

Chapter 3-17: SUBCHAPTER V CHAPTER 11 CASES

3-17.1 INTRODUCTION

The Small Business Reorganization Act of 2019 (“SBRA”), Pub. L. No. 116-54, effective February 19, 2020, provides that a small business debtor may elect at the time of filing to proceed under a new subchapter V of chapter 11. This section of the manual discusses the provisions of the new law, including the legal rights and duties of the debtor and other parties, and the new responsibilities of the United States Trustee.

3-17.1.1 Statutory Framework

The major changes to chapter 11 made by SBRA for small business cases in which the debtor elects to proceed under subchapter V are highlighted below:

- A trustee is appointed in every case tasked primarily with facilitating a consensual plan.
- The court conducts a mandatory status conference within the first 60 days of the case. A status report must be filed by the debtor prior to the status conference.
- There is no required disclosure statement or mandatory unsecured creditors’ committee, unless the court orders otherwise.
- Only the debtor may file a plan, but it must do so within 90 days of the petition date, except with permission of the court for cause as described below.
- Plans may be confirmed consensually or through cram down. Each leads to different results under SBRA in terms of trustee retention, modification requirements, and timing of discharge, among other things.
- Debtors are not required to pay quarterly fees to the United States Trustee.

The legislative purpose of the SBRA was to provide a fast track for small businesses to confirm a consensual plan with the assistance of a private trustee. SBRA’s key provisions seek: to increase a debtor’s ability to negotiate a successful reorganization while retaining control

of its business; to reduce “unnecessary procedural burdens and costs” by eliminating the creditors’ committee and disclosure statement requirements; and to increase oversight and ensure quick reorganizations.

Debtors electing to proceed under subchapter V are subject to several additional requirements, set forth in more detail in Manual 3-17.5 below. These include reporting to the court and parties on progress towards achieving a consensual plan of reorganization and adhering to an accelerated schedule for confirming a plan.

3-17.1.2 Role of the United States Trustee in General

Under SBRA, the United States Trustee appoints and supervises subchapter V trustees and, as in other chapter 11 cases, takes enforcement action to ensure compliance with the Bankruptcy Code and Rules. As a practical matter, the United States Trustee generally should not take an enforcement action in a subchapter V case without first consulting and coordinating with the trustee appointed in the case to ensure that the United States Trustee is not frustrating the trustee’s ability to facilitate a consensual plan. This is especially true during the first 90 days of the case. Moreover, the United States Trustee should not take action that would unduly frustrate the debtor’s implementation of a consensual plan.

3-17.2 SUBCHAPTER V ELECTION BY DEBTOR

Election to proceed under subchapter V is at the discretion of the debtor, but this election should be made in the petition (or, in an involuntary case, within 14 days of the entry of the order for relief). *See* Proposed Int. R. Bankr. P. 1020(a). Although neither the Bankruptcy Code nor the Bankruptcy Rules discuss amending the election after the petition has been filed, there is a general right to amend a voluntary petition under Rule 1009. The United States Trustee generally should not object to such an amendment unless it appears to be offered in bad faith or adversely affects the rights of creditors.

3-17.3 ROLE OF THE SUBCHAPTER V TRUSTEE

The United States Trustee will appoint a private trustee in each

subchapter V case. Section 1183(a) provides that the United States Trustee may appoint a standing trustee pursuant to 28 U.S.C. § 586(b) to handle such cases. If no standing trustee has been appointed, the United States Trustee shall appoint a disinterested person to serve as the trustee for a case. If necessary, the United States Trustee may serve as trustee. This should occur in only the rarest of circumstances, and the United States Trustees should not appoint themselves without obtaining approval from the Assistant Director for Oversight.

Under section 1183(b)(1), upon appointment, the trustee shall perform the duties specified in sections 704(a)(2), (5), (6), (7), and (9):

- Being accountable for all property received. 11 U.S.C. § 704(a)(2).
- Examining proofs of claim and objecting as needed. 11 U.S.C. § 704(a)(5).
- Opposing the debtor's discharge, if advisable. 11 U.S.C. § 704(a)(6).
- Furnishing information concerning the estate requested by a party in interest, unless the court orders otherwise. 11 U.S.C. § 704(a)(7).
- Making a final report and filing an account of the administration of the estate with the court and the United States Trustee. 11 U.S.C. § 704(a)(9).

If there is a claim for a domestic support obligation with respect to the debtor, the trustee must furnish the notice required by section 704(c).

The trustee also is charged with facilitating the development of a consensual plan of reorganization and ensuring that the debtor commences making timely payments under any confirmed plan. 11 U.S.C. §§ 1183(b)(4), (7). The trustee must also take part in the status conference required by section 1188(a) and at any hearing concerning the value of property subject to a lien, confirmation of a plan, or sale of property of the estate. 11 U.S.C. § 1183(b)(3).

Given the prescribed duties, the trustee should attend the initial debtor interview (IDI) convened by the United States Trustee with the debtor and debtor's counsel within 10 days after the case is filed and begin

the process of facilitating a consensual plan with the debtor. And the trustee should participate in the section 341 meeting of creditors convened by the United States Trustee to question the debtor and continue the facilitation of a consensual plan. The United States Trustee may also consult with the trustee to determine whether an inspection of the debtor's business premises, books, and records permitted under section 1116(7) is necessary or appropriate. 11 U.S.C. §§ 1116(7) and 1187(b). In addition, the trustee should be heard by the court on any extension sought by the debtor under section 1189(b) to file a plan beyond 90 days after the order for relief.

Section 1194 permits, but does not require, a debtor to make adequate protection payments through the trustee. If the trustee holds funds pre-confirmation, then upon confirmation, section 1194 directs that the trustee either distribute those funds in accordance with a confirmed plan or return those funds to the debtor after deducting any (1) unpaid administrative expenses, (2) adequate protection payments due to a secured lender, and (3) fees owing to the trustee.¹ 11 U.S.C. § 1194(a).

For cause, and upon the request of a party in interest, the court may also require the trustee to perform the duties specified in sections 1106(a)(3), (4), and (7)—to investigate the conduct and financial condition of the debtor, and any other matter relevant to the case; to file a report of any investigation conducted; and, after confirmation, to file any such reports that are necessary or as the court orders. 11 U.S.C. § 1183(b)(2).

In addition, if the court orders under section 1185 that the debtor shall no longer be a debtor in possession, the trustee shall perform the duties required by section 704(a)(8) and section 1106(a)(1), (2), and (6), including:

- Operating the debtor's business. 11 U.S.C. § 1183(b)(5).
- Filing any required schedules and statements. 11 U.S.C. § 1106(a)(2).
- Filing periodic operating reports. 11 U.S.C. § 704(a)(8).

¹ The trustee's fees should not be paid until they are awarded by the court pursuant to 11 U.S.C. § 330. *See* Manual 3-17.15.2.

- Serving as the administrator of any employee benefit plan. 11 U.S.C. § 704(a)(11).
- Making reasonable efforts to transfer patients from a closing health care business to a new provider offering similar services. 11 U.S.C. § 704(a)(12).
- And, for any year in which a tax return has not been filed, furnishing such information as may be required by the applicable governmental entity. 11 U.S.C. § 1106(a)(6).

11 U.S.C. § 1183(b)(5). In such cases, the trustee is an independent third party who “steps into the shoes” of the debtor’s management and becomes a fiduciary with an obligation of fairness to all parties in the case.

Note that although the subchapter V trustee may employ professionals under section 327(a), subchapter V is intended to be a quick and low cost process to enable debtors to confirm consensual plans in a short period with less expense while returning appropriate dividends to creditors. Therefore, the services required of outside professionals, if any, will be limited in many cases. This is especially important in cases in which the debtor remains in possession.

