Attorney and only the district court can grant the request.

## 12) RECORD OF MEETING

All meetings must be electronically recorded using equipment provided by the United States Trustee. The trustee is responsible for ensuring that the recording equipment is operating properly. The trustee must require parties to speak clearly and is responsible for ensuring that the testimony is being recorded. The electronic recording shall be delivered to the United States Trustee as soon as practicable after the conclusion of the day's meetings. Fed. R. Bankr. P 2003(c).

There may be circumstances, such as when a trustee is in a remote location, where it may be appropriate for the trustee to make a copy of the original recording prior to forwarding it to the United States Trustee. When this occurs, the trustee shall complete a signed affidavit to ensure the integrity of the recording is maintained and fully admissible in a court of law, if required. The recording must be maintained by the United States Trustee for two years. Fed. R. Bankr. P 2003(c).

Depending upon the requirements of the United States Trustee, 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 filed promptly with the United States Trustee and with the Clerk of the Bankruptcy Court, if the Clerk so requests. The trustee must retain a copy. 28 U.S.C. § 586.

## 13) NON-ATTENDANCE BY DEBTORS

The debtor or, in the case of a partnership or corporation, a designated representative of the partnership or corporation, must attend the meeting of creditors in person, with very limited exceptions as discussed below. This is true even if no creditors attend. Neither the trustee nor the United States Trustee may waive the requirement for the appearance of the debtor at the meeting. When spouses have filed jointly, the Bankruptcy Code requires both debtors to attend the meeting. 11 U.S.C. § 341, Fed.R.Bankr.P. 2003(b).

There may be local rules or United States Trustee procedures which provide alternatives in extenuating circumstances for the debtor's personal appearance at the meeting. The circumstances may include military service, terminal illness, disability, or incarceration. The trustee must comply with these procedures and requirements. 28 U.S.C. § 586, Soldiers and Sailors Relief Act.

Depending on local rules and United States Trustee requirements, alternatives to the debtor's attendance at the meeting in person include a telephonic meeting or video conference under oath. Written interrogatories may be used only in extreme circumstance where telephone and video alternatives are not possible.

When the debtor cannot personally appear before the trustee, arrangements must be made for an independent third party authorized to administer oaths to be present at the alternate location to administer the oath and to verify the debtor's identity and social security number. Examples of individuals who may serve in this capacity include: employees of the United States Trustee or bankruptcy trustees situated in the debtor's locale; court reporters; notaries; or others authorized by law to administer oaths in the jurisdiction where the debtor will appear. A "Declaration Regarding Administration of Oath and Confirmation of Identity and Social Security Number" shall be completed by the individual performing this function. A sample declaration is provided in the Supplementary Materials. The "declarant" shall indicate on the form the type of original documents used for proof.

When a debtor fails to appear under circumstances not excused by local rule or United States Trustee requirements, the trustee must take appropriate action, which includes:

a. Continuing the meeting to another calendar date and notifying the United States Trustee, if requested, of the new date;

b. Filing a motion to dismiss or convert the case; or

c. Following other appropriate procedures as required by the United States Trustee or local rules.

11 U.S.C. § 341, 28 U.S.C. § 586, Fed. R. Bankr. P. 2003(b).

## 14) NON-ATTENDANCE BY ATTORNEYS

If a debtor's attorney fails to appear at the meeting, the trustee may either continue the meeting or proceed with questioning the debtor. Generally, the better practice is to

continue the meeting. In some circumstances, it may be appropriate to proceed, but the trustee should only do so if local law and applicable rules of professional conduct in the jurisdiction clearly permit examination of the debtor.

The unjustified failure of an attorney to appear at the meeting justifies a trustee's motion under 11 U.S.C. § 329(b) to compel a refund by debtor's counsel of compensation received. Repeated unjustified failure to appear should be reported to the United States Trustee.

Paraprofessionals, such as a paralegal or a petition preparer, may not advise the debtor or stand in for the debtor's attorney at the meeting.

# 4. DUTIES OF A TRUSTEE IN THE ADMINISTRATION OF A CASE

## A. INTRODUCTION

The principal duty of the trustee is to collect and liquidate the property of the estate and to distribute the proceeds to creditors.

A chapter 7 case must be administered to maximize and expedite dividends to creditors. A trustee shall 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. The trustee 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 unsecured creditors, including unsecured priority creditors, before administering a case as an asset case. 28 U.S.C. § 586.

The trustee should be aware of the provisions of the "Servicemembers Civil Relief Act", enacted on December 19, 2003, which provides for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service. The protections provided to servicemembers and their dependents are quite broad and should be carefully reviewed prior to taking actions which may affect the rights of any person who may be a servicemember or a dependent.

## B. STATUTORY AND GENERAL DUTIES

The specific statutory duties of a trustee are set forth in section 704(a). 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. 11 U.S.C. § 704(a)(1).

2. Be accountable for all property received. 11 U.S.C. § 704(a)(2).

3. Ensure that the debtor performs his or her intentions as to the retention or surrender of property of the estate that secures consumer debts. 11 U.S.C. § 704(a)(3).

4. Investigate the financial affairs of the debtor. 11 U.S.C. § 704(a)(4).

5. If a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper. 11 U.S.C. § 704(a)(5).

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). 11 U.S.C. § 704(a)(6).

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. 11 U.S.C. § 704(a)(7).

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. 11 U.S.C. § 704(a)(8).

9. Make a final report and file a final account of the administration of the estate with the United States Trustee and the court. 11 U.S.C. § 704(a)(9).

10. Provide the applicable notice to the holder of a domestic support obligation.11 U.S.C. § 704(a)(10).

11. If required, perform the obligations required of an administrator of an employee benefit plan. 11 U.S.C. § 704(a)(11).

12. Use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business. 11 U.S.C. § 704(a)(12).

The chapter 7 trustee is the representative of the estate. 11 U.S.C. § 323(a). 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 duties enumerated under section 704 are specific, but not exhaustive. The trustee must assist the United States Trustee in the performance of its civil enforcement duties and refer to the United States Trustee matters that might indicate the commission of a crime. 28 U.S.C. § 586.

## C. COLLECTION AND LIQUIDATION OF ASSETS, 11 U.S.C. § 704(a)(1), AND ACCOUNTABILITY OF THE TRUSTEE FOR ALL PROPERTY RECEIVED , 11 U.S.C. § 704(a)(2)

A trustee has a duty to ensure that a debtor files all schedules and statements required under section 521 and Fed. R. Bankr. P. 1007. A trustee must also ensure that a debtor surrenders non-exempt property of the estate and turns over books and records to the trustee. 11 U.S.C. § 704.

The trustee must be familiar with the definition of property of the estate as set forth in section 541. Under section 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.

Section 704(a)(2) requires the trustee to be accountable for all property received and Fed. R. Bankr. P. 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.

## 1) DETERMINATION AND ADMINISTRATION OF 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 unsecured creditors. The trustee must review the bankruptcy schedules to make a preliminary determination as to whether there appears to be assets in the case or areas warranting further inquiry at the meeting of creditors. The trustee should not rely upon any designation by the Clerk of the Bankruptcy Court as to whether the case is an asset or no-asset case. The trustee must conduct an independent investigation to make this determination. 11 U.S.C. § 704.

## 2) DETERMINATION AND ADMINISTRATION OF NO-ASSET CASES

If the trustee determines after the meeting of creditors that the case is a no-asset case, then the trustee must timely file a report of no distribution ("NDR"). 11 U.S.C. § 704(a)(9).

The trustee shall file the NDR with the court within 60 days after the initial examination of the debtor at the meeting of creditors. Failure to timely file NDRs may result in an appropriate remedial action.

The purpose of the NDR is to close administration of the case. The 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.

If the trustee discovers assets to administer for the benefit of creditors after the NDR is filed, the trustee must: (1) withdraw the NDR in writing to administer the assets and (2) seek to have the case reopened if the case is closed. See Handbook Chapter 4.N.3 for additional procedures concerning reopening closed cases. The trustee should consider a complaint to deny or revoke the debtor's discharge if the debtor intentionally failed to disclose the assets. See Handbook Chapter 4.G.

## 3) FURTHER CONSIDERATIONS IN DETERMINING WHETHER TO ADMINISTER ASSETS

### a. INVENTORY OF ESTATE PROPERTY

The trustee should inventory the debtor's property, unless the trustee accepts as that inventory the debtor's Schedule A - Real Property and Schedule B - Personal Property. Fed. R. Bankr. P. 2015(a)(1). Given the debtor's duty to cooperate with the trustee in preparation of this inventory, the trustee must verify at the meeting of creditors that the debtor's inventory, as shown on Schedules A and B or other documents, is complete and satisfactory. There may be instances when Schedules A and B do not provide sufficient detail in order to properly administer the assets. For example, if the debtor has listed Furs and Jewelry at $10,000, the trustee will need to obtain a detailed list of the items. In addition to a written list, the trustee

should consider using other methods to document the assets, such as videotaping the assets. The inventory must be sufficient to enable a trustee to later verify whether an auctioneer or other liquidator has accounted for all property turned over for sale. The trustee may use an auctioneer or appraiser to conduct an inventory of the debtor's property. This auctioneer or appraiser may not subsequently sell the property, unless the trustee or a designee, such as a staff person, was also present when the auctioneer or appraiser took the inventory. 11 U.S.C. § 704, Fed. R. Bankr. P. 2015.

### b. AUTOMATIC STAY

Pursuant to sections 362(c)(3) and (c)(4), the automatic stay terminates or never goes into effect for repeat or serial filers. Depending upon the law in the particular jurisdiction, the trustee may need to take immediate action to request the court to continue the stay until the trustee can determine if there is equity in property of the estate.

If a repeat filer has had an earlier case pending within the preceding year, the automatic stay terminates after 30 days. If a repeat filer has had two or more cases pending within the preceding year, the stay does not go into effect at all. The law is unsettled as to whether, in addition to termination of the stay with respect to the debtor, these provisions also terminate the stay with respect to property of the estate. The trustee should determine the state of the law in the trustee's district.

### c. EXEMPTIONS

A debtor must list property claimed as exempt on the schedule of exempt property filed with the court. Fed. R. Bankr. P. 4003 (a). Only individuals may claim exemptions; corporations and partnerships may not.

Specific exemptions are not addressed in depth in this Handbook. Section 522(d) sets forth allowable exemptions under federal bankruptcy law. The trustee must know which states have opted out of the federal exemptions. 28 U.S.C § 586. If a state has opted out, the state property exemptions apply instead of those provided in section 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.

The trustee must review the circumstances of the debtor's domicile to ensure that the debtor qualifies for the exemptions scheduled. Generally, a debtor may elect a state's exemptions only if that state was the debtor's domicile for the 730 days immediately before the petition was filed. If the debtor did not have a domicile located in a single state for that 730-day period, then the debtor may elect the exemptions in the state that was the debtor's domicile for 180 days immediately before the 730-day period, or for a longer portion of such 180-day period than in any other place. 11 U.S.C. § 522(b)(3)(A). Trustees must be aware of state exemption statutes that may allow exemptions based on factors other than domicile.

The trustee must object to a claimed exemption if doing so benefits the estate. For example, 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. 11 U.S.C. § 704. The objection must be filed within 30 days after the conclusion of the meeting of creditors or the filing of any amendment to the list or supplemental schedules, whichever is later, unless, within such period, further time is granted by the court. Fed. R. Bankr. P. 4003(b).

The objecting party has the burden of proving that the exemptions are not properly claimed. If the trustee or another party does not file a timely objection to an exemption, it is deemed allowed.

### d. VALUATION OF PROPERTY

In determining whether property has value to the estate that would result in a meaningful distribution to creditors, the trustee needs to consider a number of issues, including:

1) The fair market 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. Other valuation methods include the NADA book for automobiles; information acquired from real estate agents; county records regarding recent sales of comparable real property; Internet searches and web sites; and advertisements for the sale of like goods. The basis for the value must be documented. 28 U.S.C.§ 586.

2) 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 sections 544, 545, 547, and 548, to the extent a purported lien is invalid or could be avoided by the trustee, the property must not be abandoned if the value thereof without the lien would benefit the estate.

3) Exemptions, as discussed above.

4) Tax considerations, including any section 724(b) issues. The trustee must consider the tax consequences of a sale in determining whether to administer an asset. 11 U.S.C. § 704. When estate property is sold, the estate recognizes a taxable gain or loss. Any resulting tax liability is treated as an administrative expense. 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.

5) Administrative expenses and litigation costs to be borne by the estate resulting from the recovery and sale of the property.

### e. ABANDONMENT OF ESTATE PROPERTY

Abandonment of property of the estate is governed by section 554. Scheduled property that is not administered before the case is closed is deemed abandoned

upon entry of the order closing the estate, absent an order to the contrary. 11 U.S.C. § 554(c). However, the trustee must not rely on the deemed abandonment provisions of section 554(c) where possession of the property will expose the estate to liability. Examples of when the trustee must formally abandon property of the estate in asset cases are:

1) The net proceeds from a sale of the asset will be insufficient 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.

2) Failure to abandon the property would expose the estate to additional tax liability. For example, in an individual case, the estate 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. An order granting relief from stay does not remove property from the estate.

3) Possession of the property exposes the estate to a risk of liability which cannot be insured against, and which outweighs its economic value to the estate.

Immediate consideration must 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 shall be abandoned after consultation with appropriate federal, state, and local authorities.

The trustee must be able to justify the decision to abandon estate property. Any documentation in support of this decision is to be kept in the estate file. 28 U.S.C. § 586.

### f. CONTROL AND PRESERVATION OF ESTATE PROPERTY

In those cases where the property appears to have value for the estate, the trustee must obtain control over the property, which may include changing the locks at the premises, hiring guards, etc. The trustee also must immediately take all other steps which may be reasonably necessary to preserve the assets. It is not always sufficient to wait until after the meeting of creditors to take action to preserve assets. 11 U.S.C. § 704.

With regard to insuring real and personal property (e.g., buildings and vehicles) that has value for the estate, the trustee must either determine that the property is insured by the debtor or obtain insurance for the estate. 11 U.S.C. § 704. If insured by the debtor, the trustee shall request proof of insurance from the debtor and ensure that it is continued for the benefit of the estate. If the debtor does not have insurance, the property is encumbered, and there are no estate funds available, the trustee must contact the secured creditor immediately, so that the secured creditor can obtain insurance or otherwise protect its own interest in the property. The trustee may consider (a) an agreement with the secured creditor to fund the expense of insurance and provide proper safeguarding under section 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 section 506(c).

