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BY MICHAEL J. BUJOLD, NAN ROBERTS EITEL AND ANDREW R. VARA

Introducing the USTP's New Chapter 11 Periodic Reports



Michael J. Bujold
Executive Office
for U.S. Trustees
Washington, D.C.



Nan Roberts Eitel
Executive Office
for U.S. Trustees
Washington, D.C.



Andrew R. Vara
U.S. Trustee for
Regions 3 and 9
Cleveland

On Dec. 21, 2020, the U.S. Trustee Program (USTP) promulgated a final rule, “Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11” (hereinafter referred to as the “Final Rule”).¹ The Final Rule, which is authorized by 28 U.S.C. § 589b, provides that chapter 11 debtors in possession (DIPs) and trustees — other than small business debtors² — file monthly operating reports (MORs) and post-confirmation reports (PCRs) using streamlined, data-embedded, uniform forms in every case in every judicial district where the USTP operates. The Final Rule will become effective for all reports filed on or after June 21, 2021. This article discusses the basis for the Final Rule, the USTP’s development of consensus views through robust stakeholder participation during the rule-making process, and tips for implementing the new uniform MOR and PCR forms in practice.

Reporting Requirements in Chapter 11

By longstanding statute and rules, DIPs and trustees must account for the receipt, administration and disposition of all property, provide information concerning the estate and the estate’s administration as parties-in-interest request, and file periodic reports and summaries of a DIP’s business, including statements of receipts and disbursements and such other information as the U.S. Trustee or the bankruptcy court requires.³

Moreover, DIPs are obligated to comply with the U.S. Trustee’s reasonable requests for information and to timely file all reports required by the Bankruptcy Code and Rules, and the failure to do either can be cause for dismissal or conversion.⁴ The U.S. Trustee has the duty to ensure that DIPs and trustees properly and timely file all required reports.⁵

DIPs and chapter 11 trustees currently file MORs and PCRs using more than 150 different forms that developed over time across the USTP’s 21 regions according to local practices. MORs serve an essential purpose in helping parties evaluate a case’s progress, including compliance with legal requirements and determining whether the case should be converted or dismissed. Much of the information required under the Final Rule is already collected in the various existing local forms, but not in a uniform or consistent way. The Final Rule eliminates this patchwork of forms as Congress intended in streamlining chapter 11 reporting through nationally uniform reports.

Formulating the Final Rule

Congress authorized an enhanced and uniform bankruptcy reporting and data regime “to facilitate compilation of data” and of public access either through physical inspection or electronic means.⁶ The objective of uniform financial reporting reflects the broader transparency that stakeholders rightfully expect in the bankruptcy system. Uniformity and consistency in the information collected might also facilitate aggregation of data, which will assist Congress in analyzing bankruptcy trends and making policy decisions, with-

¹ 85 FR 82905.

² Small business and subchapter V debtors (including those covered by the temporarily expanded debt limits) file MORs on official forms promulgated by the Judicial Conference of the United States. See 11 U.S.C. §§ 308, 1187; Fed. R. Bankr. P. 2015(a)(6); Official Form 425C. Subchapter V trustees do not file MORs unless the debtor is removed from possession. See 11 U.S.C. § 1185. Any reference to “chapter 11 trustees” or “trustees” in this article does not include subchapter V trustees.

³ 11 U.S.C. §§ 1106(a)(1), 1107(a); Fed. R. Bankr. P. 2015(a)(2), (a)(3).

⁴ 11 U.S.C. § 1112(b)(4)(F), (H).

⁵ 28 U.S.C. § 586(a)(3)(D).

⁶ 28 U.S.C. § 589b(b).

out imposing significant additional burdens upon chapter 11 DIPs and trustees.

Congress identified seven data elements for inclusion in the uniform periodic reports and empowered the attorney general to include others as a matter of discretion.⁷ The seven required informational categories, which served as the baseline for the USTP's rulemaking process, are as follows: (1) information about the industry classification, published by the Department of Commerce, for the businesses conducted by the debtor; (2) the length of time the case has been pending; (3) the number of full-time employees as of the date of the order for relief and at the end of each reporting period since the case was filed; (4) cash receipts, cash disbursements, and the profitability of the debtor for the most recent period and cumulatively since the date of the order for relief; (5) compliance with title 11, whether or not tax returns and tax payments since the date of the order for relief have been timely filed and made; (6) all professional fees approved by the court in the case for the most recent period and cumulatively since the date of the order for relief (separately reported, for the professional fees incurred by or on behalf of the debtor, between those that would have been incurred absent a bankruptcy case and those not); and (7) reorganization plans filed and confirmed and, with respect thereto by class, the recoveries of the holders, expressed in aggregate dollar values and, in the case of claims, as a percentage of total claims of the class allowed.⁸

Governed by the Administrative Procedure Act (APA), the Final Rule is the end result of the USTP's enhanced rule-making process.⁹ The APA provides for publication of a notice of proposed rule-making in the Federal Register, followed by an opportunity for the public "to participate in the rule-making through submission of written data, views, or arguments with or without opportunity for oral presentation."¹⁰ The robust public comment and hearing process yielded an informed exchange of ideas among the various stakeholders and the USTP that improved the Final Rule and developed a consensus among stakeholders.