Additional information regarding the role, qualifications, and oversight of subchapter V trustees may be found in Manual 3-17.16.

3-17.4 CREDITORS’ COMMITTEE ONLY ON ORDER OF COURT

SBRA amended section 1102(a)(3) to provide “[u]nless the court for cause orders otherwise, a committee of creditors may not be appointed in a small business case or a case under subchapter V of this chapter.”² Therefore, the United States Trustee will not appoint a creditors’ committee in either a small business case or a subchapter V case unless the court orders such an appointment for cause. Generally, the United States Trustee will not have sufficient information to establish cause for the appointment of a creditors’ committee.

² SBRA deleted the existence or level of activity of a creditors’ committee as a criterion for status as a “small business debtor,” including a subchapter V debtor. 11 U.S.C. § 101(51D).

3-17.5 SUBCHAPTER V DEBTOR'S DUTIES

Subchapter V debtors are subject to many of the same requirements as non-electing small business debtors, despite the fact that section 1116 does not apply in subchapter V cases. *See* 11 U.S.C. § 1181(a). That is because section 1187 applies most of the duties under section 1116 to subchapter V cases by reference. For example, section 1187(a) applies most of subsection 1116(a)(1), and section 1187(b) applies subsections 1116(a)(2)-(7).

As a result, subchapter V debtors must:

- File the small business case documents required by section 1116(1). 11 U.S.C. § 1187(a).
- File the periodic financial reports required by section 308 and Rule 2015(a)(6). 11 U.S.C. § 1187(b).
- Attend meetings scheduled by the United States Trustee and the court, including IDIs, scheduling conferences and section 341 meetings as required by section 1116(2). 11 U.S.C. § 1187(b).
- Timely file all schedules and statement of financial affairs. 11 U.S.C. § 1187(b).
- File post-petition financial and other reports as required by section 1116(4), including a list of the 20 largest unsecured creditors (*see* Rule 1007(d)), monthly operating reports (*see* Rule 2015(a)(6)), and entity ownership reports (*see* Rule 2015.3). 11 U.S.C. § 1187(b).
- Maintain insurance per section 1116(5). 11 U.S.C. § 1187(b).
- File tax returns per section 1116(6). 11 U.S.C. § 1187(b).
- Allow the United States Trustee to inspect the debtor's premises, books, and records per section 1116(7). 11 U.S.C. § 1187(b).

But unlike non-electing small business debtors, subchapter V debtors must also attend a status conference no later than 60 days after the order for relief to further the expeditious and economical resolution of the case, and to encourage and facilitate the attainment of a consensual plan. 11 U.S.C. § 1188(a). This 60-day period can be extended for circumstances for which the debtor should not justly be held accountable. 11 U.S.C. § 1188(b). Not later than 14 days before the status conference the debtor is required to file with the court and

serve on all parties a report detailing the debtor's past and anticipated efforts to attain a consensual plan of reorganization. 11 U.S.C. § 1188(c).

3-17.6 **UNITED STATES TRUSTEE'S OVERSIGHT OF SUBCHAPTER V CASES**

It is important to note that 28 U.S.C. § 586(a)(7) *does not apply* to subchapter V cases. This subsection is the source of many of the United States Trustee's duties to oversee small business cases. But by its terms, subsection 586(a)(7) applies only to "small business cases," which are chapter 11 cases of small business debtors that have not elected treatment under subchapter V. *See* Pub. L. No. 116-54, § 4(a)(1)(A).

This does not mean, however, that the United States Trustee will not monitor subchapter V cases. SBRA amended 28 U.S.C. § 586(a)(3) to expressly include the United States Trustee's general duty to supervise the administration of subchapter V cases.

Thus, in general, the United States Trustee should take appropriate action where a debtor is not fulfilling its duties as a debtor in possession, but remain mindful of SBRA's goals of increasing the debtor's ability to negotiate a successful reorganization by reducing unnecessary procedural burdens and costs.

Similarly, as more fully set forth in Manual 3-17.16, the United States Trustee should also supervise the trustee pursuant to 28 U.S.C. § 586(a)(3) and take appropriate action where a trustee is not fulfilling the required trustee duties, or is engaging in misconduct. If necessary, the United States Trustee may seek to remove a trustee pursuant to section 324. The Office of the General Counsel must review and approve all proposed motions by United States Trustees to remove a trustee. The United States Trustee should consult the Office of Oversight prior to submitting the proposed motion to the Office of the General Counsel. The United States Trustee also must notify the Office of Oversight whenever a motion to remove a trustee under section 324 has been filed by third parties.

When a subchapter V case is filed, the United States Trustee appoints the trustee and schedules the section 341 meeting of creditors in

accordance with Rule 2003. If the United States Trustee has a pool of case-by-case trustees available for appointment instead of a standing trustee, the United States Trustee should review the facts and circumstances of the case and the skills of the trustees in the pool to select the trustee best suited for the given case. The United States Trustee, who generally presides at the meeting of the creditors, should schedule the meeting after consulting with the trustee to ensure the trustee is available to attend the meeting, consistent with the trustee's duty to facilitate a consensual plan under section 1183(b)(7).

The United States Trustee must communicate the selection of the trustee (if a case-by-case trustee) and the date of the section 341 meeting quickly to the clerk of court (within one to two days after the case is filed, if possible) to avoid unduly delaying the initial administration of the case. In addition to notifying the clerk about the selection of the trustee and the date of the section 341 meeting, the United States Trustee should concurrently or promptly thereafter file a Notice of Appointment with the court with an attached verified statement by the trustee disclosing that the trustee is disinterested and the trustee's proposed arrangement for compensation.

The United States Trustee should facilitate the participation of the trustee in the United States Trustee's case oversight activities, such as the IDI or any site visit. The United States Trustee should coordinate with the trustee in scheduling the IDI within 10 days after the case is filed. At the IDI, the United States Trustee should discuss the facts of the case and explain the administrative requirements of the case to the debtor and debtor's attorney with the trustee present, including required financial information, taxes, insurance, debtor in possession bank accounts, and monthly reports.

The United States Trustee may also consult with the trustee to determine whether an inspection of the debtor's business premises, books, and records permitted under section 1116(7) is necessary or appropriate. 11 U.S.C. §§ 1116(7) and 1187(b). Any such inspection should be coordinated with the debtor, debtor's counsel, and the trustee. There should be no "surprise" inspections.

The United States Trustee should review the materials received from subchapter V debtors under section 1187. The United States Trustee

should also review the debtor's report and attend and participate in the status conference required by section 1188(a) to inform the court about any administrative deficiencies or other concerns in the case. Before the status conference, the United States Trustee should consult with the trustee, who is required to attend, about the trustee's views of the case.

Under section 1185, the United States Trustee and other parties may file a motion to remove the debtor in possession for "cause," including pre- or post-petition "fraud, dishonesty, incompetence, or gross mismanagement" or for default under a confirmed plan. 11 U.S.C. § 1185(a). *See also* 11 U.S.C. § 307. If the court grants the motion, or acts *sua sponte*, the debtor in possession is removed and the subchapter V trustee is empowered to operate the business, file reports with the court, and file tax returns. 11 U.S.C. § 1183(b)(5).

Other duties of the United States Trustee include reviewing the plan, monitoring the case post-confirmation and, if necessary, reappointing a trustee. The post-confirmation duties are described in Manual 3-17.10.