When property with value to the estate cannot be insured, the trustee must 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.

In asset cases, when the property is fully encumbered and of nominal value to the estate, the trustee must immediately abandon the asset and contact the secured creditor immediately so that the secured creditor can obtain insurance or otherwise protect its own interest in the property. 11 U.S.C. §§ 554, 704. 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.

#### g. ENVIRONMENTAL ISSUES

The trustee should take reasonable 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 the property under section 554(a). Before abandoning the property, however, the trustee must take all precautions possible in light of the available assets of the estate, consult with appropriate federal, state and local authorities, and document the actions taken. 11 U.S.C. § 704.

### 4) CLAIMS BAR DATE

In most districts, a notice of insufficient assets to pay dividends is provided to creditors as part of the section 341(a) meeting notice. Fed. R. Bankr. P. 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. Fed. R. Bankr. P. 3002(c).

In a case reconverted to chapter 7, in most instances a new period for filing claims commences, but see Fed. R. Bankr. P. 1019(2).

### 5) TAX CONSIDERATIONS IN THE ADMINISTRATION OF ESTATE ASSETS

#### a. OVERVIEW

The trustee has an obligation to file appropriate tax returns and pay tax liabilities on behalf of the bankruptcy estate. Failure to file or pay taxes could result in penalties and interest which will reduce the amounts paid to creditors and may subject the trustee to personal liability. The trustee must disclose to the debtor all information contained in the estate tax returns. 28 U.S.C.§ 586, 11 U.S.C. § 346.

This Handbook contains an abbreviated summary of the tax provisions which may be of most interest to chapter 7 trustees. Trustees should seek professional tax advice on a case-by-case basis when the need arises.

Sections 346 and 505 of the Bankruptcy Code, along with 28 U.S.C. § 960 and 26 U.S.C. §§ 1398 and 1399 (the Internal Revenue Code), set forth special tax provisions with which the trustee should be familiar.[3] These sections generally provide that the trustee must prepare and file appropriate income tax returns for the bankruptcy estate and pay post-petition taxes as they become due.

Any taxes incurred by the estate, whether secured or unsecured, including property taxes, are allowable as an administrative expense. The taxing authority is not required to file a request for payment of the expense as a condition of its being allowed an administrative expense claim. See 11 U.S.C. §§ 503(b)(1)(B) and (D).

In a business case, the trustee may defer the payment of taxes incurred by the chapter 7 bankruptcy estate until final distribution is made if, before the due date for the tax, the court enters an order finding that the estate is administratively insolvent. 28 U.S.C. § 960(c)(2).

**b. INCOME TAXES**

The trustee is responsible for preparing and filing income tax returns on behalf of the bankruptcy estates, and should normally employ a tax professional to assist in preparing the return. In preparing estate tax returns, the trustee will often need to 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 of the tax returns or a transcript thereof from the IRS using Form 4506 or Form 4506-T. The trustee may wish to contact the local IRS Field Insolvency office to determine if it can obtain the returns more quickly.

(1) Individual Chapter 7 Debtors

For purposes of federal, state, and local tax purposes, the individual debtor and the bankruptcy estate are treated as separate taxable entities. Generally, the individual debtor retains his or her tax identity and must file his or her own personal tax returns, and the trustee must obtain a separate tax identification number for the estate. See generally Sections 346 and 505 of the Bankruptcy Code, along with 28 U.S.C. § 960 and 26 U.S.C. §§ 1398 and 1399 (the Internal Revenue Code). If spouses file a joint petition under section 302, absent substantive consolidation, two separate estates and two separate taxable entities are created and, if tax returns are required, the trustee must obtain a tax identification number and file a tax return for each estate. Id.

Generally, the estate succeeds to the individual debtor's tax attributes upon commencement of the case. 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 plus the basic standard deduction for a taxpayer filing as married filing separately. Id. The standard

[3] Trustees should also be familiar with IRS Publication No. 908 (Bankruptcy).

deduction can be found at 26 U.S.C. § 63(c)(2)(C). The exemption amount can be found at 26 U.S.C. § 151(d). The threshold for filing state and local income tax returns will be governed by state and local law. The trustee should consult with the tax professional for federal and state filing thresholds.

(2) Partnership and Corporate Chapter 7 Debtors

The filing of a bankruptcy petition by a partnership or corporation does not create a separate taxable entity. 26 U.S.C. § 1399.

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

Unless a corporation is exempt from income tax, corporate returns must be filed by the trustee regardless of whether the corporation has income. 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.[4] The procedures for requesting a waiver of filing are detailed in Internal Revenue Manual section 5.96.15.1(2).

For partnership cases, the chapter 7 trustee must file the federal and state tax returns regardless of the amount of gross income. 11 U.S.C. § 346.

### c. 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, and 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. 11 U.S.C. § 346. A failure to file these returns may lead to the imposition of penalties against the trustee or the estate. 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.

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. 11 U.S.C. § 346. The withheld taxes receive the same priority for payment as the claims from which they were withheld. The taxes must be properly and timely remitted to the IRS using the Treasury's Electronic Federal Payment System (EFTPS). Information about this system is available at: https://www.eftps.gov/eftps.

[4] See Rev. Rul. 84-123, 1984-33 I.R.B. 6, 1984-2 C. B. 244; and Rev. Proc. 84-59, 1984-33 I.R.B. 11, 1984-2 C. B. 504.

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 certain interest payments. Similarly, the trustee may be required to issue to payees and to file with the IRS Form 1099-MISC when 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 also be reported to the IRS and the attorney. The trustee should consult with the tax professional to determine the appropriate threshold amounts required for filing these forms.

### d. 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 the employee's 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).

### e. SALES AND ABANDONMENTS

When estate property is sold, the estate recognizes a taxable gain or loss. The trustee must abandon assets that will not generate net proceeds sufficient to pay any tax liability generated by the sale. 28 U.S.C. § 586. The estate may be liable for any taxable gain upon the sale of property, even if the proceeds are abandoned. 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 trustee does not abandon the property before the foreclosure sale.

### f. PROPERTY TAXES

As noted above, property taxes incurred by the estate, whether secured or unsecured, are allowable as administrative expenses and the governmental unit is not required to file a request for payment. The trustee may recover the payment of ad valorem property taxes from the property securing the claim, pursuant to section 506(c).

The trustee is generally required to pay property taxes in a business case on or before their due dates, unless the taxes are secured by a lien against property that is abandoned by the trustee within a reasonable period of time after the lien attaches. 28 U.S.C. § 960(b)(1).

### g. PROCEDURES FOR DETERMINING ESTATE TAX LIABILITY

Under section 505(b)(2), 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 "prompt determination," 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 Centralized Insolvency Operation, P.O. Box 7346, Philadelphia, PA, 19101-7346. 11 U.S.C. § 505(b), 28 U.S.C. § 586. 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 filed by the trustee and a statement as to where the original return was filed. Any tax shown owing on the return must have been paid. The request and envelope must be marked: "Request for Prompt Determination."

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 and the estate also are discharged upon paying the tax determined to be due by the agency or by the court upon completion of the prompt determination.

The trustee should consult Rev. Proc. 2006-24 and IRS Announcement 2011-77 for the prompt determination procedures applicable to federal taxes.

## 6) TURNOVER DEMANDS

When the debtor has control or possession of assets that have equity, the trustee must seek to gain control of those assets as soon as possible. 11 U.S.C. § 704. 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 meeting of creditors. In most cases, requests for turnover are followed up in writing, designating a time limit for compliance.

The procedures for requesting turnover of a federal tax refund are set forth in section 5.9.6.1.3 of the Internal Revenue Manual, found at www.irs.gov. These procedures were agreed upon between the IRS and the Executive Office for United States Trustees. The request must relate to a specific debtor for a specific tax year. The request must be in writing, preferably on the form designated for that purpose called "Application and Authorization for Internal Revenue Service Refund Turnover to Chapter 7 Bankruptcy Trustee Pursuant to 11 U.S.C. § 542" (see the Supplemental Materials). If the form is not used, the trustee's request must contain the same information as the form. The IRS will honor the turnover request for a period of 180 days from the date of receipt, or for 180 days after the due date of a return (including extensions), whichever is later. If no return is received within these 180 day periods, the turnover request will not be honored.

If the initial requests do not produce results, the trustee must seek a court ruling requiring the debtor or third party to give up possession to the trustee. 11 U.S.C. §§ 542,704.

An action against the debtor is commenced by motion. An action against a third party is brought by adversary proceeding in accordance with Fed. R. Bankr. P. 7001(1). If there is a danger that the assets are wasting in the hands of the debtor or third party, the trustee should request an emergency or expedited hearing or seek 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, Fed. R. Bankr. P. 1019(4) requires that any debtor or trustee turn over to the chapter 7 trustee all records or property of the estate in his or her possession or control. See Handbook Chapter 4.N.2.

## 7) 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 sections 365(b), (c) and (d). 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 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 may 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.

## 8) AVOIDANCE POWERS

The trustee is provided with various avoiding powers in sections 544 - 553 as tools to be used to avoid unequal treatment among creditors of the same class or other parties in interest. The trustee needs to 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. Fed. R. Bankr. P. 7001. The trustee does not need court approval to prosecute such an action. Fed. R. Bankr. P. 6009.

The trustee and trustee's counsel must be familiar with the venue provisions in 28 U.S.C. § 1409.

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 section 101(53).

Section 546 - Limitations: This section places limitations on the trustee's power. Various limits are specified, including a statute of limitations, which is 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.

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 property to a creditor for an antecedent debt made while the debtor was insolvent within 90 days of the date the petition was filed.

The 90-day time period is extended to one year if the transfer is to an "insider" as defined in section 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 must be familiar with the provisions of section 547, including section 547(c) which defines transfers that the trustee cannot avoid. 11 U.S.C. § 704, 28 U.S.C. § 586. A transferee will most likely raise a provision of this subsection as a defense to an avoidance action brought by the trustee. One of the transfers that a trustee cannot avoid in a non-consumer case is a transfer of property valued at less than $5,000 (for cases commenced before April 1, 2007) or $5,475 (for cases commenced on or after that date).

Section 548 - Fraudulent Transfers: This section allows the trustee to avoid transfers that are fraudulent in fact, or made for less than reasonable consideration. Fraudulent transfers are not the same as preferential transfers described above. While preferential transfers are most often made to creditors, fraudulent transfers are most frequently made to family or friends. Under section 548, the trustee may avoid fraudulent transfers or obligations made or incurred within two years before the date of the filing.

The trustee should also be aware of state fraudulent conveyance laws which may allow avoidance of transfers beyond the one year period, through application of section 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 must notify the United States Trustee who will 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. Section 726(a)(4) contemplates that such claims will be paid only after all other timely and tardy claims are paid.

## 9) SALE OF ASSETS

### a. GENERAL STANDARDS

11 U.S.C. §§ 554, 704; 28 U.S.C. § 586.

A trustee may sell assets only if the sale will result in a meaningful distribution to creditors. 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 may seek a "carve-out" from a secured creditor and sell the property at issue if the "carve-out" will result in a meaningful distribution to creditors. 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 will not result in a meaningful distribution to creditors, the trustee must abandon the asset. See Handbook Chapter 4.C.3.e regarding abandonments.

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 section 363(b) before liquidating an estate asset.

The 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 must be included in the notice:

1) Type of sale (private, auction, etc.);

2) Location, date, and time of public sale;

3) Description of assets;

4) Terms and conditions of sale;

5) Factors used to establish value (appraisal, book value, etc.) in a private sale;

6) Procedure and time period for filing objections;

7) Amount of liens and identity of lien holders; and

8) In a private sale, identity of purchaser and relationship, if any, to any creditor or party in interest.

If the sale includes personally identifiable information under sections 363(b)(1)(A) or (B), the notice shall include a statement whether the sale is consistent with a policy prohibiting the transfer of the information. See Handbook Chapter 4.C.9.f. for guidelines that apply for motions for sale of personally identifiable information.

Creditors must receive 20 days' notice of a proposed sale of estate property. Fed. R. Bankr. P. 2002(a)(2) and 6004(a).

The trustee must be familiar with any local rules concerning the requirements for notices, motions, orders, and advertising related to sales of estate property. 11 U.S.C. § 704, 28 U.S.C. § 586.

In general, the trustee begins liquidating estate assets after the meeting of creditors. Exigent circumstances, however, may require liquidation of assets immediately after the case is filed.

As a best practice, all sales should be paid for in cash equivalents, such as certified checks, cashier's or teller's checks, and money orders, and the trustee normally should not accept a promissory note or installment payments. See Handbook Chapter 4.C.9.h for the guidelines that apply when installment payments are accepted.

**b. SALE FREE AND CLEAR OF LIENS**

A sale of estate property is subject to liens or security interests, unless it is sold free and clear of such interests pursuant to section 363(f). This section allows a trustee to sell property of the estate free and clear of an interest of an entity, such as a lien of a secured creditor, only under certain circumstances.

If the trustee decides to sell property free and clear of liens, the trustee must determine the identity of the lien holders and give them notice of the proposed sale. The notice must tell them how much, if anything, they are to receive from the sale. 11 U.S.C. § 704, 28 U.S.C. § 586.

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 section 506(c).

### c. 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 section 363(h) to sell jointly owned property must be brought by the trustee as an adversary proceeding. Fed. R. Bankr. P. 7001.

### d. SALE OF ENCUMBERED 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 encumbered property that would generate no proceeds for the benefit of unsecured creditors ("fully encumbered 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 other funds available for unsecured creditors, a trustee also may sell fully encumbered 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.

When selling fully encumbered property, the trustee must administer the sale to avoid a diminution of funds otherwise available for unsecured creditors. 11 U.S.C. § 704, 28 U.S.C. § 586. The trustee should obtain an agreement in writing from the secured creditor to recover the costs of sale from the collateral pursuant to section 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. 11 U.S.C. § 363, Fed. R. Bankr. P. 6004. Any sums recovered from the collateral under section 506(c) are property of the estate and must be deposited in the estate account.

### e. INTERNET AUCTIONS AND SALES

A trustee may sell assets through an Internet auction web site. 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 web site.

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. 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 section 327 unless they specifically contract to perform substantial additional services beyond simply providing a web site to market estate assets. 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, the trustee must obtain an order authorizing such services pursuant to section 327. See paragraph 10 of this Chapter below for further discussion on employing professionals.

The trustee must 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. 11 U.S.C. § 363, Fed. R. Bankr. P. 6004.

