

Guidance Will Help Trustees Plan Ahead for Business Interruptions and Transitions

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Introduction

Interruptions to a chapter 7 trustee operation can occur under almost any conceivable scenario: technology-related disruptions, a medical crisis, natural disasters or man-made events whether accidental or intentional. Advance preparation and planning is crucial to minimize the disruption and, if possible, to promptly recover and return to normal operations.

In recent years, it became apparent to United States Trustee Program (USTP or the Program) personnel as well as to private trustees that the business interruption planning process should include consideration of what may happen if a trustee suddenly dies or resigns, fails to qualify under 11 U.S.C. § 322, is permanently incapacitated or is removed under 11 U.S.C. § 324, and that both the trustees and the Program would benefit from more guidance in this area. The trustees and their family, staff and business colleagues can be better prepared if the actions the U.S. Trustee must take when the trustee can no longer administer cases are clearly delineated.

In 2014, the Program began a dialogue with the leadership of the National Association of Bankruptcy Trustees (NABT) that resulted in the development of new guidance regarding business interruption planning by trustees, successor trustee issues and the actions that will be undertaken by the U.S. Trustee to ensure the continued administration of the trustee's cases. The guidance was published in September 2016 in the *Handbook for Chapter 7 Panel Trustees* (Handbook) and the *United States Trustee Program Policy and Practices Manual* (Manual), Volume 2, "Chapter 7 Case Administration."

In this article, we discuss these updates to the Handbook and Manual, with a focus on the language in the Handbook. The updated Handbook and a list of changes are available at <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials>. The updated Manual, Volume 2, is available at https://www.justice.gov/ust/file/volume_2_chapter_7_case_administration.pdf/download.

Business Interruption Planning

Handbook Chapter 5.G.4, which requires a trustee to develop and maintain a written business interruption plan, was expanded to help the trustee develop an appropriate plan. It now provides a list of key plan provisions and recommends that the trustee discuss the plan with family members. This should include a discussion of the U.S. Trustee's role in the event of the incapacity or death of the trustee. In addition, a sample outline and sample plan were added to the Handbook Supplementary Materials available at <https://www.justice.gov/ust/private-trustee-handbooks-reference-materials/chapter-7-handbooks-reference-materials>.

We also recommend that each trustee provide a copy of the business interruption plan to the U.S. Trustee. In addition to making the U.S. Trustee's staff aware of the trustee's recovery procedures, this ensures that the trustee can access the plan even if the trustee's office or offsite storage location is inaccessible.

The updated Handbook also addresses trustee business interruption plans in Chapter 5.B, “Control Procedures to be Personally Performed by the Trustee.” New Chapter 5.B.8 states that the trustee must maintain a current business interruption plan, a current list of contacts and current records on the status of open cases to help ensure a prompt recovery or transition in the event of a natural disaster or the incapacity or death of the trustee or a key staff person. These are not new requirements, but the addition of this provision to Handbook Chapter 5.B adds emphasis to this responsibility of the trustee.

Successor Trustees

Chapter 2 of the Handbook, “Appointment to the Panel of Trustees,” was updated to reflect new guidance for successor trustees. New and revised provisions make clear that the successor trustee must promptly take control of the cases and ensure that the estate files, accounting records and estate funds are expeditiously transferred to the successor trustee. Further, if the prior trustee is not available due to death or incapacity, the successor trustee will need to work with the prior trustee’s staff, family or law firm; the prior trustee’s bank and computer software vendor; the U.S. Trustee; and the estate professionals to assure a smooth transition of the records and bank accounts.

The successor trustee must also consult with the estate professionals to identify pending court hearings involving adversary proceedings and contested matters, sales and auctions, and other important issues. If the successor trustee does not continue the employment of current professionals, the U.S. Trustee will review any new retention applications to ensure that the replacement of the professionals is likely to lower the costs of administration or increase the dividend for creditors, or otherwise is necessary or appropriate and in the best interest of the estate.

The successor trustee should work with the prior trustee or the prior trustee’s representative to propose an equitable division of compensation. The total amount of compensation may not exceed the cap established by 11 U.S.C. § 326(a). Any such proposal will be reviewed by the U.S. Trustee and is of course ultimately subject to consideration and approval by the court.

Fed. R. Bankr. P. 2012(b) requires the successor trustee to prepare an accounting of the prior trustee’s administration of the estate. The successor trustee may, absent some evidence of defalcation or other harm to the estate, include this account as part of his or her next scheduled Trustee Interim Report. The accounting filed with the court can be the standard Form 1 and Form 2 required by the U.S. Trustee or a different form approved by the U.S. Trustee or the local bankruptcy court.

U.S. Trustee’s Actions upon Death or Incapacity of Trustee

Chapter 6 of the Handbook covers U.S. Trustee oversight in areas such as trustee training, performance reviews, independent audits and other reviews, and compliance measures. New subsection E, entitled “Death or Incapacity of Trustee,” contains three main points.

The U.S. Trustee’s first priority in the event of the trustee’s death or permanent incapacitation must be to secure the estate assets and bank accounts, appoint successor trustees if needed and ensure that cases are administered efficiently. The U.S. Trustee will work with the trustee’s staff, professionals and family to accomplish these tasks.

Second, the U.S. Trustee will review the allocation of compensation between the former trustee and the successor trustee to ensure there is an equitable division under the circumstances and the total amount does not exceed the compensation cap established by section 326(a).

Third, if the successor trustee does not continue the employment of the current professionals, the U.S. Trustee will review any new retention applications to ensure that the replacement of professionals is likely to lower the cost of administration or increase the dividend for creditors, or otherwise is necessary or appropriate and in the best interest of the estate.

In addition to this new section in the Handbook, the Program added step-by-step guidance in the Manual to help USTP offices carry out their responsibilities promptly, efficiently and consistently, and with professionalism and compassion. The new guidance covers several scenarios: the temporary suspension of case assignments due to the incapacity of the trustee, the resignation of the trustee, the permanent incapacity or death of the trustee and the removal of the trustee under section 324.

Conclusion

We appreciate the efforts of interested stakeholders to help craft the policies on trustee business interruption planning and transitions. The Handbook changes will ensure that case administration proceeds in a systematic and organized manner when an unexpected event such as a business interruption or medical emergency occurs, and should help alleviate concerns of family members and business partners. The updated guidance in the Manual will assist USTP personnel in responding more efficiently and consistently when a trustee suddenly dies or resigns, fails to qualify under 11 U.S.C. § 322, is permanently incapacitated or is removed under 11 U.S.C. § 324.