3-17.7 SUBCHAPTER V EXCLUSIVITY PERIODS AND DISCLOSURE REQUIREMENTS

SBRA imposes substantially different exclusivity period and disclosure statement requirements for cases under subchapter V. Section 1121 does not apply with respect to exclusivity. 11 U.S.C. § 1181(a). Instead, only the debtor may file a plan, and that plan must be filed not later than 90 days after the order for relief under chapter 11. 11 U.S.C. § 1189(a), (b).

The court may extend the 90-day period if the need for the extension "is attributable to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1189(b). The statute does not limit the length or number of potential extensions. The United States Trustee should review requests for extensions and in most cases, discuss those requests with the trustee serving in the case. The trustee should be heard by the court on such extensions. After consulting with the trustee, the United States Trustee should consider objecting if it appears that the case is languishing with no real prospect for

rehabilitation.

Section 1125 does not apply in subchapter V unless the court for cause orders otherwise. 11 U.S.C. § 1181(b). Therefore, absent a court order, the debtor need not file a disclosure statement with the plan.³ The plan, however, must include:

- a brief history of the business operations of the debtor;
- a liquidation analysis; and
- projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.

11 U.S.C. § 1190(1). This information is the core information that creditors and other interested parties would expect to see included in a disclosure statement filed under section 1125. The United States Trustee should review plans filed under subchapter V and file comments or objections if the disclosures appear to be inadequate. *See* 28 U.S.C. § 586(a)(3)(B).

3-17.8 SUBCHAPTER V PLAN REQUIREMENTS

The requirements for a plan in a subchapter V case can be found in certain subsections of 1123 and in new sections 1181(a) and 1190. Specific confirmation requirements are discussed further in Manual 3-17.9.

In general, section 1123 of the Code governing the contents of chapter 11 plans applies in subchapter V cases. Significantly, sections 1181(a), 1190(2), and 1190(3) contain three exceptions for subchapter V cases filed by individual debtors.

First, section 1181(a) provides that subsection 1123(a)(8), which requires that an individual chapter 11 debtor dedicate earnings from personal services as are necessary for the execution of the plan, does not apply in subchapter V cases. Instead, the plan must provide for the submission of such portion of the future earnings or other future

³ Note that if the court directs the filing of a disclosure statement in a subchapter V case, section 1125(f) will apply. 11 U.S.C. § 1187(c). That subsection relaxes disclosure requirements for small business cases. 11 U.S.C. § 1125(f). *See also* Official Bankr. Form 425B.

income of the individual debtor to the supervision and control of the trustee as is necessary for the execution of the plan. 11 U.S.C.

§ 1190(2). Note that this requirement applies only if the plan provides for periodic payments from income. Although most plans will contain such a provision, it is not required unless the plan is confirmed non-consensually under section 1191(b), as discussed in Manual 3-17.9.

Second, section 1181(a) provides that subsection 1123(c) does not apply. That subsection provides that a plan concerning an individual chapter 11 debtor cannot rely on the debtor's exempt property unless the debtor consents. It is unnecessary in a subchapter V case because only the debtor may file a plan.

Third, section 1190(3) creates a limited exception to the general proposition that a plan of reorganization cannot provide for the modification of a claim secured only by a security interest in the principal residence of an individual debtor. *See* 11 U.S.C.

§ 1123(b)(5). Section 1190(3) permits the modification of the rights of the holder of such a claim if the new value received by the debtor in connection with the granting of the security interest was not used primarily to acquire the residence and was used primarily in connection with the debtor's small business. 11 U.S.C. § 1190(3). Secured creditors holding such claims are expected to police their own rights in connection with plans providing for the modification of their claims.

Other provisions of section 1123 govern all plans filed in subchapter V cases, including plans filed by individual debtors. In addition, section 1190(1) specifies the required disclosures in the subchapter V plan, as discussed in Manual 3-17.7. 11 U.S.C. § 1190(1).

3-17.9 SUBCHAPTER V PLAN CONFIRMATION

Confirmation of a plan is governed by a combination of certain subsections of section 1129 and new section 1191. Section 1191(a) provides that the following subsections of section 1129 *do not* apply in a subchapter V case: 1129(a)(15) (means test in individual chapter 11 cases); 1129(b) (cram down provisions); 1129(c) (court may confirm only one plan); and 1129(e) (requirement that plan in small business case be confirmed within 45 days).

Subchapter V does require that the plan classify claims and that it be submitted to creditors for balloting. 11 U.S.C. §§ 1122 and 1191(a). As discussed below, confirmation of a plan under section 1191 is either consensual or, if one or more impaired classes votes to reject the plan, non-consensual.

Note that priority claims under sections 507(a)(2) (administrative expenses) and 507(a)(3) (unsecured “gap period” claims in involuntary cases) may be paid over the life of the plan, presumably in full, notwithstanding section 1129(a)(9)(A). 11 U.S.C. § 1191(e). A plan providing for such delayed payment of these priority claims must be confirmed non-consensually under 11 U.S.C. § 1191(b).

As described below, a plan that cannot be confirmed consensually under 11 U.S.C. § 1191(a) may still be confirmed non-consensually (*i.e.*, by “cram down”) if the requirements of 11 U.S.C. § 1191(b) are met.

3-17.9.1 Consensual Plans

Section 1191(a) provides that the court may confirm a plan only if all requirements of section 1129(a) other than 1129(a)(15) are met. This is “consensual” confirmation. Effectively, this requires that all impaired classes accept the plan.

In a consensual plan, the debtor generally makes payments under the plan directly. Except as otherwise provided in the plan or confirmation order, the confirmation of a consensual plan discharges the debtor under section 1141(d), and section 1141(d)(5) does not apply in subchapter V cases to delay the discharge for individual debtors. 11 U.S.C. § 1181(a).

The trustee’s services are terminated upon the substantial consummation of a consensual plan. 11 U.S.C. § 1183(c)(1).

3-17.9.2 Non-consensual Plans

A plan that is not confirmed consensually under section 1191(a) can still be confirmed “non-consensually” under section 1191(b).

Generally, section 1129(b) does not apply in a subchapter V case. Instead, section 1191(b) permits the court, on request of the debtor, to confirm a plan that does not meet the requirements of subsections 1129(a)(8), (10), or (15). Subsection (a)(8) requires that all impaired classes accept the plan. Subsection (a)(10) requires, as a prerequisite to cram down under 11 U.S.C. § 1129(b), that at least one impaired class of claims has accepted the plan. And subsection (a)(15) requires that if an unsecured creditor objected to the plan in a case filed by an individual debtor, the debtor pays the greater of the amount of the claim or the debtor's projected disposable income for five years.

To confirm a subchapter V plan non-consensually under section 1191(b), the court must find that the plan does not discriminate unfairly and that the plan is fair and equitable with respect to each class of impaired claims or interests that has not accepted the plan. While the standards for the unfair discrimination prong are the same as under section 1129(b)(1) applicable to other chapter 11 cases, what is "fair and equitable" with respect to unsecured creditors is different and the absolute priority rule of subsection 1129(b)(2) does not apply.

Section 1191(c) defines "fair and equitable" under a non-consensual plan. There are four requirements.

First, for a class of secured claims, subsection 1191(c)(1) incorporates the fair and equitable standards from subsection 1129(b)(2)(A). Section 1129(b)(2)(A) provides three alternatives for what is "fair and equitable" treatment for a secured claim. First, the plan may provide for the retention by the holder of the claim of the liens securing the claim and the payment to the holder of deferred cash payments totaling at least the allowable amount of the claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in the property securing the liens. 11 U.S.C. § 1129(b)(2)(A)(i). Second, the plan may provide for the sale, subject to 11 U.S.C. § 363(k), of the property securing the liens, free and clear of the liens, with the liens to attach to the proceeds of such sale, and the treatment of such liens under subsection (i) or (iii) of section 1129(b)(2)(A). 11 U.S.C. § 1129(b)(2)(A)(ii). Third, the plan may provide for the realization by the holder of the secured claim of the "indubitable equivalent" of such claim. 11 U.S.C. § 1129(b)(2)(A)(iii).