See Handbook Chapter 5.G.2 for record keeping procedures and internal controls related to internet auctions and sales.

### f. SALE OR LEASE OF PERSONALLY IDENTIFIABLE INFORMATION

If the trustee determines that personally identifiable information has value to the estate, the trustee must notify the United States Trustee prior to filing a motion to sell or lease such personally identifiable information under section 363(b)(1), so that a consumer privacy ombudsman may be timely appointed. If the trustee does not believe that section 363(b)(1) applies, the trustee must explain in the notice why it does not apply. 11 U.S.C. § 332, 28 U.S.C. § 586.

The trustee must provide timely notice of the hearing on the motion for the proposed sale or lease of any personally identifiable information to the consumer privacy ombudsman. 11 U.S.C. § 363(b)(1), Fed. R. Bankr. P. 6004.

### g. CONDUCT OF SALES

Sales of estate property must conform to the requirements of Fed. R. Bankr. P. 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 must 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. Fed. R. Bankr. P. 6004(f)(1).

### h. 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 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 must obtain and perfect a security interest in the estate assets sold and take other suitable precautions to protect the estate against default by the purchaser. 28 U.S.C. § 586.

When an estate asset consists of 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.

## 10) EMPLOYMENT OF PROFESSIONALS

### a. GENERAL STANDARDS

Under section 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 section 330.

The employment of professionals must be approved by the court. Court approval must be sought prior to the rendering of any services. 11 U.S.C. § 327(a). 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.

### b. DEFINITION OF PROFESSIONALS

The list of "professional persons" provided by section 327(a) – attorneys, accountants, appraisers, liquidators, 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 section 327(a). The trustee may find it necessary to employ brokers, underwriters, farm managers, private investigators, or others to assist in the administration of estate assets. If an issue arises regarding the need to obtain court approval of the employment, the trustee should consider the following:

1) Does the person play a central role in the administration of the estate?

2) Does the person possess discretion or autonomy over some part of the estate?

3) Does the person have special knowledge or skill usually achieved by study and educational attainments?

4) Does the person operate under a license or governmental regulation?

When in doubt, it is recommended that the trustee err on the side of caution and seek court approval of the employment.

### c. EMPLOYMENT STANDARDS

The threshold question for the employment of any professional is the necessity of employment. The trustee must determine whether the services of a professional are needed and whether the cost is warranted. 11 U.S.C. §§ 330 and 704(a). Further, the trustee needs to 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. 11 U.S.C. §§ 327(a) and 101(14). There are some exceptions. If a trustee is authorized to operate the debtor's business under section 721, and if the debtor has regularly employed professional persons on salary, the trustee may retain or replace such professional persons. 11 U.S.C. § 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. 11 U.S.C. § 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. 11 U.S.C. § 327(e).

The employment of a professional with a conflict of interest can result in denial of compensation to the professional under section 328(c) and to the trustee under section 326(d).

The trustee may not employ a person who has served as an examiner in the case. 11 U.S.C. § 327(f).

### d. 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. Fed. R. Bankr. P. 2014(a).

The form of applications for employment is governed by Fed. R. Bankr. P. 2014 and 6005. An employment application must state:

1) The specific facts necessitating employment;

2) The name of the person employed;

3) The reasons for selecting the firm or individual;

4) The professional services to be rendered;

5) The proposed arrangements for compensation; and

6) The professional's connections with the trustee, debtor, creditors, and other parties in interest.

Fed. R. Bankr. P. 2014(a). The application must 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. Fed. R. Bankr. P. 2014(a).

Fee sharing arrangements are prohibited. 11 U.S.C. § 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 must approve 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. 11 U.S.C. § 328(a).

### e. SUPERVISION OF PROFESSIONALS

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. 28 U.S.C. § 586, 28 C.F.R. § 58.6(a) (7).

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 Handbook Chapter 4.C.10.g) apply equally to other professionals who take possession of estate funds and property.

### f. 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. 11 U.S.C. § 327(d). A trustee must 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. 11 U.S.C. § 327. The trustee may not be employed as counsel or accountant to provide services that a trustee could perform without professional assistance.

The trustee shall 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 the trustee's own attorney or accountant, detailed time records of the tasks performed as attorney or accountant must be maintained. A trustee acting as attorney or accountant under section 327(d) may receive compensation only for services performed in that capacity and not for the performance of regular trustee duties. 11 U.S.C. § 328(b).

The demarcation of the roles of the trustee and the professional must be made to ensure that an estate incurs only appropriate costs for administration. The cost of administration and its financial effect upon creditors demand careful scrutiny of the trustee's application to employ themselves or others. Abuses in the process of a trustee serving dually as attorney or accountant may be the basis for suspension or removal from the panel.

Attorneys and accountants shall not be compensated for performing the statutory duties of the trustee. 11 U.S.C. § 704, Fed. R. Bankr. P. 2015(a). The following list includes examples of services considered to fall within the duties of a trustee:

1) preparing for and examining the debtor at the meeting of creditors in order to verify factual matters;

2) Examining proofs of claim and filing routine objections to the allowance of any claim that is improper;

3) Investigating the financial affairs of the debtor;

4) Furnishing information to parties in interest on factual matters;

5) Collecting and liquidating assets of the estate by employing auctioneers or other agents and soliciting offers;

6) Preparing required reports;

7) Performing banking functions; and

8) In appropriate cases, filing applications for employment of professionals and supervising those professionals.

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

## g. AUCTIONEERS

(1) General Standards

The trustee may employ auctioneers as professional persons pursuant to sections 327(a) and 328(a) to sell property of the estate. All auction sales require notice pursuant to Fed. R. Bankr. P. 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. 28 U.S.C. § 586, 28 C.F.R. § 58.6(a)(7).

Methods by which a trustee can supervise auctioneers include personally attending auction sales, sending an assistant or staff person to attend auction sales, thoroughly reviewing auctioneer reports, and independently verifying reported information. 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.

The trustee must immediately advise the United States Trustee of concerns with respect to auctioneers and must immediately report situations which could result in a loss to the estate. Failure to appropriately supervise auctioneers may result in claims against the trustee individually. 28 U.S.C. § 586, 28 C.F.R. § 58.6(a)(7).

A representative of the United States Trustee may attend auctions.

(2) Compensation

An auctioneer's compensation must be approved by order of the court. 11 U.S.C. § 328, Fed. R. Bankr. P. 6005. Any buyer's premium 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. The order authorizing the employment must specify the percentage fee to be charged by the auctioneer and may 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.

(3) Bonding and Insurance

The trustee must ensure that auctioneers are adequately bonded, prior to auction or taking possession of estate property, in an amount that is sufficient to cover all receipts from the sale. 11 U.S.C. § 704(a)(2), 28 U.S.C. § 586. The bond must be in favor of the United States of America and is distinct from any other auctioneer's bond required under state law. All original bonds must be forwarded to the United States Trustee.

The trustee needs to verify that the auctioneer maintains insurance for lost or stolen property in the event that the trustee decides to make a claim against the insurer in the event of such losses. Insurance claims for lost or stolen property must be made promptly, and the trustee must immediately inform the United States Trustee of such claims. 11 U.S.C. § 704(a)(2), 28 U.S.C. § 586.

(4) Turnover of Proceeds

As a general rule, the auctioneer should immediately turn over auction proceeds to the trustee. In any event, all proceeds must be turned over within thirty days of the auction. The United States Trustee may have additional requirements. 11 U.S.C. § 704(a)(2), 28 U.S.C. § 586.

If an auctioneer fails to account for or to turnover auction proceeds within thirty days, the trustee must promptly notify the United States Trustee and take immediate action to recover the funds, including initiating a proceeding against the auctioneer's bond11 U.S.C. § 704(a)(2), 28 U.S.C. § 586.

If the trustee discovers that the auctioneer has commingled estate auction proceeds with business operating or personal accounts, the trustee must immediately notify the United States Trustee. 11 U.S.C. § 704(a)(2), 28 U.S.C. § 586.

(5) Auctioneer's Report of Sale

The auctioneer must submit to the trustee, the United States Trustee and must also file with the court 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. Fed. R. Bankr. P. 6004(f). In all cases, the auctioneer must present an affidavit or declaration listing all costs and expenses incurred with the report of sale.

The trustee must ensure that the auctioneer files the report promptly upon completion of the auction. 28 U.S.C. § 586. If the report has not been provided within thirty days after the auction, the trustee must 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. 28 U.S.C. § 586.

The trustee must compare the auctioneer's report of sale to the initial inventory and obtain an explanation for any discrepancies. 11 U.S.C.

§ 704(a)(2), 28 U.S.C. § 586. 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.

## 11) COMPENSATION AND EXPENSES OF TRUSTEES

Trustee compensation is governed by section 330 and treated as a commission, subject to the limitations set forth in section 326. The compensation allowable in section 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.

The United States Trustee will not object to a full commission except in rare and unusual circumstances. Examples of rare and unusual circumstances may include cases where it appears that the trustee has delegated a substantial portion of case administration, i.e., trustee duties, to an attorney or where the trustee's case administration fell below acceptable standards.

Section 330 also allows the recovery of actual, necessary expenses. Overhead expenses of a trustee are not reimbursable from the estate.

Section 331 permits a trustee to apply to the court for interim compensation or reimbursement of expenses pursuant to section 330. 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.

## 12) COMPENSATION OF PROFESSIONALS

Section 330(a) authorizes professionals employed by the trustee under section 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 may not be compensated for performing work that the trustee can do without professional assistance. Particular care must be taken to avoid "double-dipping" when the trustee also serves as an attorney or accountant in a case. 11 U.S.C. § 327.

Pursuant to section 330, after notice and a hearing, and subject to section 328, the court may award a professional person employed pursuant to section 327 reasonable compensation for actual, necessary services. Section 330 also allows the recovery of actual, necessary expenses. Overhead expenses of a professional are not reimbursable from the estate.

Pursuant to 28 U.S.C. § 586(a)(3), as amended, applications for compensation and reimbursement of expenses filed by professionals must be prepared in accordance with

the Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. § 330. See the Supplementary Materials for more information about the fee guidelines.

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. 11 U.S.C. § 331. The trustee has a fiduciary obligation to review professional fee applications and to object when appropriate.

Unless otherwise ordered by the court, all creditors and parties in interest must receive notice of all fee applications over $1,000.00. Fed. R. Bankr. P. 2002(a)(6).

### 13) CASE PROGRESS

Section 704(a)(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 section 704(a)(1), the United States Trustee monitors the number and age of open cases and the reasons they remain open.

To help ensure that case administration and closure are not unduly delayed, the trustee must implement a system to review the progress of each case and must be able to demonstrate that this review is performed on a regular basis. 28 U.S.C. § 586. It is recommended that the review of all cases be conducted monthly, but it must be conducted not less than quarterly. It is also acceptable for the trustee to review individual cases on a rotating basis, as long as each case is reviewed at least quarterly.

Essentially, the trustee's records must indicate regular and ongoing management of the cases. Evidence of the review must be preserved and made available for review by the United States Trustee, upon request, or during the course of an audit or review of the trustee's operation. Evidence may include, for example, a print-out of cases with notations as to what was done or notes kept in the case file or electronic case management system. Such paper or electronic documentation shall be notated to indicate the date of the trustee's review.

## D. EXAMINE THE DEBTOR'S STATEMENT OF INTENTION, 11 U.S.C. § 704(a)(3)

Section 521(a)(2) requires an individual debtor to file a statement within 30 days of the bankruptcy petition or on or before the date of the meeting of creditors, whichever is sooner, disclosing the debtor's intention with respect to the retention or surrender of property of the estate that secures any debts. The debtor must perform such intention within 30 days of the meeting of creditors, unless the court extends the deadline for cause. The trustee must ensure the performance of such intentions by examining the statement of intention early in the case and seeking the debtor's verification at the meeting of creditors that the intentions have been, or will be, performed. 28 U.S.C. § 586.

If the debtor fails to file a proper statement or to timely perform the intention, sections 362(h) and 521(a)(6) provide that the automatic stay is terminated with respect to any such personal property and the personal property will no longer be property of the estate. 11 U.S.C. § 521(a)(2). Individual debtors are given 45 days from the date first set for the meeting of creditors to reaffirm debt secured by a purchase money security interest in property of the estate or redeem such property, and 30 days in the case of non-purchase money security interests in property.

If the property has value for the estate, the trustee must ensure that the debtors timely perform their intentions or the trustee should timely file a motion seeking the court's determination that the property is of consequential value or benefit to the estate to avoid the property being abandoned. 11 U.S.C. §§ 704(a)(1) and 704(a)(3).

## E. INVESTIGATE THE FINANCIAL AFFAIRS OF THE DEBTOR, 11 U.S.C. § 704(a)(4)

The trustee must investigate the debtor's financial affairs by reviewing 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 section 521 and Fed. R. Bankr. P. 1007 and by examining the debtor at the meeting of creditors. The trustee must also conduct such other investigation as necessary, such as following up on credible tips about unscheduled assets.

## F. EXAMINE PROOFS OF CLAIM, 11 U.S.C. § 704(a)(5)

Section 704(a)(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.

### 1) REVIEW OF CLAIMS

The claims review process commences after the trustee 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. The trustee may not submit the final report (TFR) for a case prior to completion of the claims examination and determination process.

### 2) OBJECTIONS TO CLAIMS

The trustee must consider the following issues when reviewing claims:

a. If a claim is filed as secured, there must be appropriate documentation, such as a security agreement and/or UCC-1 financing statement. Fed. R. Bankr. P. 3001. The trustee must review this documentation to determine whether the secured creditor's lien is subject to avoidance pursuant to section 544. The trustee must 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 section 547. Per Fed. R. Bankr. P. 3002(a), a secured creditor is not required to file a proof of claim. Therefore, prior to selling estate assets, the trustee ordinarily needs to perform a lien search to verify that all liens have been identified. Even if secured claims are not

required to be filed, the trustee should review the security documents to ensure that a claim is secured.

b. Tax claims must 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.

c. Unsecured claims must be reviewed for appropriate documentation, accuracy and timeliness.

d. Claims set forth on the debtor's schedules D, E and F should be reviewed and compared to claims that are filed.

e. Tardily filed claims are subordinated to timely claims, or paid pro rata with timely claims in accordance with sections 726(a)(2) and (3). Tardy filing of a claim in chapter 7 is not grounds for disallowance. The trustee must not seek disallowance of a claim solely on the grounds that it is not timely filed. 11 U.S.C. § 502(b)(9).

