

Handbook for Small Business Chapter 11 Subchapter V Trustees

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CHAPTER 1

INTRODUCTION

CHAPTER 1 – INTRODUCTION

A. OVERVIEW

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. 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, a subchapter V trustee. SBRA’s key provisions seek: to increase a debtor’s ability to negotiate a successful reorganization while retaining control of the business; to reduce “unnecessary procedural burdens and costs” by eliminating the creditors’ committee and disclosure statement requirements for the plan of reorganization; and to increase oversight and ensure quick reorganizations.

In each case in which a small business debtor elects to proceed under SBRA, a subchapter V trustee is appointed immediately to perform certain duties in connection with the administration of the case. In general, among the most important subchapter V trustee 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. The subchapter V trustee also may be required to act as a disbursing agent for the debtor’s payments to creditors under the confirmed plan of plan reorganization. In certain instances, the subchapter V trustee may be required to administer property of the debtor’s bankruptcy estate for the benefit of creditors. SBRA prescribes the trustee’s specific case administration duties, which are hereafter discussed in greater detail.

The United States Trustee¹ is charged with the responsibility of supervising the administration of cases under chapter 7, 11, 12, and 13 of title 11 of the United States Code (the Bankruptcy Code). Under SBRA, the United States Trustee appoints and supervises subchapter V trustees. The primary goal of the United States Trustee in subchapter V cases is to appoint trustees who will exercise appropriate business and professional judgment in performing their trustee duties to promote the expeditious administration of the cases and to fulfill the statutory purpose of SBRA. Subchapter V trustees must fully comply with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (the Bankruptcy Rules), and the United States Trustee’s oversight.

This Handbook discusses the provisions of the new law, including the legal rights and duties of the debtor and other parties, including the United States Trustee, and focuses specifically on the duties and responsibilities of trustees appointed under subchapter V. This Handbook represents a statement of operational policy and is intended as a working

¹ All references to the United States Trustee shall include the United States Trustee’s designees, unless otherwise indicated. See 11 U.S.C. § 102(9) (“United States [T]rustee” includes designee).

manual for trustees appointed under Subchapter V of chapter 11 of the Bankruptcy Code (hereafter referred to at times as “subchapter V trustee” or “trustee”) and supervised by the United States Trustee. This Handbook is not intended to represent a complete statement of the law. It should not be used as a substitute for legal research and analysis. The trustee also should be familiar with the Bankruptcy Code, the Bankruptcy Rules, any local bankruptcy rules, and relevant case law.²

B. THE BANKRUPTCY CODE

The Bankruptcy Code consists of nine chapters.

| | |
|-------------|---|
| Chapter 1: | General Provisions |
| Chapter 3: | Case Administration |
| Chapter 5: | Creditors, the Debtor and the Estate |
| Chapter 7: | Liquidation |
| Chapter 9: | Adjustment of Debts of a Municipality |
| Chapter 11: | Reorganization |
| Chapter 12: | Adjustment of Debts of a Family Farmer with Regular Annual Income |
| Chapter 13: | Adjustment of Debts of an Individual with Regular Income |
| Chapter 15: | Ancillary and Other Cross-Border Cases |

The provisions of chapters 1, 3, and 5 apply to all cases under chapters 7, 11, and 13, and, with the exception of § 361, apply to cases under chapter 12. 11 U.S.C. § 103(a). The provisions of chapters 7, 9, 11, and 13 apply only to cases under each specific chapter. 11 U.S.C. § 103. A chapter 11 trustee, including a subchapter V trustee, is concerned primarily with chapters 1, 3, 5, and 11. A subchapter V trustee should be familiar with the provisions of these chapters which apply or were incorporated by SBRA, as well as with SBRA conforming amendments to certain provisions of these chapters. A subchapter V trustee should also be familiar with § 1181, which specifies provisions of other chapters, primarily chapter 11, that do not apply to cases under subchapter V, and the other specific provisions of SBRA, which are discussed in this Handbook.

C. 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.

² All statutory references herein refer to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, unless otherwise indicated.

- There is no required disclosure statement for the plan of reorganization 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 non-consensually (hereafter referred to at times as a "cramdown" plan). 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.

Debtors electing to proceed under subchapter V are subject to several additional requirements, set forth in more detail in the United States Trustee Legal Manual ("Legal Manual"), volume 3, chapter 3-17. 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.