Second, for other impaired classes, a plan is fair and equitable if, as of the effective date of the plan, it provides that (a) all of the debtor's projected disposable income for the three- to five-year period (as fixed by the court) will be applied to make payments under the plan, *or* (b) the value of the property to be distributed under the plan during the three to five-year period is not less than the projected disposable income of the debtor. 11 U.S.C. § 1191(c)(2). Thus, the debtor is not required to satisfy the "absolute priority rule" applicable in other chapter 11 cases.

For purposes of 11 U.S.C. § 1191(c)(2)(A), "disposable income" is defined as income received by the debtor that is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor, for a post-petition domestic support obligation, or for the payment of necessary business expenditures. 11 U.S.C. § 1191(d). For individual debtors, the disposable income test is akin to that in chapter 12, *see* 11 U.S.C. § 1225(b)(2), and is not based on the "means test" as in chapter 7 under section 707(b)(2) or in chapter 13 under section 1325(b)(2).

Third, the plan must provide that the debtor will be able to make all plan payments or that there is a reasonable likelihood that the debtor will be able to make the payments. 11 U.S.C. § 1191(c)(3)(A).

Finally, the plan must provide "appropriate remedies" to protect holders of claims or interests if the payments are not made, including liquidation of nonexempt assets. 11 U.S.C. § 1191(c)(3)(B).

When a plan is confirmed non-consensually, under section 1192 the debtor will not receive a discharge until after the debtor has made all plan payments due within three to five years, as set by the court. Section 1141(d)(5), which would otherwise delay discharge for individual debtors, does not apply in subchapter V cases. 11 U.S.C. § 1181(a). Debts on which the last payment is due after the first three years of the plan, or up to five years as fixed by the court, are not discharged. 11 U.S.C. § 1192(1). Furthermore, debts excepted from discharge under section 523(a) are not discharged. 11 U.S.C. § 1192(2).

In a non-consensual plan, except as otherwise provided in the plan or the confirmation order, the trustee shall make the payments to creditors under the plan, pursuant to section 1194(b).

3-17.10 SUBCHAPTER V POST-CONFIRMATION

Not later than 14 days after the debtor's consensual plan is substantially consummated, the debtor shall file a notice of substantial consummation and serve this notice on the subchapter V trustee, the United States Trustee, and all parties in interest. 11 U.S.C. § 1183(c)(2).

If the trustee is holding funds upon confirmation, regardless of whether the plan is consensual or non-consensual, the trustee should distribute those funds in accordance with the plan. 11 U.S.C. § 1194(a).

If the plan is consensual, unless otherwise provided in the plan or ordered by the court, the subchapter V trustee's duties terminate with substantial consummation. 11 U.S.C. § 1183(c)(1). Trustees should promptly file their compensation and expense requests, pursuant to section 330 for case-by-case trustees or 28 U.S.C. § 586 for standing trustees (*see* Manual 3-17.15), and distribute any funds on hand in accordance with the plan. In cases in which trustees made no distributions, the trustee shall file a report of no distribution with the court in accordance with section 1183(b)(1), which incorporates section 704(a)(9). In cases in which the trustee made distributions, the trustee should promptly submit the final report and account of administration to the United States Trustee for review pursuant to section 1183(b)(1). After review, the final report and account will be filed with the court. 11 U.S.C. §§ 1183(b)(1); 704(a)(9).

If the plan is non-consensual, the trustee will disburse payments under the plan, unless otherwise provided in the plan or confirmation order. 11 U.S.C. § 1194(b). The trustee should file with the court quarterly reports as prescribed by the court, and submit a copy of those quarterly reports to the United States Trustee for review, during the period in which the trustee continues to make plan payments. 11 U.S.C. §§ 1183(b)(2); 1106(a)(7). Upon completion of all plan payments, the trustee should submit the final report and final account

of the administration of the estate to the United States Trustee for review pursuant to section 1183(b)(1). After review, the final report and account will be filed with the court. 11 U.S.C. §§ 1183(b)(1); 704(a)(9).

If the debtor fails to perform under the plan, the United States Trustee should consider the appropriate response, which could include a motion for conversion or dismissal, revocation of the confirmation order if circumstances warrant under section 1144, or reappointment of a previously terminated trustee. *See generally* Manual 3-11.6.

3-17.10.1 Final Decree and Case Closing

After substantial consummation of a consensual plan, as provided in section 1101(2), and termination of the trustee's services pursuant to section 1183(c)(1), the debtor may proceed to seek entry of a final decree closing the case pursuant to section 350(a) and Fed R. Bankr. P. 3022, upon a showing that the estate has been fully administered and that there are no remaining matters for which the court must continue to exercise jurisdiction.

If the confirmed plan is non-consensual and the trustee is responsible for making plan payments to creditors, the case ordinarily will remain open after substantial consummation until the trustee has made all payments, the trustee has filed his final report and account, and there are no remaining matters for which the court must continue to exercise jurisdiction. *See* 11 U.S.C. § 350(a).

3-17.11 MODIFICATION OF SUBCHAPTER V PLANS

While section 1127 of the Code does not apply in subchapter V cases, many aspects of section 1127 allowing modification have been retained in some form under section 1193. One notable change is that in cases with proposed modifications either before confirmation or after confirmation but before substantial consummation, lien stripping may be allowed as to certain secured liens in the debtor's personal residence. 11 U.S.C. § 1190(3). Further, while section 1127 allows modification of plans in individual cases after confirmation but before completion of all plan payments, modification after substantial consummation in subchapter V cases is limited to non-consensual

plans within three to five years of confirmation as long as the requirements of section 1191(b) for non-consensual plans are met. 11 U.S.C. § 1193(c). Finally, as with the initial proposed plan, disclosure requirements under section 1125 are not required for plan modifications in subchapter V cases. 11 U.S.C. § 1181(a) (section 1127 inapplicable in subchapter V; disclosure statement requirement found in 1127(c)).

3-17.11.1 Modification before Confirmation

The debtor may modify a plan at any time before confirmation, but may not modify the plan so that as modified it fails to meet the requirements of sections 1122 and 1123 of the Code, other than section 1123(a)(8) (modification of lien on principal residence). 11 U.S.C. § 1193(a). The plan as modified becomes the plan upon filing with the court.

3-17.11.2 Modification after Confirmation

The debtor may modify a plan that has been consensually confirmed under section 1191(a) at any time before the plan is substantially consummated. The plan as modified must meet the requirements of sections 1122 and 1123 of the Code, other than section 1123(a)(8) (modification of lien on principal residence). The modified plan becomes the plan only if the court finds that circumstances warrant the modification and, after notice and a hearing, confirms the plan under section 1191(a). 11 U.S.C. § 1193(b).

Note that holders of claims or interests that have accepted or rejected a plan that was confirmed consensually under section 1191(a) are deemed to have similarly accepted or rejected the plan as modified unless, within the time fixed by the court, the holder changes its previous acceptance or rejection. 11 U.S.C. § 1193(d).

The debtor may modify a plan that has been confirmed non-consensually under section 1191(b) at any time during the three- to five-year period after confirmation (as set by the court). The plan as modified must meet the requirements of section 1191(b). The modified plan becomes the plan only if the court finds that circumstances warrant the modification and, after notice and a

hearing, confirms the plan under section 1191(b). 11 U.S.C. § 1193(c).