11 U.S.C. § 704(a)(5), 28 U.S.C. § 586.

A trustee should file objections to allowance of claims, if appropriate, and may file omnibus objections if they satisfy Fed. R. Bankr. P. 3007(d) and (e). Possible reasons for objecting to a claim include:

a. Sufficient documentation was not provided;

b. The claim amount is in error;

c. The claim has been previously paid;

d. The claim is not owed;

e. The claim is a duplicate of another claim; or

f. The claim arose from obligations arising from the debtor's personally owned business.

Other grounds for objection may be found in section 502.

The trustee should perform a second review for new, tardy, amended or assigned claims prior to distribution. See, especially, section 726(a)(1) regarding tardily filed priority claims. Tardily filed claims may be paid under certain circumstances and should not be barred from payment on that basis alone.

### 3) TRUSTEE FILING PROOFS OF CLAIM

If the trustee determines that the funds to be distributed exceed the filed claims and anticipated administrative expenses, the trustee may contact creditors who have not

filed claims. While section 501(c) and Fed. R. Bankr. P. 3004 give the trustee the ability to file proofs of claim on behalf of creditors, the trustee should exercise caution in doing so. In contacting creditors or filing claims, the trustee should exercise caution to treat similarly situated creditors equally.

### 4) 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 may ask the trustee to review the debtor's books and records to determine the correct amount of unpaid fees.

### 5) 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 inequitable conduct or 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 certain tax liens to claims entitled to priority under sections 507(a)(1) and 507(a)(3) through (a)(7), and to some claims entitled to priority under section 507(a)(2), up to the amount of the tax liens. The trustee must exhaust all of the unencumbered assets of the estate, and recover costs of preserving and disposing of secured property as allowed under section 506(c), before subordinating any tax liens. The proceeds received from property subject to other types of tax liens are distributed in accordance with section 724(b)(2). The trustee must be familiar with the scheme of distribution under that section.

## G. OPPOSE THE DISCHARGE OF THE DEBTOR, 11 U.S.C. § 704(a)(6)

The trustee has a duty under section 704(a)(6) to object to the debtor's discharge if advisable. 11 U.S.C. § 727(a). To determine if it is advisable to oppose the debtor's discharge, the trustee must consider the cost of the litigation, the amount of estate funds available, the benefit to creditors of a denial of the discharge, and the likelihood of success. 11 U.S.C. § 704(a)(1), 28 U.S.C. § 586.

The trustee must be familiar with the grounds for objecting to discharge, and whenever appropriate, must examine the acts and conduct of the debtor to determine whether grounds exist for denial of discharge. 11 U.S.C §704(a)(6).

A complaint objecting to discharge must be filed within 60 days of the date first set for the meeting of creditors. Fed. R. Bankr. P. 4004(a). The court may extend the time, but the motion for extension must be filed before expiration of the 60-day period. Fed. R. Bankr. P. 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. Fed. R. Bankr. P. 4004(b).

A debtor's discharge may be revoked within one year after it was granted, or in some cases within one year after the case is closed. 11 U.S.C. §§ 727(d), (e). The trustee must be familiar with the grounds for revocation and the time limits for filing a complaint. 11 U.S.C. § 727.

The United States Trustee is also authorized to object to the discharge of a debtor or seek revocation of the discharge. If the trustee has information that would support an objection to discharge but deems such an action infeasible, the trustee must promptly bring that information to the attention of the United States Trustee. A trustee that has filed a complaint objecting to the debtor's discharge must not move for dismissal of the complaint without notice to the United States Trustee. 28 U.S.C. § 586, Fed. R. Bankr. P. 7041.

## H. FURNISH INFORMATION CONCERNING THE ESTATE, 11 U.S.C. § 704(a)(7)

A trustee shall have a system in place to timely respond to reasonable inquiries on behalf of debtors, creditors, attorneys, the court, and other interested parties.

## I. PROVIDE OPERATING REPORTS, 11 U.S.C. § 704(a)(8)

Under section 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. 11 U.S.C. §§ 704(a)(1) and (2).

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, not the debtor, can 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 must 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.

28 U.S.C. § 586 (a)(3).

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 must 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. 11 U.S.C. § 704(a)(1), 28 U.S.C. § 586.

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 section 704(8). 28 U.S.C. § 586 (a)(3). 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.

The trustee of an operating business must 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. 11 U.S.C. § 704(a)(2), 28 U.S.C. § 586 (a)(3). 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 with a legal interest in the cash collateral 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 sections 363 and 364. The trustee may, however, sell or lease property in the ordinary course of 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 or 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. See generally 11 U.S.C. §§ 346 and 505, along with 26 U.S.C. §§ 1398 and 1399 (the Internal Revenue Code) and 28 U.S.C. § 960. For further information, the trustee should consult IRS Circular E (Employer's Tax Guide) and Handbook Chapter 4.C.5. The trustee also must comply with other laws applicable in the states 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 section 706(b), and requesting the appointment of a chapter 11 trustee pursuant to section 1104(a). The trustee should determine whether a proposed plan of liquidation could satisfy the requirements of confirmation under section 1129.

## J. MAKE A FINAL REPORT AND FINAL ACCOUNT OF THE ESTATE, 11 U.S.C. § 704(a)(9)

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 must be familiar with the following basic criteria and with any additional local court rules or policies that apply. 28 U.S.C. § 586 (a)(3).

### 1) TRUSTEE'S FINAL REPORT (TFR)

When a case is ready to be closed, the trustee must prepare and submit a TFR to 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. 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. The report must be submitted prior to any distribution of funds to creditors, unless the trustee has previously made an interim distribution pursuant to a court order. In any event, a TFR must be submitted before final distribution of all funds in the case. See Amended Memorandum of Understanding Between the Executive Office for U.S. Trustees and the Administrative Office for U.S. Courts Regarding Case Closing and Post Confirmation Chapter 11 Monitoring at Section II , 28 U.S.C. §§ 586 and 589(b), and Fed. R. Bankr. P. 5009.

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 distribution report. 28 U.S.C. § 586, Fed R. Bankr. P. 2015(a)(2). Financial-account numbers must be redacted; only the last four digits of a financial-account number may be shown. See Fed R. Bankr. P. 9037(a)(4).

The TFR summarizes all actions taken by the trustee to administer the case. In addition, each report must:

a. Request payment of the trustee's compensation and expenses and any unpaid professional fees and expenses; and

b. Report the trustee's actions on claims or their disposition.

For cases with gross receipts of $25,000 or less, the trustee must provide to the United States Trustee the bank statement(s) showing that the balance in the estate account(s) matches the remaining balance on hand per the TFR. For cases with gross receipts greater than $25,000, all original bank statements and canceled checks (from all estate accounts) must be provided. 28 U.S.C. § 586.

Any outstanding final applications for professional compensation and expenses should also be provided 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.

If the net proceeds realized in the estate exceed the amount specified in Fed. R. Bankr. P. 2002(f)(8), the trustee also must submit a Notice of Final Report (NFR) to the United States Trustee along with the TFR. 28 U.S.C. § 589(b). Pursuant to Fed. R. Bankr. P. 2002(f), the Clerk, the Clerk, or some other person as the court may direct, is required to notice all creditors with a summary of the final report before the trustee actually makes the distribution to creditors. The notice informs creditors that the TFR 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.

Generally, estate funds should be maintained in an interest-bearing account until the trustee is ready to distribute the funds to creditors. 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 submitted to 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 TFR must set forth the distributions to be made under section 726. The trustee must be familiar with the distribution priorities set forth in the Code. If insufficient funds exist to pay all claims in full, the balance is prorated among the creditors in that category. 28 U.S.C. §§ 586 and 589(b).

The United States Trustee reviews the TFR to assess whether the trustee has properly and completely administered estate property. 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 TFR is filed with the court. If there is a dispute between the United States Trustee and the trustee concerning the report, the United States Trustee will file an objection.

## 2) DISTRIBUTION OF FUNDS

If no objections are lodged to the notice of intent to distribute or to the report of distribution, then the trustee may make the distribution according to the TFR. If the court modifies the fees and expenses, the trustee may be required to submit an amended TFR. The final distribution to creditors must be paid within 30 days of the entry of the final orders on compensation and expenses. Payment of the trustee's final compensation and expenses cannot be made until after payment of the final dividends to creditors.

Checks must be made payable to the creditor and must 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 Fed. R. Bankr. P. 3010(a), in chapter 7 cases, 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. Fed R. Bankr. P. 3010 and 3011, 11 U.S.C. § 347. 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 shall issue a stop payment request on said checks. 11 U.S.C. § 347.

In addition, the trustee must make a reasonable effort to locate creditors who do not cash their checks promptly or whose checks are returned undeliverable. 28 U.S.C. § 586. 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 Fed. R. Bankr. P. 3011, along with a transmittal document to the court indicating the last known address of the creditor.

Payments to the court for unclaimed dividends and dividends less that $5 must be paid by estate check.

When a creditor returns funds to the trustee because the creditor has been paid from another source, the trustee must redistribute the funds to other creditors according to the priorities set forth in sections 507 and 726 and in accordance with Fed. R. Bankr. P. 3010 and 3011.

## 3) TRUSTEE'S FINAL ACCOUNT (TDR)

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 TDR signed under penalty of perjury certifying that the estate has been fully administered. All original bank statement(s), including the bank statement showing a zero balance, and all canceled checks (except those already submitted with the TFR) must be submitted to the United States Trustee. 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. See

Amended Memorandum of Understanding Between the Executive Office for U.S. Trustees and the Administrative Office for U.S. Courts Regarding Case Closing and Post Confirmation Chapter 11 Monitoring at Section II , 28 U.S.C. §§ 586 and 589(b), and Fed. R. Bankr. P. 5009.

All financial-account numbers contained in the TDR must be redacted; only the last four digits of a financial-account number may be shown. See Fed R. Bankr. P. 9037(a)(4).

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. Problems or mistakes will be brought to the trustee's attention for corrective action. Upon completion of this review, the TDR is filed with the court. If there is a dispute between the United States Trustee and the trustee concerning the report, the United States Trustee will file an objection. 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 will close the case and discharge the trustee.

The canceled checks and bank statements 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 section 322(d), or as otherwise required by the IRS, whichever period is longer.

## K. PROVIDE NOTICES OF DOMESTIC SUPPORT OBLIGATIONS (DSOs), 11 U.S.C. § 704(a)(10)

The trustee must provide the two statutorily required written notices to the holder of a DSO claim and the appropriate State child support enforcement agency. The first notice to a DSO claim holder advises of the right to payment in the bankruptcy case, the right to use the collection services of the State child support enforcement agency of the State where they reside, and the contact information for the agency. While the Bankruptcy Code is silent on the timing of the first required notices, the trustee should send these notices generally no later than three business days after the meeting of creditors is held. However if the information is otherwise available to the trustee, the trustee may send the notices at any time prior to the meeting of creditors.

The trustee must send the second required notice to the DSO claim holder and the State child support enforcement agency when a discharge is granted. This notice must contain the debtor's last known address, the last known name and address of the debtor's employer, as well as contact information for certain creditors whose claims were either reaffirmed or not discharged. The notices shall be sent within a reasonable period of time following the granting of the debtor's discharge. If the case is closed by the trustee while an applicable section 523 dischargeability action is pending against the debtor, the trustee shall send the discharge notice and include the name of the creditor, with a notation that an action to determine the dischargeability of the creditor's claim is pending.

In order to assist State child support enforcement agencies in identifying debtors with DSOs, the trustee must include the debtor's full Social Security number on those notices going to the State child support enforcement agency, except where prohibited by State law or regulation.

28 U.S.C. § 586. The United States Trustee must be notified immediately if the trustee is not in compliance with this requirement based upon a State statute or regulation that prohibits the full disclosure of Social Security numbers. The debtor's full Social Security number is not be included on the notices going to the DSO claim holder. If the trustee chooses to file the notice with the court, the trustee must ensure that the first five digits of the debtor's Social Security number are redacted from the notice. 28 U.S.C. § 586.

## L. SERVE AS PLAN ADMINISTRATOR, 11 U.S.C. § 704(a)(11)

Under section 704(a)(11), the trustee has the duty to act as administrator of an employee benefit plan if the debtor was the plan administrator when the chapter 7 was commenced. If the trustee believes he or she is unable to act as administrator, the trustee should contact the United States Trustee.

## M. USE BEST EFFORTS IN TRANSFERRING PATIENTS WHEN SHUTTING DOWN A HEALTH CARE BUSINESS, 11 U.S.C. § 704(a)(12)

The trustee must use all "reasonable and best efforts to transfer patients" from a closing health care business. The trustee also has certain responsibilities for the disposal of patient records from the health care business. 11 U.S.C. § 351. "Health care business" is a defined term. 11 U.S.C. § 101(27A). The trustee must make an independent determination that a debtor is a health care business and must immediately notify the United States Trustee upon being appointed to a health care business case. 28 U.S.C.§ 586. The court must order the appointment of a patient care ombudsman to a health care business within 30 days of commencement of the case unless the court finds that the appointment of an ombudsman is not necessary under the specific facts of the case. 11 U.S.C. § 333.

## N. OTHER DUTIES OF A CHAPTER 7 TRUSTEE

### 1) DISMISSALS OR CONVERSIONS OF A CHAPTER 7 CASE

Chapter 7 cases may be dismissed pursuant to section 707. The trustee should review motions to dismiss 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 and return any property to the person or entity from whom the funds and property were obtained. See 11 U.S.C. § 349(b). Generally, this will mean that the trustee will return the funds and property to the debtor or third party from whom the trustee received the funds, 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 section 706. The court may not convert a chapter 7 case to a chapter 12 or chapter 13 case unless the debtor requests or consents to conversion. 11 U.S.C. § 706(c). The trustee may be able to challenge conversion to chapter 13 if the debtor has engaged in fraudulent conduct or bad faith. 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 an NDR after a case has been dismissed or converted to another chapter. If the trustee collected any funds, the trustee may need to provide Form 1 to

the United States Trustee. The trustee should contact the United States Trustee for the local procedure. If the trustee opened a bank account, the trustee must provide Forms 1 and 2 and all original bank statements and cancelled checks to the United States Trustee. The NDR should be filed after a zero bank balance, if applicable, is attained. See Amended Memorandum of Understanding Between the Executive Office for U.S. Trustees and the Administrative Office for U.S. Courts Regarding Case Closing and Post Confirmation Chapter 11 Monitoring at Section II and 28 U.S.C. §§ 586 and 589(b).