Even before initiating the formal rule-making process with publication of a notice of proposed rule-making (NPRM), the USTP engaged chapter 11 experts and professional associations, and invited them to review and comment on drafts of proposed forms and instructions for both the MORs and PCRs. The USTP undertook a similar process internally, providing review and comment opportunities for USTP personnel across all 21 regions. After considering all pre-publication input, on Nov. 14, 2014, the USTP published an NPRM, along with draft forms and instructions, already

reflective of stakeholder participation.¹¹ During the 60-day public comment period on the NPRM, the USTP received nine comments expressing views on a range of topics, including a request to meet with USTP representatives. Accordingly, on Nov. 30, 2015, the USTP published a notice announcing a public hearing on Feb. 17, 2016, and a reopening of the public comment period through Feb. 22, 2016.¹²

At the USTP public hearing convened on Feb. 17, 2016, four groups of stakeholders — representatives of the Association of Insolvency and Restructuring Advisors, National Association of Consumer Bankruptcy Attorneys, and the States' Association of Bankruptcy Attorneys/National Association of Attorneys General — and one panel trustee from the Southern District of New York provided testimony and engaged in colloquy with the USTP about the proposed rule.¹³ The witnesses provided both technical expertise and policy advice on formulating the Final Rule and forms. The USTP also received three additional or supplemental comments during the second comment period.

The Public Comments and Testimony, and the USTP's Response

As a result of the comments and hearing testimony, the USTP amended the draft rule and forms in several respects before publishing the Final Rule. The comments and testimony largely focused on five areas: (1) the scope of financial information required; (2) the issues unique to individual chapter 11 DIPs; (3) accounting methodology; (4) public access to data; and (5) reporting professional fees.

The USTP acknowledges the valuable contributions and time invested by the commenters and witnesses in crafting the Final Rule and forms. These exchanges enhanced the USTP's understanding of information needed by divergent constituencies. The Final Rule reflects a consensus view among stakeholders in these five key areas, ensures fealty to the statute, and strikes a reasonable balance between requiring necessary information while not overburdening DIPs and chapter 11 trustees. The USTP addresses the five key areas and their resolution in the Final Rule below.

First, in the Final Rule, the USTP exempted individual DIPs from the requirement to provide supplemental documents of any kind unless specifically requested by the U.S. Trustee.¹⁴ Conversely, the Final Rule requires that *nonindividual* DIPs file three basic financial statements with the MOR that every business should reason-

Michael Bujold is associate general counsel for General and Administrative Law, and Nan Roberts Eitel is associate general counsel for Chapter 11 Practice with the Executive Office for U.S. Trustees in Washington, D.C. Andrew Vara is the U.S. Trustee for Regions 3 and 9.

7 28 U.S.C. § 589b(e).

8 *Id.*

9 See 5 U.S.C. § 553.

10 5 U.S.C. § 553(c).

11 See 79 FR 66659.

12 See 80 FR 74739.

13 See Transcript, available at [regulations.gov/document?D=DOJ-Eoust-2015-0011-0010](https://www.regulations.gov/document?D=DOJ-Eoust-2015-0011-0010) (unless otherwise specified, all links in this article were last visited on Jan. 6, 2021).

ably be expected to have: (1) statement of cash receipts and disbursements; (2) balance sheets; and (3) statement of operations (profit or loss statement). By setting a baseline expectation for document production in every nonindividual chapter 11 case, the Final Rule increases predictability for all stakeholders. The Final Rule also retains the USTP’s flexibility and discretion to require the production of additional financial information based on the needs of the case, including the DIP’s profile and the complexity of issues at stake. Although some stakeholders would require DIPs and chapter 11 trustees to file extensive and detailed information, including in some cases requiring a type of Securities and Exchange Commission reporting and the filing of 10 supplemental financial statements¹⁵ originally proposed to be discretionary, others would limit required information to less than that required by the statute because of concerns about burdens on individual DIPs. With these revisions, the Final Rule strikes a reasonable balance between ensuring that DIPs provide sufficient information for others to ascertain the DIP’s financial condition and not overburdening DIPs by remaining adaptable to the circumstances of both individuals and large corporate enterprises.

Second, although the circumstances of individual DIPs can vary between high-wealth individuals with complex finances and middle-class consumers with relatively simple finances, and business debtors likewise can vary in their circumstances, the statute prescribes “uniform forms for ... periodic reports by [DIPs]” — both individuals and businesses — “or trustees.”¹⁶ In fidelity to the statute, the USTP adopted a single MOR form and PCR form in the Final Rule. In connection with the Final Rule, the USTP also revised the forms and instructions to clarify which sections apply to individual DIPs and modified Part 8 of the MOR form to better reflect the types of disbursements typically made by individual DIPs.