3-17.11.3 Reappointing a Subchapter V Trustee Post-confirmation

Section 1185(a) provides that the debtor in possession can be removed for, among other reasons, failure to perform “the obligations of the debtor” under a plan that is confirmed consensually under section 1191(a). Upon the debtor in possession’s removal under section 1185(a), section 1183(c)(1) provides that the United States Trustee may reappoint a trustee (1) as needed to appear and be heard on post-confirmation modifications and (2) as needed for performance of the debtor in possession’s duties, including the obligations under the confirmed plan.

3-17.12 TRANSACTIONS WITH PROFESSIONALS IN SUBCHAPTER V CASES

Section 1195 provides that a professional is not disqualified for employment under section 327(a) solely because that person holds a claim of less than \$10,000 that arose before the commencement of the case. Such a claim would otherwise make the professional a creditor and *per se* not disinterested.⁴ 11 U.S.C. § 101(14)(A). Although SBRA is silent as to the priority of the professional’s pre-petition claim, nothing in the SBRA or elsewhere in the Code would allow the claim as other than a general unsecured claim.

3-17.13 SUBCHAPTER V TRUSTEE QUALIFICATIONS FOR APPOINTMENT

3-17.13.1 Qualifications and Acceptance

⁴ This means that the United States Trustee should not object to the retention of a professional who waives the amount of any pre-petition claim exceeding \$10,000. Similarly, the United States Trustee should not object to the retention of a professional who returns to the estate the total of pre-petition fee payments that are voidable as preferences under 11 U.S.C. § 547 and waives the amount of any resulting claim under 11 U.S.C. § 502(d) exceeding \$10,000.

To ensure accountability, the United States Trustee generally will appoint individuals to serve as subchapter V trustees.⁵ Subchapter V trustees may not accept appointment to cases in which they have a conflict and they must successfully complete background investigations. As discussed in Manual 3-17.16.2, the trustee must also either post or maintain an appropriate bond. In addition, pursuant to section 321(a), the trustee must be competent to perform the statutory duties set out in section 1183. For case-by-case trustees, additional considerations for the selection may be based on the unique circumstances of the specific case.

3-17.13.2 A Trustee Must Not Have Conflicts of Interest

The subchapter V trustee is an independent third party who owes fiduciary duties of fairness and impartiality to all parties in the case. *CFTC v. Weintraub*, 471 U.S. 343 (1985). The trustee must be free of conflicts of interest that might impair the trustee's ability to carry out these duties.

Conflicts of interest include, without limitation, the representation by a trustee's firm of a debtor or any party in interest in any case being administered by the trustee. Further, a conflict exists if the representation of a client by a trustee or the trustee's firm requires the trustee to take a position contrary to the fiduciary responsibilities of the trustee.

SBRA also specifies that a person appointed as a case-by-case subchapter V trustee must be "disinterested." 11 U.S.C. § 1183(a). Among other things, to be disinterested, a person must not be a creditor, equity security holder, or insider of the debtor. 11 U.S.C. § 101(14). Practically, the United States Trustee will insist that standing trustees decline cases in which they lack disinterestedness.

⁵ All subchapter V standing trustees under subchapter V, as well as chapters 12 and 13, must be individuals. 28 U.S.C. § 586(b). Subchapter V case-by-case trustees must be "persons," 11 U.S.C. § 1183(a), which include partnerships and corporations in addition to individuals. 11 U.S.C. § 101(41). Pursuant to section 321(a)(2), partnerships and corporations that are authorized by their charters or bylaws to act as trustees are eligible to serve as case-by-case trustees. Nevertheless, as with the subchapter V standing trustees, the United States Trustee will generally appoint individuals as subchapter V case-by-case trustees.

The trustee must decline to accept any appointment where the trustee has a conflict of interest. Moreover, the trustee's duty to review for conflicts in assigned cases is ongoing. The trustee must advise the United States Trustee in writing of any actual or potential conflicts upon becoming aware of them, and disclose any actual or potential conflicts at the meeting of creditors or on the court record, if applicable. If the trustee discovers a conflict after accepting an appointment, the trustee must immediately file a notice of resignation in the case and notify the United States Trustee, who will reassign the case to another trustee.

Conflict waivers by either the debtor or a creditor are not effective to obviate the necessity for the trustee to decline an appointment or to resign from the case. And to the extent that a standing trustee has a large number of resignations due to conflicts, the United States Trustee, with the approval of the Director of EOUST, may appoint another standing trustee.

3-17.13.3 Background Investigation

All persons appointed to serve as a trustee in a subchapter V case must undergo and successfully complete a security background investigation. Once the Assistant Director for Oversight has approved the United States Trustee's tentative recommendation of a candidate, the proposed appointee must promptly submit to the United States Trustee a Form E-Mail Pre-background (Form 8 in the trustee recruitment and selection package); USCIS – Form I-9 – Employment Eligibility Verification (form 9) and Subchapter V Trustee Notice and Acknowledgement (form 10); the trustee's full name and address (including middle name); the trustee's e-mail address; and the addresses to which each trustee candidate wants background documents sent.

After the United States Trustee reviews the documents for completeness and accuracy, the documents and information should be transmitted to the Office of Oversight for final review and processing. The Facilities and Security Branch of the Office of Administration will then initiate the background process directly with trustee candidates. The Office of Oversight will inform the United States

Trustee when the trustee candidate has been preliminarily qualified to be a member of a pool subject to the completion of a full background check.

If the individual is in a pool of case-by-case trustees or is a standing trustee, then new security application forms are not required if a background investigation is in progress or has been completed within the preceding five years in connection with another chapter 11, chapter 7, or standing trustee appointment.

3-17.14 SUBCHAPTER V TRUSTEE RECRUITMENT

When seeking applicants for a position as subchapter V trustee, the United States Trustee, in consultation with the Assistant Director for Oversight, will engage in a process of public advertising and outreach to identify persons interested in serving. The United States Trustee should try to recruit a broad group of individuals to serve as subchapter V trustees who are not limited to attorneys or current trustees and include individuals with business and accounting backgrounds. All trustee appointments are made by the United States Trustee on a non-discriminatory basis.

Initially, the United States Trustees plan to appoint case-by-case trustees in subchapter V cases, learning from actual experience and may adjust this policy over time.

The United States Trustee should recruit individuals who are interested in potential appointment as a subchapter V trustee through a public solicitation. The Program has adopted standard public vacancy notices to attract a broad pool of qualified applicants. All advertisements must conform to these notices, which may be obtained from the Office of Oversight.

Before commencing any solicitation, the United States Trustee must forward the advertisement and solicitation package to the Office of

Oversight for review and suggestions. The solicitation package includes a proposed notice, a list of contacts, and a description of proposed outreach efforts to encourage a broad pool of applicants.

After review by the Office of Oversight, the Administrative Officer or another person designated by the United States Trustee will place the advertisement. The Office of Oversight will post the recruitment announcement on the Program's Website. The United States Trustee will handle local posting of announcements. The United States Trustee will also provide information concerning trustees to any local professional groups for notice to their membership where possible. The Office of Administration may also provide targeted notices of the solicitation to participants in professional or employment websites to increase the possible number of qualified applicants for the United States Trustee to review. All recruitment notices are to be advertised for a reasonable period.

The United States Trustee must follow the advertising policy set forth herein and avoid making any appointments of individuals who have not responded to a solicitation as described above.