In a case which was converted to another chapter or reassigned to another trustee, the trustee must provide to the successor trustee a complete accounting for all funds received as well as all the books and records in the trustee's possession or control. 28 U.S.C. § 586.

## 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 promptly turn over to the chapter 7 trustee all records and property of the estate, unless the court orders otherwise. Fed. R. Bankr. P. 1019. 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. New time periods for filing claims and objecting to discharge are established if the case was not previously a chapter 7 case.

Debtors who initially filed cases under chapter 13 and filed Form 22C, along with their other initial documents, should file Form 22A upon conversion to chapter 7. Some jurisdictions require debtors to file this form, others do not. Therefore, the trustee should be familiar with the controlling case law in the jurisdiction.

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. Generally, the United States Trustee will schedule a meeting of creditors when a case converts to chapter 7 from another chapter. 11 U.S.C. §§ 341 and 348.

In a case converted from chapter 11 to chapter 7, the chapter 11 trustee must promptly turnover the records and property of the estate to the successor trustee, unless the court orders otherwise, and must file a final report within 30 days of the conversion. Fed. R. Bankr. P. 1019(5)(A). The chapter 11 books and records must be closed as of the conversion date, and new bank accounts, books and records must be opened for chapter 7, unless otherwise ordered. 28 U.S.C. § 586.

Section 348 addresses the effects of case conversion.

The trustee should be aware of the time limitations on bringing avoidance actions in converted cases. 11 U.S.C. § 546.

## 3) REOPENING CLOSED CASES

Occasions may arise when a closed case has to be reopened to administer unreported or recently discovered assets. The filing of an NDR, TFR or TDR by a trustee does not close a case; it can only be closed by court order. In an asset case, if a new asset is discovered before the 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. 28 U.S.C. § 586. If the court has officially closed the case, the trustee should notify the United States Trustee. The trustee should not resume his or her duties in re-opened cases without being appointed by the United States Trustee.

If a case is reopened, a trustee is appointed only upon order of the Bankruptcy Court. Fed. R. Bankr. P. 5010. If the court orders appointment of a trustee, the United States Trustee may reappoint the original trustee to the case provided the original trustee is still a member of the panel.

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

## 4) TRANSMISSION OF DOCUMENTS

In the administration of a case, the trustee or the attorney for the trustee must 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). Fed. R. Bankr. P. 2002(k). Electronically filed documents generally shall be served on the United States Trustee in the manner prescribed for such documents under local rule. The United States Trustee may also require the trustee to transmit all documents through other means. The method of transmittal will be determined locally by the United States Trustee. In addition, the method of transmittal for Forms 1, 2 and 3, as well as for the NDRs, TFRs, and TDRs, shall be determined locally by the United States Trustee.

Although Rule 5005(c) provides a safety net for creditors filing proofs of claim with the trustee, the trustee must encourage creditors to file claims with the Clerk of the Bankruptcy Court. The trustee must not accept claims at the meeting of creditors or at any other time. 28 U.S.C. § 586. If the trustee receives an original proof of claim, the trustee should note the date of receipt, retain a copy, and transmit the claim to the clerk. The trustee shall not electronically file the mis-transmitted claim, except in compliance with local rule or court order.

## 5) 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 section 329(a) and Rule 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 must review this disclosure of compensation and make an independent determination whether the fee paid or agreed to be paid is excessive. 11 U.S.C. §704(a) If the fee is excessive, the

trustee must discuss with the United States Trustee the possibility of bringing the matter before the court for a review of fees pursuant to section 329(b) and Rule 2017(a). 28 U.S.C. § 586.

Claims for unpaid attorney fees for pre-petition services provided to the debtor generally will be discharged in a chapter 7 case. The trustee must advise the United States Trustee if a debtor's attorney attempts to collect fees from the debtor or the estate for pre-petition services. Chapter 7 debtor attorney fees may not be paid from the chapter 7 estate. 28 U.S.C. § 586.

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.

## 6) REVIEW FOR PETITION PREPARERS

The trustee must be prepared to provide any assistance that may be needed by the United States Trustee to determine the nature and extent of the services provided by a bankruptcy petition preparer, including further inquiry at the meeting of creditors and collecting requested documents from the debtor. In addition, the trustee must report potential violations of section 110 to the United States Trustee. 28 U.S.C. § 586.

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 court fees, 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 generally 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 section 110 and may receive an additional $1,000 plus reasonable attorney's fees and costs. The bankruptcy court may triple the amount of the fine under certain circumstances. 11 U.S.C. § 110(l)(2).

The petition preparer statute also authorizes injunctive relief against preparers under certain circumstances, including when they have engaged in fraudulent, unfair, or deceptive conduct. 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.

Pursuant to section 110(e)(2)(B), a petition preparer is now expressly prohibited from providing legal advice. Legal advice includes advising the debtor: (a) whether to file bankruptcy, (b) which chapter to file under, (c) whether the debtor's debts will be discharged, (d) whether the debtor will be able to retain the debtor's home, car or other property after the bankruptcy is filed, (e) of any tax consequences, (f) whether tax

claims will be discharged, (g) whether the debtor should promise to repay or reaffirm debts, (h) how to characterize the nature of debtor's interest in property or debtor's debts, or (i) concerning bankruptcy rights and procedures.

## 7) REVIEW FOR ABUSE UNDER § 707(b)

The trustee must review the schedules, statements of financial affairs, and statements of current income and expenses in each case, for any evidence of abuse that may provide the basis for a motion to dismiss pursuant to section 707(b). Such evidence may also arise or be confirmed at the meeting of creditors. If such evidence exists, the trustee must timely notify the United States Trustee. 11 U.S.C. § 704 (b)(1), 28 U.S.C. § 586.

Debtors' counsel may be required to reimburse the trustee for all reasonable costs incurred by the trustee in successfully prosecuting a section 707(b)(2) motion, if the court also finds that the attorney violated Rule 9011. 11 U.S.C. § 707(b)(4)(A).

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

### a. DETERMINATION OF "PRIMARILY CONSUMER DEBT"

Consumer Debt

Section 707(b) applies only to a case filed by an individual with consumer debts, i.e., debts incurred primarily for personal, family, or household purposes. 11 U.S.C. § 101(8). The most common consumer debts are home mortgages, credit card debts, and personal loans. Debt incurred for a business venture or with a profit motive is not a consumer debt. Debt that is owed for income taxes is not consumer debt. When reviewing for consumer debt, the trustee should consider all listed debts, secured and unsecured, without taking into consideration whether any of the debt is to be discharged.

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, unless the proceeds are used for a business purpose. The trustee should be alert to a 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. Three approaches are used by courts to evaluate whether debts are incurred primarily for a consumer purpose:

1) Overall ratio of consumer to non-consumer debts is greater than 50 percent.

2) Number of consumer debts more than one-half of the total debts.

3) Both the percentage of consumer debt and the number of consumer debts.

**b. DETERMINING ABUSE**

Every individual debtor with primarily consumer debt is required to complete Official Form 22A. (But refer to Handbook Chapter 4.N.2 for discussion of this requirement in cases converted from chapter 13). If a debtor's current monthly income (as defined in section 101(10A)) exceeds the state median income, then the debtor will be required to complete the expense portion to determine the debtor's disposable income for means testing purposes. Implementing the means test provisions is principally the responsibility of the United States Trustee.

The trustee is expected to assist the United States Trustee in the collection and verification of information provided by the debtors, which includes:

1) Verifying the accuracy of the debtors' reported income by reviewing payment advices from employed debtors and other verifications of income from self-employed debtors (section 521(a)(1)(B)(iv) requires debtors to file copies of all payment advices or other evidence of payment received within 60 days before date of the filing of the petition) and reviewing tax return(s);

2) Verifying the number of dependents or household members claimed;

3) Verifying the disabled veteran status for debtors asserting qualification for the disabled veteran safe harbor from means testing. 11 U.S.C. § 707(b)(2)(D)(i); and

4) Verifying the reservist or National Guard status for debtors asserting qualification for the reservist or National Guard safe harbor from means testing. 11 U.S.C. § 707(b)(2)(D)(ii).

The trustee also will collect other documents required as a prerequisite to qualify for certain exceptions under the means testing provisions. These documents include receipts for private school or other school expenses, if such a claim is made, and documentation to support additional food and clothing and/or home energy expenses in excess of IRS standards.

The trustee should continue meetings of creditors where the debtors have not provided sufficient documentation to support entries on Official Form 22A (or Form 22C in cases converted from chapter 13, in those jurisdictions that do not require debtors to file Form 22A upon conversion).

**c. BAD FAITH AND TOTALITY OF THE CIRCUMSTANCES, 11 U.S.C. § 704(b)(3)**

The trustee must refer each of the following matters to the United States Trustee for further investigation and action as appropriate. The trustee may be asked to provide additional assistance to help the United States Trustee pursue the matter, including

further inquiry at the meeting of creditors and collecting requested documents from the debtor. 28 U.S.C. § 586.

1) Manipulation of income or filing date including seasonal employment, overtime availability, new employment at time of filing, and adjustment of withholding.

2) Adjustment of secured debt.

3) Adjustment or increase of unsecured debt.

4) Post-petition desire to maintain a "lifestyle" that the debtor cannot afford.

5) Substantial credit card debt, but de minimis scheduled property, no transfers and under- or unemployment, i.e., bust-outs.

6) Use of false social security numbers to file bankruptcy petition or obtain credit.

7) Concealment or fraudulent transfer of assets.

8) Ability to pay a meaningful amount toward, or percentage of, unsecured debts over a period of time.

This list is not exhaustive.

## 8) DEBTOR AUDITS

Debtor audits are designed to determine the accuracy, veracity and completeness of petitions, schedules, and statements of financial affairs.[5] Auditors will file Reports of Debtor Audit with the court which will identify material misstatements, if any. In addition, the United States Trustee will provide to the trustee any information gleaned from audits that is relevant to case administration, such as undisclosed assets.

## 9) REFERRAL OF POTENTIAL BANKRUPTCY CRIMES

### a. 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 must notify the United States Trustee immediately. 18 U.S.C. § 3057.

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), credit bust outs, real estate fraud, or identity theft.

[5] Debtors are required to cooperate with the auditors as necessary to enable the auditors to perform their duties. 11 U.S.C. § 521(a)(3).

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 meeting of creditors 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, the debtor may lie during questioning about recent repayments of debts, gifts or transfers to insiders. In all cases where the trustee suspects criminal activity, the trustee must immediately notify the United States Trustee so that the recording of the meeting of creditors may be properly secured and stored to preserve its later use in a criminal proceeding. 28 U.S.C. § 586.

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.

### b. TYPES OF CRIMINAL CONDUCT

The most common bankruptcy crimes are set forth in section 152 of title 18. That section 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 the trustee's 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, including 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 of title 18 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.

Under section 156 of title 18, 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. 18 U.S.C. § 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 of title 18 is similar to the federal mail fraud and wire fraud statutes in that it requires a showing of intent to devise or intent 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:

1) Files a petition under title 11;

2) Files a document in a proceeding under title 11; or

3) 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 section 157.

The Sarbanes-Oxley Act of 2002, created 18 U.S.C. § 1519. Section 1519 covers the alteration, destruction or falsification of records, documents or tangible objects, by any person, with intent to impede, obstruct or influence, the investigation or proper administration of any "matters" within the jurisdiction of any department or agency of the United States, or any bankruptcy proceeding, or in relation to or contemplation of any such matter or proceeding. It provides:

> "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

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 trustee should consult with the United States Trustee if additional information and training on these statutes is needed.

### c. COMPLIANCE WITH 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. This statutory obligation does not provide for the referral of only those matters which will be prosecuted or for which there is proof beyond a reasonable doubt. Nor is it subject to any thresholds or guidelines established by the United States Attorneys' offices.

Accordingly, the trustee should continue to refer to the United States Trustee matters which relate to any action which the trustee believes may constitute a crime. It is important that the 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 must submit the referral through the United States Trustee or furnish a copy to the United States Trustee. 28 U.S.C. § 586. The mechanics of this referral be discussed with the United States Trustee or the Assistant United States Trustee, as they may have developed specific procedures with the local offices of the United States Attorney, the Federal Bureau of Investigation, and other law enforcement agencies.

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

28 U.S.C. § 586

# 5. FINANCIAL POLICIES, PROCEDURES AND REPORTING REQUIREMENTS

Section 704(a)(2) requires the trustee to be accountable for all property received. This statutory duty of accountability and the trustee's responsibilities as fiduciary of the bankruptcy estate require the trustee to establish and maintain adequate procedures for asset administration and case progress, investing and protecting estate assets and funds, and financial record keeping and reporting.

## A. ADEQUATE RECORDKEEPING AND REPORTING

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. 28 U.S.C. § 586. The Program has developed a uniform record keeping and reporting system that the trustee must use. It consists of Uniform Transaction Codes (UTCs), akin to a uniform chart of accounts, and three primary records[6]:

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).

This system is used throughout the country and shall not be altered. Detailed instructions and samples are provided in the Forms and Instructions and Sample Case sections of the Supplementary Materials.

In addition to the above, the trustee's financial record-keeping system shall include the following:

1) Cash Receipts Log to contemporaneously record incoming receipts and to verify that receipts are deposited and properly accounted for (see Handbook Chapter 5.D.1).

2) Receivables Ledger to track receivable collections and remaining balances (see Handbook Chapter 5.G.1)

3) Receipt Book containing numbered, duplicate receipts for payers who request a receipt and for currency payments (see Handbook Chapter 5.D.2).

[6] These records are submitted to the United States Trustee at least annually. In addition, Form 1 and 2 are periodically filed with the court in some jurisdictions, and they are attached to TFRs and TDRs filed with the court. Financial-account numbers must be redacted in Forms 1 and 2 filed with court; only the last four digits of a financial-account number may be shown. See Fed R. Bankr. P. 9037(a)(4).

4) Bank Reconciliation Reports/Records to monitor estate account activity and balances for propriety (see Handbook Chapter 5.E).

## B. CONTROL PROCEDURES TO BE PERSONALLY PERFORMED BY TRUSTEE

The trustee, as fiduciary, must oversee the entire trustee operation and actively supervise employees and independent contractors in the performance of their cash management and accounting duties. 28 U.S.C. § 586. The primary 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. At a minimum, all cash management duties (e.g., handling mail, processing deposits, writing checks, opening and closing bank accounts, reconciling bank accounts) must be conducted at the trustee's primary business location. In addition, 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 bank statements. For a handwritten cash receipts log, the trustee may initial the receipts that are tested and indicate the date deposited. For a computerized cash receipts log, the trustee's initials and date deposited can be entered in the "remarks" column.