Third, because not all DIPs follow the generally accepted accounting principles (GAAP), requiring GAAP’s adoption could be unduly burdensome for many DIPs, including individuals. As a result, the Final Rule provides that DIPs may use the accounting method they used pre-petition in preparing the periodic reports. The USTP further determined that DIPs should disclose their costing method for inventory on the MOR. Although this did not require an amendment to the Final Rule, the USTP did modify the MOR form and instructions to require this disclosure.

Fourth, the Final Rule clarifies that both the MOR and PCR forms must be “smart forms” filed through the bankruptcy courts’ case management/electronic case filing system, and adopts the U.S. Courts’ read-only, “data-embedded” format. This feature allows data to be extracted from a report and searched. Filing smart forms will also facilitate the USTP’s automated receipt and processing of data by eliminating manual report retrieval and data entry. This

automation simplifies the intake process and offers DIPs and trustees welcome certainty that the USTP received the required reports.

Fifth, the reporting of court-approved professional fees to understand the true costs of chapter 11 received much attention. Although no change to the Final Rule was required, the USTP modified both the MOR and PCR forms and instructions to add line items for lead counsel, efficiency counsel, co-counsel, local counsel, financial professionals and other professionals. In addition, the statute requires that fees incurred because of the bankruptcy be reported separately from those incurred because of nonbankruptcy matters. Therefore, the USTP added a clarifying definition of “nonbankruptcy matters” in the instructions to ensure uniform reporting of all court-approved fees. Finally, the statute requires reporting professional fees on a court-approved, not incurred, basis, so the provision requiring the reporting of approved fees remains unchanged in the Final Rule.

Practice Guide

Before the Final Rule becomes effective on June 21, 2021, the USTP will engage stakeholders to familiarize them with the forms and to promote compliance with the Final Rule, and will coordinate closely with bankruptcy courts and clerks. Sample uniform forms will appear on the USTP’s website, which will be periodically updated.¹⁷ Although the data-embedded “smart” forms will ultimately be available directly on the website at no cost, the USTP will also provide bankruptcy software vendors the underlying technical specifications so that report-filers eventually may have the option to complete the uniform forms using private software products.

In addition to familiarizing themselves with the forms, practitioners should understand potential changes to applicable filing and service requirements. Unless otherwise provided by local rule, each report must be filed with the bankruptcy court no later than the 21st day of the month immediately following the covered reporting period.¹⁸ For MORs, the Final Rule requires service upon the U.S. Trustee, official committees appointed under 11 U.S.C. § 1102, governmental units charged with responsibility for collection or determination of any tax arising out of the estate’s operation, and any requesting party-in-interest.¹⁹

Finally, DIPs should confer with local USTP representatives early in the case, whether at the initial debtor interview or some other initial meeting, to discuss the DIP’s reporting capabilities and the supplemental documentation that the DIP may be required to file. Before issuing the Final Rule, the USTP modified the MOR instructions to clarify that this initial meeting should occur before both the first MOR due date and the meeting of creditors.

The Final Rule vests the U.S. Trustee with discretion to customize the required documentation consistent with the informational needs of the case.²⁰ In making these determinations, the USTP will seek to ensure that the

14 This is without prejudice to the rights of a party-in-interest to seek further information through Fed. R. Bankr. P. 2004 or other court order in a particular case.

15 These documents include the following: (1) statement of cash receipts and disbursements; (2) balance sheets; (3) profit and loss statement; (4) aged summary of accounts receivable; (5) aged summary schedule of post-petition liabilities; (6) statement of capital assets; (7) schedule of payments to professionals; (8) schedule of insider payments; (9) bank statements and reconciliations; and (10) descriptions of asset sale transactions.

16 28 U.S.C. § 589b(a)(2) (emphasis added).

17 See “Chapter 11 Operating Reports,” U.S. Dep’t of Justice, *available at* justice.gov/ust/chapter-11-operating-reports.

18 See 85 FR 82905 (to be codified at 28 C.F.R. §§ 58.8(e), (g)).

19 See *id.* (to be codified at 28 C.F.R. § 58.8(b)).

20 See *id.* (to be codified at 28 C.F.R. § 58.8(d)).

reports provide sufficient information to ascertain the DIP's financial condition while not overburdening the report-filer.

Conclusion

The USTP's mission is to enhance the efficiency and integrity of the bankruptcy system for the benefit of all stakeholders. This Final Rule requiring uniform periodic reports is another step forward in accomplishing this mission. This Final Rule reflects substantial and valuable stakeholder engagement on achieving a balance between the need for information and the need to minimize burdens. Before the effective date, the USTP encourages bankruptcy professionals to engage with their local USTP offices to learn more about the Final Rule and forms, and to be ready to file data-embedded MORs and PCRs come June 21. **abi**

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