The number of trustees in any judicial district is determined by the United States Trustee, in consultation with the Assistant Director for Oversight. The assignment of specific cases to trustees is within the discretion of the United States Trustee. The trustee must be competent to perform the duties of the office as defined by statute, be an able administrator, and be able to carry out fiduciary duties free from improper influence or conflict.

3-17.15 TRUSTEE COMPENSATION AND BENEFITS

Compensation for subchapter V trustees is determined by both the disposition of the case and whether the trustee is a case-by-case trustee or a standing trustee. Section 326(a), which sets forth limitations on chapter 11 trustees' compensation based on moneys disbursed or turned over in cases by the trustees, does not apply to subchapter V trustees. Pub. L. No. 116-54, § 4(a)(4)(A).

3-17.15.1 Effect of Disposition of the Case

How a trustee collects compensation depends on the outcome of the case. For cases with plans confirmed non-consensually under section 1191(b), the trustee will remain in place throughout the life of the plan and generally disburse payments received from the debtor in accordance with the plan and confirmation order, including payments to satisfy the trustee's compensation. 11 U.S.C. § 1194(b).

By contrast, in cases with plans confirmed consensually under section 1191(a), the trustee's service ends with substantial consummation of the plan under section 1183(c)(1).

In consensual plan cases, or cases that are terminated by dismissal or conversion, the trustee will collect reasonable compensation based on the value of time spent providing services, subject to the limitations described below for case-by-case and standing trustees.

In addition, section 1194(a) provides that if the trustee holds funds during the case, then upon confirmation, the trustee must distribute those funds in accordance with a confirmed plan or, if a plan is not confirmed, return those funds to the debtor after deducting, among other things, fees owing to the trustee as allowed by the court.

3-17.15.2 Case-by-Case Trustee Compensation

Subchapter V case-by-case trustees are compensated through section 330(a)(1)(A), which allows for "reasonable compensation for actual, necessary services rendered by the trustee ... and by any paraprofessional person employed by any such person." The trustee may also be reimbursed for "actual, necessary expenses" pursuant to section 330(a)(1)(B).

These section 330 compensation provisions apply regardless of whether the case-by-case trustee makes disbursements of estate funds. SBRA specifically excludes all subchapter V trustees from section 326(a), which sets limits on other chapter 11 trustees' compensation based on the moneys they disburse or turn over. Pub. L. No. 116-54, § 4(a)(4)(A). And subchapter V case-by-case trustees are not subject to the section 326(b) limitation of compensation to five percent of plan payments that is applicable to chapter 12 and 13 case trustees.

See 11 U.S.C. § 326(b), as amended by Pub. L. No. 116-54, § 4(a)(4)(B).⁶

When submitting their fee applications, trustees are encouraged to keep in mind Congress' stated intent that subchapter V cases not be burdened with excessive administrative expenses.

The United States Trustee should object or take other appropriate action in response to requests by subchapter V case-by-case trustees for excessive fees and expenses.

3-17.15.3 Standing Trustee Compensation

Like chapter 12 and chapter 13 standing trustees, subchapter V standing trustees are compensated pursuant to 28 U.S.C. § 586(e). The Director of EOUST, by delegation from the Attorney General and in consultation with the United States Trustee, sets the standing trustees' annual compensation and a percentage fee, including overhead, of no more than 10% of plan payments. 28 U.S.C. § 586(e)(1).

Note that SBRA amended 28 U.S.C. § 586(e) to add a new subsection (5) specifically for subchapter V standing trustees. Pub. L. No. 116-54, § 4(b)(1)(D)(3). Subsection (5) provides that if a subchapter V case is converted or dismissed, or a consensually confirmed plan is substantially consummated, thereby impairing the ability of the standing trustee to collect an adequate percentage fee, the court may allow compensation consistent with the services performed by the trustee and subject to limits on the trustee's overall compensation established by the Attorney General. Note that this new provision applies only to standing subchapter V trustees.

⁶ Section 326(b) provides, in part, that the court may allow reasonable compensation to case trustees in chapter 12 and chapter 13 cases, not to exceed 5% upon all payments under the plan. SBRA amended section 326(b) to make clear that the court may not award compensation to subchapter V standing trustees under section 330(a), but SBRA did not further revise section 326(b) to provide that the 5% cap on plan payments expressly applies to subchapter V case-by-case trustees. Instead, the 5% cap remains effective only as to chapter 12 and 13 case-by-case trustees appointed under sections 1202(a) and 1302(a), respectively. As a result, there appears to be no express statutory limit on the compensation that can be awarded to subchapter V case-by-case trustees beyond the general "reasonableness" requirement imposed by section 330(a).

3-17.16 SUPERVISION OF SUBCHAPTER V TRUSTEES

Subchapter V trustees are required to perform many duties in administering the cases in which they are appointed by the United States Trustee. In general, among the most important duties are assessing the financial viability of the small business debtor, facilitating a consensual plan of reorganization, and helping ensure that the debtor files or submits complete and accurate financial reports. Moreover, the statute sets forth specific case administration duties. Subchapter V trustees must be accountable for all property received during their administration of cases; they must retain all payments and funds received in cases until confirmation or denial of the plan; they must distribute such funds as authorized by the court or in accordance with any confirmed plan, or return the funds to the debtor if the court denies confirmation of the plan; and they must act as a disbursing agent under confirmed plans in certain cases. 11 U.S.C. §§ 1183(b)(1) (incorporating 11 U.S.C. §§ 704(a)(2), 1194(a)-(c)). In certain cases, they may be required to replace the debtor in possession and operate the business. 11 U.S.C. § 1185(a).

In addition, subchapter V trustees are required to preserve and safeguard all funds they administer, and they must be adequately bonded in all cases they administer. 11 U.S.C. §§ 322, 345(a). They also are required to file final reports and fully account for their administration of estates. 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(9)).

The United States Trustee is charged with the responsibility to “appoint” the subchapter V trustees and “supervise” their administration of small business cases. 11 U.S.C. § 1183(a); 28 U.S.C. § 586(a)(3). Pursuant to this broad statutory mandate, the United States Trustee performs a variety of oversight functions as part of the supervision of subchapter V trustees. This is to ensure that the trustees are adequately performing their duties and to determine whether they should be appointed to administer future cases. These trustee oversight functions cover the duties performed by the trustees under SBRA and are similar to the United States Trustee’s oversight

functions in supervising trustees who are appointed under other chapters of the Bankruptcy Code.

The United States Trustee's oversight functions include reviewing and evaluating subchapter V trustees' banking practices to ensure estate funds are preserved and accounted for, determining the amount and sufficiency of trustee bonds for the cases they administer, monitoring and reviewing certain trustee financial and case reports to ensure proper case administration and safeguarding of assets and personally identifiable information (PII), conducting audits and other periodic trustee reviews and evaluations, and undertaking enforcement actions, when appropriate and necessary.

In judicial districts in which the United States Trustee has appointed standing subchapter V trustees, the United States Trustee's oversight duties also will include reviewing and approving budgets for these trust operations, similar to the budget approval process currently in effect for trust operations for standing trustees in chapter 12 and 13 cases. 28 U.S.C. § 586(b).

These trustee oversight functions are further described below.

3-17.16.1 Banking⁷

Not all subchapter V trustees will hold or disburse estate funds. But to the extent that they do, trustees must preserve and safeguard estate funds by following statutory requirements for deposit and investment of money of the estates that they administer. 11 U.S.C. § 345(a). The United States Trustee closely supervises the trustees' banking practices to ensure performance of these specified duties, pursuant to 28 U.S.C. § 586(a)(3).