2) Review and sign all checks.

3) Authorize stop payment requests and cancellations in writing (see Handbook Chapter 5.F.4.a).

4) Receive the monthly bank statements, unopened; review the statements and canceled checks for errors, unusual transfers and endorsements, alterations, and forged or unauthorized signatures within 10 days of receipt; and immediately report discrepancies to the bank. Evidence of alterations, forgeries, and similar concerns must also be reported to the United States Trustee. If a canceled check image is illegible, the trustee must request a clearer image or a substitute check.

5) Review, date, and initial the monthly bank account reconciliations in accordance with Handbook Chapter 5.E.5. For reconciliations prepared by a staff member, the trustee's initials and the date should appear on the summary account reconciliation and on a sample of individual account reconciliations.

6) Ensure that unique passwords for the case management system and for ECF are established for each authorized employee. Passwords are to be changed at least quarterly and 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.

7) Have sole responsibility for setting up passwords and access rights within the computer system used for chapter 7 case management, record keeping, and reporting. Access to sensitive data fields, such as creditor name and address, distribution amounts, etc., should be limited to only those employees who need access to these fields to perform their assigned job duties. 28 U.S.C. § 586.

## C. SEGREGATION OF DUTIES/DOCUMENTATION OF PROCEDURES

1) Wherever possible, cash handling duties (i.e., receipts and disbursements) are to be separated from the record keeping and reconciliation functions. 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 and restrictively endorsing checks; preparing deposit slips and making deposits; preparing disbursements and having custody of check stock; maintaining accounting records (i.e., Forms 1, 2 and 3) and preparing Trustee Interim Reports; reconciling bank statements to Form 2 and reconciling the cash receipts log to bank statements and Form 2. When small staff size precludes segregating duties, the trustee must be more actively involved. 28 U.S.C. § 586. Suggestions for segregating duties in a two-person office are provided in the Supplementary Materials.

2) Documenting routine staff procedures and developing written job descriptions are good internal control measures that help ensure consistent staff performance.

## D. CONTROLS OVER INCOMING RECEIPTS

The trustee must maintain control of all incoming receipts and ensure that they are promptly deposited in an estate bank account. 28 U.S.C. § 586. Under no circumstances may funds or accounts of separate estates be aggregated or commingled. Bankruptcy-related funds may not be deposited to the trustee's business, personal or trust account (a limited exception is discussed in Handbook Chapter 5.D.3.c). Payers must be instructed to makes checks payable to "Jane Doe, Trustee" or to the "Estate of _____." NSF checks must be formally recorded and monitored until resolved.

### 1) CASH RECEIPTS LOG

A cash[7] receipts log must be used to track all incoming receipts (except wire transfers). 28 U.S.C. § 586. This log must be used exclusively for the chapter 7 operation and may not be combined with a law firm or business receipts log. Generally, entries to a cash receipts log are handwritten, preferably in pen. However, a cash receipts log may also be kept electronically 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. Both types of logs must be maintained by the person who opens the mail. Entries are to be made contemporaneously with opening the mail and not at a later time. Receipts for all estates are recorded in the same log. The log must contain columns for the payer, date received[8], case number or name, amount, and remarks.

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

[8] This is the date that the funds come into the trustee's possession, i.e., the date they are received in the mail, delivered to the trustee in person at the trustee's office or at a meeting of creditors, received at the closing of a sale, etc.

## 2) SAFEGUARDING RECEIPTS UNTIL DEPOSITED

(a) Checks must be restrictively endorsed immediately upon receipt by the person who opens the mail and records the receipt in the receipts log. An acceptable endorsement is writing or stamping "For deposit only to the Estate of _____." 28 U.S.C. § 586.

(b) Both currency and checks must be recorded in the cash receipts log and kept in a safe or locked cabinet until deposited. 28 U.S.C. § 586.

(c) Funds are to be deposited as soon as possible after receipt (generally mailed or taken to the bank within two business days) and must not be placed in a file while the trustee waits for subsequent events to occur, with one exception noted at Handbook Chapter 5.D.3.c. 28 U.S.C. § 586.

(d) Special considerations for currency:

(1) When debtors and other payers attempt to remit cash to the trustee, the trustee may want to say that cash is not accepted and the person must convert it to a money order or cashier's check. However, this is not always the most prudent approach as the person may not return with the cash. Therefore, the trustee must consider the internal controls needed to securely handle cash until it can be deposited. 28 U.S.C. § 586. At a minimum, these internal controls must consist of the following procedures:

(i) The trustee must have a numbered, duplicate receipt book and provide a receipt to the payer and keep one in the estate file. 28 U.S.C. § 586.

(ii) Cash must be deposited to the estate account immediately or converted to a cashier's check or money order and placed in a secure location until deposited. Service charges for the cashier's check or money order 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 must record the gross amount received and the amount of the service charge in the transaction description column on Form 2 and in the remarks section of the receipts log. 28 U.S.C. § 586.

(iii) 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.

(iv) 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.

(2) All supporting documentation in connection with handling currency shall be kept together in the estate file to provide an audit trail.

**3) HANDLING EARNEST MONIES AND SETTLEMENT PROCEEDS PENDING COURT APPROVAL OF SALE/SETTLEMENT**

(a) Funds paid to the trustee or attorney for the trustee pursuant to a pending sale or settlement require special consideration. These funds are held in trust until the sale or settlement is consummated in accordance with applicable bankruptcy law. In general, the funds should be deposited as soon possible; however, under certain circumstances, depositing the funds can be deemed to be acceptance of the terms of the proposed settlement. See Handbook Chapter 5.D.4 for how to handle the funds under these circumstances.

(b) The funds may not be commingled with personal, business, or law firm accounts, with one exception. The funds may be deposited to the trustee's or outside counsel's attorney trust account only if pursuant to a written escrow agreement or court order. The trustee must disclose on Form 1 where the funds are being held. 28 U.S.C. § 586.

(c) Absent the circumstances described above in 3.a and 3.b, the funds must be deposited in the estate account, in a segregated escrow account or in a trust account established specifically for this purpose. 28 U.S.C. § 586. It may be possible for the trustee to open the segregated escrow account as an adjunct to the primary estate account. However, the trustee must be cognizant of state law and banking or other regulations that may require the funds to be held in a trust account. The trustee is required to comply with all laws and regulations governing such accounts.[9] If a segregated escrow account or trust account is utilized, the funds are then accounted for as follows:

(1) The account has its own Form 2. The deposit is recorded and described as appropriate, such as "earnest monies" or "settlement proceeds held pending court approval." Since these types of funds are not recorded on Form 1 until transferred to the estate account, no Form 1 asset reference number is assigned.

(2) When the sale or settlement is approved by the court, the settlement proceeds or earnest monies paid by the successful bidder become an estate asset and are transferred to the estate account. They are then reported on Form 1 under "Sale/Funds Received by the Estate"

[9] For example, some states require attorneys to utilize an interest bearing account for funds held in trust. In these instances, the interest is usually remitted to the state.

(column 5) and referenced on Form 2 using the applicable Form 1 asset reference number.

(3) In the event of earnest monies received from unsuccessful bidders, refunds are made via checks written on the segregated account.[10] These checks are recorded on the Form 2 and described as "return of earnest monies received in connection with the sale of x asset."

## 4) HANDLING FUNDS WHICH CANNOT OR SHOULD NOT BE DEPOSITED IMMEDIATELY

(a) There are rare instances when funds 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 currency to a cashier's or teller's check or money order (any service charge 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. 28 U.S.C. § 586.

(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.

## 5) SUPPORTING DOCUMENTS FOR RECEIPTS

Supporting documentation for receipts, including copies of checks and transmittal letters (if any), must be kept in the estate file. 28 U.S.C. § 586. Sale orders or notices and reports of sale must also be kept in the estate file if not available electronically

[10] Depending upon local rules, the trustee may need to obtain a court order to return earnest monies to the unsuccessful bidders.

from the court or if they contain other information that supports the receipt, such as the trustee's handwritten notations about the sale. Supporting documentation should contain the related docket entry number or date, when applicable.

## E. CONTROLS OVER ESTATE BANK ACCOUNTS AND INVESTMENT OF ESTATE FUNDS

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. 28 U.S.C. § 586. Accounts may only be maintained at depositories which have agreed to abide by the requirements[11] established by the United States Trustee. 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. 28 U.S.C. § 586.

Generally, a trustee should utilize a single banking institution and should initially deposit funds to an interest-bearing account in order to maximize the return to creditors. The trustee must monitor bank account activity on a regular and ongoing basis. 28 U.S.C. § 586.

### 1) TYPES OF ACCOUNTS

Section 345(a) provides that a trustee may invest monies of an estate. Estate funds must be deposited or invested in order to provide a maximum, reasonable net return to creditors.

a. Interest Bearing Accounts

Interest-bearing estate accounts are either money market accounts or savings accounts. In considering the reasonableness of the return on interest-bearing estate bank accounts, the trustee may consider the following factors: (1) size of the account; (2) expected duration of the deposit; (3) size of the interest rate differential between the bank's rate and comparable market rates in other institutions or investment vehicles; (4) whether the trustee has negotiated with the bank for the highest possible interest rate; (5) interest rates offered by other banks that provide bankruptcy services; and (6) the value and cost of software and other services provided by the trustee's bank.

The trustee may be held personally liable for lost interest.

b. 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 must consider higher yield investments such as Certificates of Deposit or Treasury Bills. 28 U.S.C. § 586. In general, investments are to be as risk free as possible. The trustee must avoid investments that will predictably delay closing but at the

[11] For information about these requirements, contact the United States Trustee for the district in which the case is pending.

same time exercise care that no early withdrawal of funds or sale of an investment such as a Treasury Bill results in a loss to the estate. 28 U.S.C. § 586. Investment vehicles must be opened, issued or purchased in the name of the trustee as trustee of the estate. The trustee may not use investment vehicles such as repurchase agreements, reverse repurchase agreements, non-bank money market accounts, mutual funds, stocks, corporate bonds, and commercial paper.

c. Non-Interest Bearing Accounts

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

(1) 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;

(2) The trustee will soon be making an interim distribution to creditors; or

(3) The trustee is directed by court order to make an immediate distribution.

d. Bond Recovery Account

Some banks offer a concentration account, or "bond recovery account," to expedite the payment of bond premiums for the trustee. 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. 28 U.S.C. § 586. In addition, the account must be listed by the bank on its quarterly bank balance report to the United States Trustee.

## 2) OPENING THE ACCOUNT

In order to open the account, the bank may require proof of the trustee's 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, accordingly, 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 of the individual debtor. Failure to provide the tax identification number to the bank results in back-up withholding being assessed and remitted to the IRS by the banking institution. 28 U.S.C. § 586.

Banks can assess charges for services if not prohibited by the Uniform Depository Agreement and subject to court approval as reasonable.

### 3) BANK STATEMENTS, DEPOSIT SLIPS, AND CHECK STOCK

All bank statements, deposit slips and checks must contain the following information to clearly identify the account as pertaining to a bankruptcy estate: case number, case name followed by the word "Debtor," trustee's name, followed by the word "Trustee," and the trustee's mailing address. 28 U.S.C. § 586.

The check stock used by the trustee must be capable of being digitally reproduced in a legible image. Checks must be consecutively numbered either by the bank or by the trustee's case management system. Checks must include a statement that the check will be void if not cashed within 90 days. 28 U.S.C. § 586.

If checks are drawn on more than one account in an estate, the numerical sequence of the checks must 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). 28 U.S.C. § 586.

Blank check stock, if pre-printed with a bank logo, account number, and other identifying information, must contain a control number. The trustee must maintain a log of these control numbers and account for every check used. At a minimum, the log must indicate the control number and the bankruptcy case number/name. 28 U.S.C. § 586. 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.

Check stock and deposit slips must be kept in a secure location to prevent unauthorized access and use. 28 U.S.C. § 586.

### 4) REQUIREMENTS FOR DEPOSITORIES HOLDING BANKRUPTCY ESTATE FUNDS

The trustee may only use a depository that has agreed to comply with section 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.

It is the responsibility of the trustee to ensure that the banking institution is in compliance with section 345 to the extent of the trustee's deposits. If the aggregate funds on deposit for an estate in a single institution exceed the 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 $250,000. 28 U.S.C. § 586.

If a depository fails to comply with section 345 and/or United States Trustee requirements, the trustee must promptly notify the United States Trustee and arrange to move the funds to another depository. 28 U.S.C. § 586.

### 5) BANK ACCOUNT RECONCILIATIONS

The trustee or an assistant must reconcile all bankruptcy estate accounts before the end of the following month. 28 U.S.C. § 586. A bank reconciliation identifies the account balance per the bank statement and the account balance per the accounting records (Form 2), as of month end, and identifies the differences, such as deposits or transfers in transit, outstanding checks, NSF checks, service charges, and errors made by the bank or by the trustee. The reconciliation preparer must initial and date each bank reconciliation. The trustee, if not the reconciliation preparer, must review, initial and date the reconciliation reports as noted above. 28 U.S.C. § 586. Additional requirements for bank account reconciliations are provided in the Supplementary Materials

### 6) OTHER INTERNAL CONTROLS OVER BANK ACCOUNTS

a. Only the trustee and, at most, one employee may be authorized to: (1) open and close bank accounts, and (2) transfer funds between accounts of the same estate. These actions may be handled by letter, phone, or computer (e.g., via a dial-in or web-based computer system).

b. Care must be taken to ensure that estate bank accounts are promptly closed after the bank account has a zero balance and the TDR has been filed.

c. Regarding transfers, only intra-estate transfers between accounts are permitted. All other transfers must be by estate check (except for certain wire transfers discussed below).

## F. CONTROLS OVER DISBURSEMENTS

### 1) DISBURSEMENTS BY ESTATE CHECKS

a. All disbursements are to be made by estate checks drawn on the estate account (with the exception of items discussed in Handbook Chapter 5.F.2 below) and be fully supported by appropriate documentation (e.g., invoice, fee application, court order).

b. The trustee must review all supporting documentation and personally sign all checks. 28 U.S.C. § 586. No signature stamp may be used.[12]

c. Checks may not be pre-signed by the trustee before the date, payee, and amount are written in.

d. Checks must be made payable to a specific payee and not payable to "cash," "bearer," or "currency."

[12] An exception to this policy may be granted by the United States Trustee on a case-by-case basis. If a stamp with the trustee's signature is maintained in the office, it must be under the trustee's sole custody and control.

e. "Starter" checks (the initial check book provided by some banks for new accounts) may only be used when absolutely necessary and must be hand-numbered by the trustee upon receipt. Starter checks must be voided and maintained in the estate file upon receipt of bank-numbered checks or checks that are printed from the trustee's case management system.

f. As an additional control, the trustee may 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.

**2) OTHER FORMS OF DISBURSEMENT**

a. Except as noted below, the trustee must not approve conversion of estate checks to Automated Clearing House (ACH) transactions or electronic funds transfers (EFTs) and must instruct the bank to refuse any attempt to make such debits to estate accounts. 28 U.S.C. § 586.

b. Wire transfers may be used in the following circumstances without prior United States Trustee approval: (1) an immediate payment by a trustee is necessary to prevent loss to the estate or injury to a person or property and the person to whom payment will be made will not accept an estate check; (2) a wire transfer is required by applicable law or regulation; (3) a payment must be made to an overseas creditor or a foreign corporation; or (4) the court order approving the transaction requires that the trustee make payment by wire transfer (the trustee should oppose the routine inclusion of such requirements in court orders, however). All other wire transfers need to be approved in advance. The wire transfer bank advice and related documentation must be maintained in the estate file.

c. Cashier's or teller's checks may only be used under extraordinary circumstances, upon approval of the United States Trustee. A copy of the cashier's or teller's check and related documentation must be maintained in the estate file.

d. Counter checks may never be used.

e. Court fees, such as filing fees for adversary proceedings, may be paid by estate checks processed as ACH transactions or EFTs. They can also be paid electronically using the trustee's personal or firm credit card. The trustee may seek reimbursement and be paid in accordance with local rules.

f. Federal tax deposits (including those resulting from wage claims) must be remitted to the IRS using the Treasury's Electronic Federal Tax Payment System (EFTPS). Information about this system is available at: https://www.eftps.gov/eftps.

g. Payments to the court for unclaimed dividends and dividends less than $5 may be paid by estate checks processed as ACH transactions or EFTs.

**3) SUPPORTING DOCUMENTS FOR DISBURSEMENTS**

a. The supporting documentation must indicate the trustee's review and approval, which may be recorded electronically or by hand.

b. The supporting documentation must be kept in the estate file. Court orders for disbursements (when required) do not need to be kept in the estate file if available electronically from the court. But if the amount on the invoice or fee application differs from the amount approved in the court order, an explanation of the difference must appear on the supporting documentation. If there is no supporting documentation other than the court order electronically available from the court, a copy of the check may serve as supporting documentation. The supporting documentation should contain the related docket entry number or date, when applicable.

**4) OTHER INTERNAL CONTROLS OVER DISBURSEMENTS**

a. Checks that have been outstanding for more than 90 days require stop payments. The 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).

b. Both stop payments and 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 must be voided within the trustee's case management system and the cause of the problem researched and corrected before the checks are re-issued. Documentation must be maintained to verify the efforts undertaken.

c. Generally, voided checks are to be maintained in the estate files. However, checks that are used for printer alignment, damaged, or rendered useless during the check printing process must 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.

## G. OTHER RECORDKEEPING PROCEDURES AND INTERNAL CONTROLS

### 1) ESTATE RECEIVABLES

a. A receivables ledger or other tracking mechanism must be maintained for monitoring collections and following up on delinquent payments when multiple payments are being collected (e.g., accounts receivable, notes receivable, installment sales). It may be kept electronically or in paper format. An acceptable receivables ledger identifies the customer or payer, the balance due, amounts collected, and the status of collection efforts. It should reflect a running balance of amounts owed and be updated as payments are received.

b. If the trustee intends to turn over the receivables to a third party for collection, the initial demand letter must be sent by the trustee. In addition, the trustee must retain a control copy of the receivables turned over and request a periodic status report and accounting of the collection efforts undertaken, monies collected, and remaining balances due. 28 U.S.C. § 586.

### 2) INTERNET AUCTIONS AND SALES

a. Sales of estate assets through the Internet are acceptable, given proper safeguards. See Handbook Chapter 4.C.9.e for a general discussion of Internet auctions and sales.

b. An Internet commerce account (akin to a credit card account) may be used to facilitate sales of estate property through Internet auction sites. In addition, sites may offer "trustee sales" accounts for such purposes. Separate Internet commerce accounts shall be maintained for each estate so that funds from different estates are not commingled. Funds shall be transferred from the Internet commerce account to the estate bank account when the transaction is final.

c. If an Internet auction provider collects deposits or sale proceeds, or takes physical possession of the property to be sold, the trustee must ensure that the funds or assets are adequately protected from risk of loss (i.e., auctioneer is bonded and insured). 28 U.S.C. § 586, 11 U.S.C. § 704.

d. If the trustee sells the assets directly to the buyer, the trustee must ensure that the funds are received and cleared before shipping or releasing the goods to the buyer. 28 U.S.C. § 586.

### 3) COMPUTER SYSTEMS

#### a. SELECTION OF A COMPUTER SERVICE PROVIDER

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 for this purpose.

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

### b. 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. The trustee's use of computer equipment is not prohibited provided it is reasonable and necessary for, and devoted primarily to, the trustee's administration of chapter 7 cases. In addition, selection of a banking institution or computer service provider must be based upon customary business considerations, such as competitive interest rate, quality and service, and not on premiums or personal gain.

### c. PARTICIPATION IN CASE MANAGEMENT SOFTWARE DEVELOPMENT

The trustee may periodically be requested by the computer service provider to test new versions of the case management software and to participate in other software development efforts. When such software development activities occur away from the trustee's office, the following conditions apply:

(1) The trustee must be a current user of the computer service provider's software. 28 U.S.C. § 586.

(2) Travel is limited to the service provider's information technology center, which may also be the location of the company's headquarters.

(3) Annual participation away from the trustee's office may occur no more than two times per year or not more than ten days, whichever is less.

(4) The trustee may accept reimbursement of reasonable transportation, accommodations and meal costs.

### d. COMPUTER EQUIPMENT RECOMMENDATIONS

The Bankruptcy Court can provide the trustee with a list of recommendations for computer hardware and software that will enable the trustee to effectively operate in the CM/ECF[13] environment. Some items for the trustee to consider are: a CD burner, additional memory for the hard drive, a scanner with an automatic sheet feeder, and a laptop with a CD-Rom drive. These items may be provided by the trustee's computer service provider. The trustee may also

[13] CM/ECF is the acronym for the Bankruptcy Court's Case Management/Electronic Case Filing system.

want to consider, at the trustee's own expense, a high speed internet line, such as DSL, cable or a T-1 line.

**e. COMPUTER SECURITY MEASURES**

(1) The trustee, employees, and independent contractors must have unique passwords for the case management system and the Bankruptcy Court's CM/ECF system. Passwords must be changed at least quarterly and when a person leaves or no longer works on chapter 7 matters. 28 U.S.C. § 586.

(2) Access to the case management system must be limited according to the duties performed by the user. The ability to set up and change passwords and access settings must be limited to the trustee. 28 U.S.C. § 586.

(3) All users are to be familiar with the computer system user's manual. The manual must explain the system's features and how it operates.

(4) Computer equipment, including desktop computers and portable equipment with memory capability (e.g., laptops, personal digital assistants (PDAs), and removable drives such as USB flash drives and CD-ROMs), must be safeguarded from unauthorized access and use. Further, when portable equipment is not in use, it should be kept in a secure, limited access area. Certain peripherals (such as a MICR toner cartridge) must be kept under lock and key. Only authorized users are to have access to the chapter 7 computer programs and data via the terminal, network or modem.

(a) The trustee must not allow remote access to the trustee's computer system (including the Internet or wireless Local Area Networks (LANs)) unless the trustee has taken appropriate steps to ensure that the remote connection is secure. 28 U.S.C. § 586. A Virtual Private Network (VPN) is recommended.

(b) Only chapter 7 software vendor-provided laptops and storage media should be used to remotely access the chapter 7 software vendor-provided computer system. The trustee should confirm with the vendor, or an independent computer security consultant, that the proposed remote access solution meets industry security standards which generally include:

i. A VPN solution that authenticates remote users and encrypts network communications to the trustee's office network.

ii. A VPN solution that supports two-factor authentication and uses the most current Federal Information Processing Standard (FIPS) compliant encryption module.

iii. A service that is installed on a dedicated server (such as a VPN appliance) along with an appropriately configured firewall.

iv. Separate user accounts and passwords for VPN access and the trustee's computer system access.

v. The inability of users to change or set security or access rights to trusted systems remotely.

(5) The data within the case management system and all electronically maintained estate files must be backed-up daily. A copy of the back-up must be transferred to a secure off-site location at least weekly. The trustee is responsible for ensuring that the data and estate files are protected and recoverable. The trustee also needs to ensure the continued availability of the software needed to access the files.

(a) If the back-ups are conducted by the software provider, the trustee must obtain written assurances from the provider regarding data integrity, security, and recovery within a reasonable amount of time (e.g., 24 - 48 hours). 28 U.S.C. § 586. The trustee may want to keep local back-ups for use in the event that the service provider cannot restore the data within the necessary time frame.

(b) The trustee must ensure that the backup and recovery procedures are tested periodically. 28 U.S.C. § 586. The trustee is advised to routinely back up computer files that are not part of the daily back up described above.

(c) If the trustee upgrades the chapter 7 computer software or hardware, or converts to a new system, the trustee must ensure continued access to archived electronic case information. 28 U.S.C. § 586. This may require retention of the prior hardware and/or software. As a security matter, unused prior software generally should not be retained on the new system.

(6) The computer system and data must be protected from viruses, intrusion via the Internet, and power disruptions. The trustee must have virus protection software that is updated daily. 28 U.S.C. § 586.

(7) Hard drives of all laptops must be encrypted. The encryption tool must meet industry standards such as the most current FIPS. 28 U.S.C. § 586.

(8) Mobile storage media (for example, USB thumb drives) or the files on them must be encrypted. 28 U.S.C. § 586.

(9) Trustees must have a set of rules governing the use of the trustee's computer system by employees. 28 U.S.C. § 586. These rules should

explain the employee's responsibilities as a user and the penalties for noncompliance, and should include policies for employees regarding Internet access, personal use of the computer, personal email, and personal instant messaging. All employees must sign the policy acknowledging receipt of these rules of behavior and an understanding of their responsibilities. A Sample Rules of Behavior document is in the Supplementary Materials.

### 4) BUSINESS INTERRUPTION PLAN

The trustee must develop and maintain a written business interruption (or disaster recovery) plan for the estate financial and administrative records, as well as for the computer system and data. 28 U.S.C. § 586. A printed copy of the plan should be stored in the trustee's office and at an offsite location known to the trustee and staff.

### 5) RECORDS SECURITY AND RETENTION

#### a. RECORDS SECURITY

(1) Savings certificates, savings account books, investments, cash, blank checks, estate checks, and other items of value must be kept in a safe or locked cabinet.

(2) Within the trustee's office, all hard copy (paper) estate files, including accounting records, must be stored in secure facilities, not accessible to the public. When estate files and other bankruptcy papers or portable equipment with memory capability (e.g, laptops, PDAs, and removable drives such as USB flash drives and CD-ROMs), which may contain electronic estate files, are taken outside the trustee's office, these items must be handled in a secure manner and protected from loss or theft. See Handbook Chapter 5.G.5.e for the procedures that must be followed when theft or loss occurs.

#### b. FORM OF RECORDS

(1) Generally, unless otherwise noted in this Handbook, the trustee may keep estate records in paper form, electronic form, or some combination of both. Except for the items listed below, original documents may be scanned and discarded after the scanned image has been verified against the original.

(2) Following is a non-exhaustive list of items that must be kept in paper form:

(a) Bank reconciliations, bank statements, canceled or imaged checks and returned items, if any;

(b) Blank deposit slips and check stock; voided checks (if in the trustee's possession);

(c) Investment certificates and other evidence of estate investments;

(d) Promissory notes for installment sales and other original documents evidencing estate assets;

(e) Business interruption/disaster recovery plan; and

(f) Any original documents the trustee is required to keep pursuant to local rules.

(3) Estate files must be logically organized and readily accessible. Filing must be up-to-date. Financial records must be segregated from the other case administration records (such as pleadings). In general, records available electronically from the court (e.g., bankruptcy petitions, schedules, and statements; court orders for sales and disbursements) need not be kept in the trustee's estate files, unless these documents contain the trustee's notes about the administration of the case.

(4) Written evidence of individual and summary (if used) estate bank account reconciliations must be preserved and made available for review by the United States Trustee, upon request, or during the course of an audit or review of the trustee's operation. Summary reconciliations, which because of their format cannot be filed by estate, must be maintained for a minimum of four years. Individual bank reconciliations filed in estate files must be retained in accordance with the next section.

**c. INDIVIDUAL CASE RECORDS RETENTION**

(1) For an asset case, the trustee must retain the paper and electronic case files and estate accounting records for a period of at least two years after the date on which the trustee was discharged and during which a proceeding on the trustee's bond may be commenced. 28 U.S.C. § 586.

(2) Following is a non-exhaustive list of items that must be maintained for each asset case:

(a) All original bank account statements, duplicate deposit slips, and canceled checks.

(b) All other documents relating to the financial transactions of the estate (e.g., cash receipts log; receivables ledger; copies of incoming checks, transmittal letters, and other supporting documentation for receipts; bills or invoices for estate expenses; tax returns or waivers, etc.).

(c) All documents relating to the possession and maintenance of assets (e.g., receipts for property turned over to trustee, appraisals, inventories, casualty insurance, etc.).

(d) All documents relating to the supervision of professionals.

(e) All documents relating to the disposition of assets (e.g., lien documentation; collection letters; notices or advertisements of sales or abandonments; court orders as to the disposition of assets and the payment of expenses [except as noted above]; offers received, auctioneer's reports, etc., and all supporting documentation relating thereto).

(f) All notes and internal memos created in connection with the above, including case notes contained in the memo and note fields of the trustee's chapter 7 computer system, notations written on correspondence or memos to the file, records of telephone conversations, and time records.

(3) For a no-asset case, the trustee must retain in paper or electronic estate files all of the documentation that supports the trustee's independent investigation and determination that the case is a no-asset case, for a period of at least two years after the date on which the trustee was discharged and during which a proceeding on the trustee's bond may be commenced. 28 U.S.C. § 586. Such documentation may include: payoff letters, lien search results, appraisals, blue book values, meeting of creditor notes, etc. The trustee need not keep documents that are part of the official court file (e.g., the petition, schedules and statements), unless these documents contain the trustee's notes regarding the no-asset determination.