A trustee who holds estate funds or acts as a disbursing agent for plan payments "may make such deposit or investment of the money of the estate for which such trustee serves as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment." 11 U.S.C. § 345(a). Unless the funds are insured, guaranteed, or backed by the full faith and credit of the United States Government or its agencies, the institution holding the

⁷ See generally Manual Volume 7.

estate funds must post a bond in favor of the United States. 11 U.S.C. § 345(b)(1). In the alternative to posting a bond, the institution must deposit securities of the kind specified in 31 U.S.C. § 9303, and the trustee cannot accept or use other types of securities or investments absent court approval. 11 U.S.C. § 345(b)(2).

As a result of these statutory requirements, trustees must deposit all receipts into a banking institution that is insured by the Federal Deposit Insurance Corporation (FDIC), and is approved by the United States Trustee to hold deposits of bankruptcy estate funds as authorized depositories. 11 U.S.C. § 345(b). Each regional office of the United States Trustee maintains a list of authorized depositories, which the trustee should request immediately upon appointment.⁸

It is the trustee's responsibility 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's insurance limits, the excess funds must be bonded or adequately collateralized as required by section 345(b). The trustee must promptly notify the United States Trustee if the amount on deposit in an estate in any single depository exceeds or is expected to exceed the FDIC's insurance limits.

The types of trustee bank accounts also vary depending on whether the trustee is acting as a case-by-case trustee or a standing trustee. Case-by-case trustees must open a separate estate account for each case administered by the trustee. All receipts and disbursements of the trustee related to the case are made through this estate account, including all plan payments, administrative expenses allowed under 11 U.S.C. § 503, and any compensation that is awarded to the trustee under 11 U.S.C. § 330.

Standing trustees must establish and maintain two accounts. The first is a trust account for receipts and disbursements for all cases administered, and the second is an operating expense account for depositing all percentage fee income, interest income, awards of compensation to the trustee, and other receipts not deposited into the trust account. The standing trustee must pay all compensation,

⁸ To be approved by the United States Trustee, the banking institution must execute a Uniform Depository Agreement.

operating expenses, and payments to the United States Trustee System Fund out of the operating expense account. 28 U.S.C. §§ 586(e)(1), (e)(2). The percentage fee and any other compensation awarded to the trustee are to be transferred from the trust account to the operating expense account after all other section 503(b) awards have been paid.

Generally, a trustee should utilize a single banking institution. Bankruptcy-related funds may not be deposited to the trustee's business, personal, or trust account. And a standing trustee may not use the operating expense account for deposit or payment of any funds unrelated to the administration of the standing trustee's cases.

All trustee bank accounts should include the trustee's name and capacity as trustee. Individual estate accounts opened by case-by-case trustees should also include the case name and number.

Trustees must disclose to the United States Trustee the identity of each banking institution in which the trustee has an estate account (case-by-case trustees) or trust and operating accounts (for standing trustees) for the cases administered. If a bond in favor of the United States is filed to protect the deposit of estate funds, the United States Trustee must approve the corporate surety securing the bond. 11 U.S.C. § 345(b)(1)(B). The United States Trustee can only approve a surety listed in Treasury Circular 570. The United States Trustee also receives a periodic report from the Federal Reserve to review the sufficiency of collateral posted by the banking institutions under 11 U.S.C. § 345(b)(2).

To assist in monitoring trustee accounts, trustees must supply all bank account information to the United States Trustee, including an authorization for the bank's release of information to the United States Trustee.

3-17.16.2 Bonding⁹

To qualify as a subchapter V trustee, the trustee has a duty to post and maintain a bond in favor of the United States, conditioned on the trustee's faithful performance of the trustee's duties. 11 U.S.C.

⁹ See generally Manual Volume 7.

§ 322(a). The bond must be posted for every case in which the trustee is appointed regardless of whether the trustee administers any estate funds or acts as a disbursing agent, or whether the trustee is appointed as a case-by-case trustee or a standing trustee. 11 U.S.C. § 322(a). The trustee is not qualified to serve as a trustee in a case unless and until the bond has been filed with the court. 11 U.S.C. § 322(a). The bond must be posted before seven days after selection to serve as trustee in a case.

The United States Trustee determines the initial amount and sufficiency of the bond. 11 U.S.C. § 322(b). The United States Trustee may authorize the issuance of a blanket bond to cover a trustee for multiple cases or to cover multiple trustees for multiple cases in a particular jurisdiction. Fed. R. Bankr. P. 2010.¹⁰ Pursuant to this statutory duty, the United States Trustee will direct the trustee whether to participate in a blanket bond or to procure an individual bond.

The initial amount of the bond shall be set by the United States Trustee after consultation with the trustees in the region, but shall not be less than \$50,000 per trustee. Only companies that appear on Treasury Circular 570 are approved by the United States Trustee as sureties for issuing trustee bonds, but it is the trustee's responsibility to procure the bond and ensure that the bonding company is an approved surety. After approval of the amount of the bond and the sufficiency of the surety, the original bond and any riders will be filed by the United States Trustee with the court.

From time to time, the amount of the bond may need to be increased. Adjustments to the bond should be made only as approved by the United States Trustee.

It is the trustee's duty to monitor the bond and to ensure that it is maintained in an appropriate amount throughout the case. The trustee must promptly notify the United States Trustee of any significant

¹⁰ An individual case bond insures a single case for a single amount. A blanket bond covers multiple cases for one or more trustees. Two types of blanket bonds are schedule bonds and aggregate bonds. A schedule bond covers all listed trustees in a particular jurisdiction, with a listed limit per trustee and often with a listed case limit. An aggregate bond covers all listed trustees and their cases in an amount equal to the face amount of the bond.

increases in bank balances or any anticipated increases in funds because these might warrant an increase in the trustee's bond. 11 U.S.C. § 322.

A trustee who assumes the duties of a debtor in possession under section 1185 must promptly confer with the United States Trustee about whether a separate bond is required in the case or whether anticipated activity in the case requires an increase to the existing bond. The United States Trustee makes the final determination of the amount and sufficiency of the bond that must be posted for the trustee to remain as trustee in the case. 11 U.S.C. § 322(b).

As soon as the trustee becomes aware of an incident that may give rise to a claim against the trustee's bond, the trustee must notify the United States Trustee and the bonding company. 28 U.S.C. § 586(a)(3). The United States Trustee or any other party in interest may make a claim on the trustee's bond by filing an adversary proceeding no later than two years after the date on which the trustee was discharged. 11 U.S.C. § 322(d); Fed. R. Bankr. P. 9025.

3-17.16.3 Reporting

In addition to their court reporting responsibilities in specific cases, including filing final reports for each case administered (*see* Manual 3-17.10), subchapter V trustees must submit monthly and annual reports to the United States Trustee to assist the United States Trustee in supervising the administration of cases and ensuring accountability for any estate funds received or disbursed. 28 U.S.C. § 586(a)(3); 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(2)). For case-by-case trustees, the monthly and annual reports will include the activity in the estate account(s) used for each assigned case during the period; for standing trustees, these reports will include the activity in the trust and operating expense accounts.

The trustee's monthly report will show activity in the various bank accounts maintained by the trustee, beginning and ending balances for each account, the trustee's receipts and disbursements, information related to the collateralization of funds and the sufficiency of the trustee's bond, case filing and closure information for all assigned cases, and such other information as is required by the United States Trustee. 28 U.S.C. § 586(a)(3). The monthly report shall be in the

form prescribed by the United States Trustee in the Subchapter V Trustee Handbook. The trustee must submit the monthly report, together with copies of corresponding bank statements, to the United States Trustee within 30 days after the end of each month. 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(2)).

The trustee's annual report will show the activity in the bank accounts maintained by the trustee, beginning and ending year-end balances for each account, the trustee's receipts and disbursements, case filing and closure statistics for the cases administered, information regarding the trustee's compensation received in the cases administered, and such other information as is required by the United States Trustee. 28 U.S.C. § 586(a)(3). The trustee must submit the annual report to the United States Trustee in the form prescribed by the United States Trustee in the Subchapter V Trustee Handbook. 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(2)). Case-by-case trustees must submit their annual reports to the United States Trustee within 45 days after the end of the fiscal year. Likewise, standing trustees must submit their annual reports to the United States Trustee within 45 days from the end of the fiscal year in which they are serving as standing trustees.

Trustees also are required to promptly report to the United States Trustee the loss, or potential loss, of PII in connection with cases the trustee administers.¹¹ The trustee's reporting obligation applies to, among other instances, the loss or potential loss of PII arising from the theft of paper files, personal computers, laptops, electronic devices, and removable drives such as USB flash drives and CDs. The trustee, in consultation with the United States Trustee, shall develop a plan of corrective action that the trustee will undertake to remediate the breach. The plan shall include the trustee's notifications to the affected individuals, law enforcement officers, and insurance carriers, as appropriate or required by law. The trustee also should take appropriate actions to mitigate the risk of further losses of PII, which largely will depend on the circumstances of the suspected breach.

¹¹ This reporting obligation applies when the loss or potential loss of PII originates from the trustee's operation. The debtor may have separate duties to report PII losses consistent with applicable law.

3-17.16.4 [Reserved]

3-17.16.5 Audits, Periodic Reviews, and Evaluations

In addition to monitoring for compliance as described elsewhere in this Manual, the United States Trustee will conduct periodic audits, reviews and evaluations of the subchapter V trustees' performance of their duties similar to those conducted for trustees whom the United States Trustee regularly appoint and supervise in other chapters. This oversight function is separate and apart from specific monitoring and enforcement activity in particular cases, which the United States Trustee also is authorized to undertake in subchapter V cases. 11 U.S.C. § 307.

These periodic audits, reviews and evaluations are performed regardless of whether the trustee administers any estate funds or acts as a disbursing agent during the review period, or whether the trustee is appointed as a case-by-case trustee or serves as a standing trustee. 28 U.S.C. § 586(a)(3). They are essential for the United States Trustee to determine not only whether the trustee is adequately performing his or her duties in the cases administered, but also to determine whether the trustee should be appointed by the United States Trustee to administer future cases.

The trustee must submit to independent audits conducted periodically at the direction of the United States Trustee. 11 U.S.C. § 1183(b)(1) (incorporating 11 U.S.C. § 704(a)(2)). The United States Trustee will conduct an audit at least every three years regarding the cases and bank accounts administered by the trustee. The frequency of these audits is consistent with the frequency of audits conducted for other trustees appointed and supervised by the United States Trustee under other chapters.¹²

The audit is designed to determine the sufficiency of internal controls over estate accounts, the accuracy of the trustee's reporting to the United States Trustee, and the trustee's compliance with the United States Trustee's practices and procedures. Audits are the starting point for determining the adequacy of the trustee's financial

¹² Chapter 7 trustees and chapter 12 standing trustees are audited every 3 to 4 years. Manual 2-2.7, 4-4.1. Standing chapter 13 trustees are audited annually. Manual 4-4.1.

management, internal control procedures, and organizational support. Audit firms are selected by the Office of Oversight, and the expense of the audit is paid from the United States Trustee Program's funds. The scope of the audit and the audit procedures are further described in the Subchapter V Trustee Handbook.

At the conclusion of the audit, the auditor will issue a report with findings. The trustee is required to satisfactorily respond to any noted deficiencies or inadequate findings, and to take corrective action as necessary or appropriate. The United States Trustee must report the trustee's failure to satisfactorily respond to the audit findings or take appropriate corrective action to the Assistant Director for Oversight and the Deputy Director for Field Operations, with a recommendation as to the appropriate response or enforcement action.

When an audit contains, in the judgment of the United States Trustee, serious findings, the United States Trustee may make a follow-up visit to the trustee's office to verify subsequent corrective actions and compliance. A follow-up visit also may be appropriate based on the auditor's disclosure of material weaknesses in internal controls or issuance of a qualified opinion, adverse opinion or disclaimer of opinion. Resolution of serious findings and audit deficiencies is an integral component of the United States Trustee's effective supervision of trustees. Failure by a trustee to implement necessary changes will result in appropriate action by the United States Trustee.

In those years in which no independent audit is performed, the United States Trustee may, but is not required, to conduct an office visit of the trustee. The scope of the office visit generally is more limited than an audit and largely dictated by areas of the trustee's past performance, if any, that may warrant further review. The trustee will be expected to satisfactorily address and resolve any performance issues or problems that are detected in connection with these office visits. The trustee's failure to implement any necessary changes may result in appropriate remedial action by the United States Trustee.

In addition to audits and field office visits, the United States Trustee will evaluate the trustees and their performance on a periodic basis as part of the United States Trustee's ongoing supervisory responsibility. As part of these evaluations, the United States Trustee will review and evaluate the trustee's case administration, success rate in negotiating

consensual plans, performance in making any plan disbursements, banking and bonding practices, professional conduct, and cooperation with the United States Trustee, among other review areas.

Standing trustees will be formally evaluated at least biennially. These evaluations will be documented in a formal written report, as further described in the Subchapter V Trustee Handbook.

Issues relating to the trustee's performance may result in remedial actions by the United States Trustee. For a standing trustee, this might include the termination of future case assignments. Because case-by-case trustees are appointed at the sole discretion of the United States Trustee, they should have no expectation of any future case assignments, regardless of the results of any particular audits or performance reviews.

3-17.16.6 Enforcement Actions Against Subchapter V Trustees

The United States Trustee's supervision of subchapter V trustees necessarily includes bringing actions in the bankruptcy court when performance problems or issues arise. Among others, enforcement actions in a specific case may include an objection to the trustee's final report and account, an objection to the trustee's requested compensation, requests for turnover of books and records, or an action to recover unauthorized expenses or compensation. These case-specific enforcement actions are prosecuted in the bankruptcy cases in which the trustee was appointed by the United States Trustee. The United States Trustee will make a concerted effort to resolve disputes consensually with the trustees, when appropriate, but final outcomes may be determined by the court when these efforts are unsuccessful or unavailable, or when a consensual resolution otherwise requires court approval.

If the United States Trustee has reason to believe that the trustee has engaged in conduct during the administration of a case that has resulted in harm to the estate, the debtor, creditors or other parties in interest, the United States Trustee also may commence a recovery action against the trustee to remedy such harms. This may include filing suit against the trustee and the trustee's surety in appropriate cases. The outcomes of these actions likewise are adjudicated by the bankruptcy court.

The United States Trustee also may move to remove the trustee from any or all assigned cases for “cause.” 11 U.S.C. § 324(a). “Cause” is not defined in the Bankruptcy Code, but it may include the trustee’s failure to properly administer cases, including the failure to comply with reporting obligations; discovery of fraud or embezzlement; mismanagement; or other misconduct or unsatisfactory performance by the trustee. Whenever the court grants a motion to remove a trustee, the trustee is removed from all other cases in which the trustee is serving, unless the court orders otherwise. 11 U.S.C. § 324(b).

In addition, if the trustee has engaged in criminal misconduct, the United States Trustee may refer the matter to the appropriate law enforcement authorities for further investigation. 18 U.S.C. §§ 152-158; 28 U.S.C. § 586(a)(3)(F).