### d. TRUSTEE ACCESS AND CONTROL OF DEBTOR TAX RETURNS

(1) A trustee shall retain a debtor's tax returns in the appropriate section (e.g., the financial section) of the case file, either paper or electronic, from the date received until the tax returns are no longer necessary to either prepare for the meeting of creditors, to aid the trustee in the administration of the case, or to support any litigation in the case.

(2) Before the meeting of creditors, a trustee shall generally limit access to a debtor's tax returns to only trustee personnel directly involved in preparation for the meeting of creditors and case administration. Unless necessary to aid the trustee in carrying out the trustee's duties, no other office personnel shall be permitted to view or to copy a debtor's tax returns. The trustee shall provide mail and file clerks with guidance on the proper handling of debtor tax returns.

(3) A trustee shall limit the number of copies made of a debtor's tax returns to the minimum necessary to enable trustee personnel to carry out the trustee's duties. Once the need for a copy no longer exists, that copy shall be destroyed promptly using one of the methods described below.

(4) A trustee shall not permit copies of a debtor's tax returns to leave the trustee's office before the meeting of creditors, except as necessary to carry out the trustee's duties. The trustee, however, may provide copies of a debtor's tax

returns to the United States Trustee upon request of the United States Trustee. A trustee may also provide copies of a debtor's tax returns to the trustee's retained professionals as necessary to enable them to perform their duties.

(5) A trustee shall not provide copies of a debtor's tax returns to a creditor or any other party in interest, except pursuant to a court order or as an exhibit to a pleading that by rule must be served upon that creditor or party in interest.

(6) A trustee shall not permit any person other than the debtor, the debtor's attorney, or the representative of the United States Trustee to view a debtor's tax returns at the meeting of creditors. The exception to this is that, with the express written consent of the debtor and, if applicable, the debtor's attorney, the trustee may show a debtor's tax returns to a party in interest or the party's attorney. At the conclusion of the meeting of creditors, the trustee shall either return all copies of the debtor's tax returns to the debtor or return the copies to the trustee's office. If the trustee returns the debtor's tax returns to the debtor at the meeting of creditors, it is a recommended practice that the trustee shall state such on the record.

(7) Under no circumstances shall copies of a debtor's tax returns be discarded by the trustee at the meeting site or left unprotected so that they can be viewed by unauthorized persons.

(8) A trustee shall ensure that all copies of a debtor's tax returns in the trustee's possession are destroyed following the meeting of creditors, unless the trustee deems it appropriate to maintain copies for use in conjunction with further proceedings in the case. The trustee shall create and maintain a system to ensure that debtor tax returns that are not destroyed immediately after the meeting of creditors are maintained no longer than provided in this policy, and that the tax returns are handled in such a way as to protect a debtor's privacy to the extent reasonably possible. A suggested practice is to maintain a log of the tax returns not destroyed or returned following the meeting and periodically review the continued need to maintain such returns.

(9) After the meeting of creditors, a trustee shall not provide copies of a debtor's tax returns to any person other than the trustee's professionals or the United States Trustee except, when necessary, a trustee may use a debtor's tax returns as an evidentiary exhibit in connection with a court proceeding. If the trustee uses a debtor's tax returns as an exhibit, all information not germane to the issue before the court shall be redacted from the tax returns.

(10) If a trustee comes into possession of copies of a debtor's tax returns filed after the commencement of the case, those tax returns shall be handled and safeguarded in accordance with these guidelines.

(11) Hard copies of debtor tax returns shall be destroyed by shredding in the trustee's office or by a qualified professional firm that provides appropriate safeguards. Furthermore, the trustee shall institute and maintain procedures to

assure the security and ultimate permanent deletion of all electronic copies of debtor tax returns, including copies attached to email messages. Permanent deletion of electronic files should follow industry standards and best practices.

(12) These guidelines control to the extent that they conflict with other records retention guidelines of the United States Trustee.

### e. DUTY TO REPORT LOSS OR POTENTIAL LOSS OF PERSONALLY IDENTIFIABLE INFORMATION (PII)

(1) The trustee has a duty to report to the United States Trustee the loss or potential loss of personally identifiable information (PII), including the theft or the accidental loss of bankruptcy papers (such as meeting of creditors notices and final reports), desktop computers, laptops, PDAs, and removable drives such as USB flash drives and CDs. The trustee must report any loss or potential loss upon discovery even though the trustee may have limited information about the loss at that time.

(a) For purposes of this Handbook, the Program has adopted the definition of PII used by the Office of Management and Budget (OMB). OMB defines PII as information which can be used to distinguish or trace an individual's identity, such as name, Social Security number, or biometric records, etc., alone or when combined with other personal or identifying information, which is linked or linkable to a specific individual, such as date and place of birth or mother's maiden name, etc.

(b) Information that is not generally considered PII because it is shared by many people includes: first or last name, if common (like Smith or Jones); country, state or city of residence; age (especially if not specific); gender or race; name of school a person attends or workplace; and grades, salary, or job position. However, since this information could be used to identify a person when multiple pieces of it are brought together, even non-PII data such as this should be protected from loss.

(2) Notice to the United States Trustee may be by phone or email and must include a summary of the known details of the breach and any actions taken or proposed to be taken in response.

(3) Once the trustee has identified the scope of the loss or potential loss, the trustee must determine the appropriate course of action, the level of notification to affected individuals, the resources needed, and any appropriate remedial actions. 28 U.S.C. § 586. Some of the risk factors that the trustee may use to determine the appropriate response are: sensitivity of the data lost, amount of data lost and number of individuals affected, likelihood data is usable or may cause harm, likelihood the data was intentionally targeted, strength and effectiveness of security technologies protecting data, nature of

the data (operational or personal), and ability of the trustee to mitigate the risk of harm.

(a) Notification to Third Parties: The trustee must notify law enforcement authorities, the trustee's computer service provider, and insurance carriers, as appropriate. 28 U.S.C. § 586.

(b) Notification to Affected Individuals: The determination of the appropriate level of notification should take into consideration the risk the data loss poses to the individuals. At a minimum, the trustee must notify the affected individuals if the loss involves full social security numbers, or banking, credit card or other financial PII. The trustee must also review state law to determine if there are any state law requirements that govern notifications to affected individuals. Examples of non-state specific notification letters can be obtained from the United States Trustee. 28 U.S.C. § 586.

# 6. UNITED STATES TRUSTEE OVERSIGHT

The United States Trustee establishes, maintains, and supervises panels of chapter 7 trustees, and monitors and supervises the administration of cases under chapter 7 of the Bankruptcy Code. The goal of the United States Trustee in chapter 7 cases is to establish a system of oversight that will allow for the complete, economical, equitable and expeditious administration of cases, while allowing the trustee to exercise appropriate business and professional judgment in performing the trustee's fiduciary duties.

The United States Trustee monitors the trustee's case load and the trustee's service as a fiduciary in each case. Supervision begins when a trustee is assigned to a case and continues throughout the administration of the case. The United States Trustee monitoring system collects, integrates and analyzes information from a variety of sources. This information is used to evaluate the trustee's competency, commitment and integrity in discharging of the trustee's fiduciary obligations.

The United States Trustee has identified a number of important areas which are reviewed on an ongoing basis. This chapter discusses the major components of the trustee oversight process.

## A. TRAINING

Trustees are responsible to develop and maintain the requisite skills and knowledge of the Bankruptcy Code, Rules, any local bankruptcy rules, and case law. Further, they are required to be conversant with the provisions of this Handbook.

While not a substitute for the trustee's own self-education plan, the United States Trustee does provide regional and local training for all trustees on an ongoing basis. Training may cover Program standards and other requirements for trustee performance, including record keeping and reporting. Training for new trustees often 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.

At the national level, the Program periodically conducts trustee training seminars at its National Bankruptcy Training Institute which is located at the Department of Justice's National Advocacy Center on the campus of the University of South Carolina in Columbia, SC. The current training program is designed for trustees who have been receiving cases at least six months. It is taught primarily by seasoned trustees. Trustees receive information and tools to help them with all facets of case administration, including meetings of creditors; finding assets and maximizing the return to creditors; monitoring cases; claims administration; setting up their offices with strong internal controls and efficient reporting systems; and fighting bankruptcy fraud and abuse.

The Program also regularly coordinates with the chapter 7 trustee professional association, the National Association of Bankruptcy Trustees, to provide programs with a national perspective during their conferences.

## B. PERFORMANCE REVIEW

Trustees receive written performance reviews at least every two years. 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 all aspects of the trustee's administration of cases, including:

1. Civil and criminal enforcement

2. The trustee's performance in meetings of creditors and in court;

3. The trustee's supervision of professionals;

4. The size and age of the trustee's caseload;

5. The trustee's progress in closing cases;

6. The trustee's maximization of funds distributed to creditors;

7. The accuracy, timeliness, and completeness of the trustee's NDRs, TFRs, TDRs, TIRs, and operating chapter 7 reports;

8. The trustee's procedures for safeguarding estate assets;

9. The trustee's judgment in determining whether to administer assets;

10. The trustee's compliance with banking and bonding policies and procedures;

11. The trustee's cooperation and responsiveness regarding audits, examinations, and reviews;

12. The trustee's conduct in administering the trustee's cases, including dealing with debtors, creditors, attorneys, the court, and the United States Trustee; and

13. The number and nature of complaints against the trustee as well as the trustee's responsiveness in addressing the complaints;

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.

## C. INDEPENDENT AUDITS AND OTHER REVIEWS[14]

The United States Trustee periodically conducts audits, field exams, and case administration reviews of a chapter 7 trustee's accounting and case administration activities. The audit is performed by independent certified public accountants. The field exam and case administration review, or CAR, are performed by United States Trustee personnel.

In general, the trustee will be advised at least two weeks in advance of when the audit, field exam, or CAR will be conducted. The trustee must have all records available and make every effort to ensure that all appropriate employees are on hand. 28 U.S.C. § 586. If the trustee maintains a paperless filing system, the trustee should be prepared to download to CD or other appropriate medium the estate files and records for the cases selected by the reviewer. The trustee also may be asked to print documents from the trustee's case management system.

An audit or field exam lasts approximately two to three days in the trustee's office; a CAR may be completed in a single day. The person(s) performing the work will examine case files and accounting records and conduct interviews with the trustee and employees.

An exit conference will be held at the conclusion of the visit to the trustee's office. The findings will be explained and the trustee may receive recommendations to improve internal controls, record keeping, and case administration procedures.

### 1) AUDIT AND FIELD EXAM REPORTS

A written report on the results of the audit or field exam is issued usually within 60 days of the exit conference. The United States Trustee forwards the report to the trustee, and the trustee must provide a written response to the United States Trustee within 45 days. 28 U.S.C. § 586. The trustee's response must describe and document 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.

If the report states that the trustee's procedures are inadequate and not in accordance with this Handbook and sound business practices, 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 means that the quality of the trustee's accounting and cash management practices and procedures is insufficient for safeguarding bankruptcy estate funds and assets. The United States Trustee will issue

[14] The terms "audit," "examination or exam," and "review" also are terms of art used by the accounting profession. As used by the Program, an "audit" is performed in accordance with generally accepted government auditing standards (GAGAS) for performance audits, except as noted in the audit reports. An "exam" and a "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.

a written notice of suspension pursuant to 28 C.F.R. § 58.6. An interim directive requiring immediate suspension of case assignments may be issued, if the circumstances under section 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 for case assignments to resume.

### 2) CASE ADMINISTRATION REVIEW REPORTS

When applicable, the trustee will receive a written notice of deficiencies with deadlines for implementing corrective actions. The trustee will be requested to 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, in limited circumstances, accept documentation to verify implementation of the corrective actions described in the trustee's response.

## D. COMPLIANCE MEASURES

### 1) REMEDIAL ACTIONS

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 remedial action by the United States Trustee. Imposition of remedial action is at the discretion of the United States Trustee.

Remedial actions are warranted to remedy inadequate trustee performance, including substandard reporting or asset investigation efforts, repeated instances of underbonding, inadequate internal controls, ineffective case administration, dilatory case administration, unprofessional behavior, and failure to liquidate assets for the benefit of unsecured creditors. The remedies available to the United States Trustee include mandatory education, imposition of case closing schedules, motions to compel the filing of reports, objections to compensation, motions seeking disgorgement or surcharge, temporary suspension or termination of the trustee from panel rotation, and an application to the court to permanently remove the trustee from all cases.

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. In addition to the actions listed above, the remedies available to the United States Trustee include temporary restraining orders, orders for turnover of books and records, orders freezing estate accounts, and referral to law enforcement agencies, the United States Attorney and state licensing authorities.

## 2) 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 or terminate the assignment of cases to the trustee. Suspension from panel rotation includes an affirmative decision by the United States Trustee to reduce a trustee's regular case assignments to give the trustee an opportunity to improve performance or as a result of an enforcement action. It does not include reductions in regular case assignments as a result of the United States Trustee's decision to increase the size of the chapter 7 panel. 28 C.F.R. § 58.6(k).

The panel trustee will continue to receive cases for the next twenty days following a suspension or termination, or longer if the panel trustee appeals the United States Trustee's decision to the Director of the Executive Office for United States Trustees. 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 section 58.6(b). 28 C.F.R. § 58.6(e).

After exhausting all available remedies, a trustee may obtain judicial review of the decision of the Director. Available administrative remedies include, if the trustee elects, a right to have an administrative hearing on the record. See 28 U.S.C. § 586(d)(2).

## 3) VOLUNTARY SUSPENSION

There may be circumstances when a trustee voluntarily seeks temporary suspension from case assignments. In this event, the trustee must submit to the United States Trustee a Notice of Voluntary Suspension. 28 U.S.C.§ 586. The format of the Notice is provided in the Supplementary Materials. A trustee may request a suspension for personal reasons. For example, the trustee may have health concerns, wish to take parental leave or need to care for a family member. A trustee may also request suspension for case administration reasons; for instance, if the trustee has a temporarily large caseload or an unusually large, complex case.

A trustee may also request a suspension for the purpose of correcting deficiencies in the trustee's administration of bankruptcy estates. The United States Trustee and trustee may agree to modify the Notice of Voluntary Suspension to delete the time period. If the trustee wishes to end the voluntary suspension and requests to return to rotation and the United States Trustee disagrees, the United States Trustee will issue a Notice of Suspension (discussed above).

Normally, a voluntary suspension may not exceed one year.