D. ROLE OF THE UNITED STATES TRUSTEE

The Bankruptcy Reform Act of 1978, as amended in 1986, removed the bankruptcy judge from certain responsibilities for day-to-day administration of cases. Many administrative functions formerly performed by the court were placed within the Department of Justice through the creation of the United States Trustee Program. Among the administrative functions assigned to the United States Trustee were the appointment and supervision of chapter 11 trustees. 11 U.S.C. § 1104(g), 28 U.S.C. § 586(a)(3). The United States Trustee is specifically charged with appointing and supervising subchapter V trustees. 11 U.S.C. § 1183(a), 28 U.S.C. § 586(e).

The United States Trustee Program is the litigating component of the Department of Justice that is responsible for overseeing the nation's bankruptcy system. The Program's mission is to promote the integrity and efficiency of the bankruptcy system by enforcing bankruptcy laws; supervising private trustees; and ensuring that those involved in the process, including debtors, creditors, attorneys, and other professionals, fulfill their legal obligations. Legal Manual, chapter 1-4. To carry out its mission, the Program has standing to participate in bankruptcy cases within its jurisdiction.

28 U.S.C. § 586(a), as amended by SBRA, provides in pertinent part, that each United States Trustee shall:

....

- (3) supervise the administration of cases and trustees in cases under chapter 7, 11, including subchapter V, 12, or 13 of title 11 by, whenever the United States Trustee considers it to be appropriate:

- (A) (i) reviewing, in accordance with procedural guidelines adopted by the Executive Office for United States Trustees (which guidelines shall be applied uniformly by the United States Trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under § 330 of title 11; and

(ii) filing with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application.
- (B) monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under §§ 1125, 1128 of such title, comments with respect to such plans and disclosure statements;³
-
- (D) taking such action as the United States Trustee deems to be appropriate to ensure that any reports, schedules, and fees required to be filed under title 11 and this title by the debtor are properly and timely filed;
- (E) monitoring creditors' committees appointed under title 11;⁴
- (F) notifying the appropriate United States attorney of matters which relate to the occurrence of any action which may constitute a crime under the laws of the United States and, on the request of the United States attorney, assisting the United States attorney in carrying out prosecutions based on such action;
- (G) monitoring the progress of cases under title 11 and taking such actions as the United States Trustee deems to be appropriate to prevent undue delay in such progress;
- (H) in small business cases, performing the additional duties specified;⁵ and

³ Subchapter V debtors are not required to file a disclosure statement, but subchapter V plans are required to include some historical and projected financial information. 11 U.S.C. § 1190(1).

⁴ A case of a small business debtor, including a subchapter V case, will have a creditors' committee only if the bankruptcy court orders one for cause, upon request of a party in interest. 11 U.S.C. § 1102(3), as amended in 2019.

⁵ Subchapter V cases are generally excluded from the small business case provisions. A "small business case" is the chapter 11 case of a small business debtor where the debtor does not elect to proceed under subchapter V. 11 U.S.C. § 101(51C).

- (I) monitoring applications filed under § 327 of title 11 and, whenever the United States Trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications
- (4) deposit or invest under § 345 of title 11 money received as trustee in cases under title 11;
- (5) perform the duties prescribed for the United States Trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe; and
- (6) make such reports as the Attorney General directs.

28 U.S.C. § 586(a)(3)

E. STATUTORY AND GENERAL DUTIES OF A SUBCHAPTER V TRUSTEE

The statutory duties of a subchapter V trustee are set forth in § 1183, which incorporates by reference certain chapter 7 trustee duties as specified in § 704(a) and certain chapter 11 trustee duties as specified in § 1106(a). The trustee has a fiduciary responsibility to the bankruptcy estate. If the trustee handles estate funds, the trustee must be mindful that he or she is more than a mere disbursing agent and must be personally involved in administration of the cases in which the trustee is appointed. If the trustee can no longer perform the duties and responsibilities of the position, the trustee must immediately advise the United States Trustee. 28 U.S.C. § 586(b).

These trustee duties include, but are not limited to, the following:

- 1. Be accountable for all property received [§ 704(a)(2)].
- 2. If a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper [§ 704(a)(5)].
- 3. If advisable, oppose the discharge of the debtor [§ 704(a)(6)].
- 4. Unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest [§ 704(a)(7)].
- 5. Make a final report and file a final account of the administration of the estate with the United States Trustee and the court [§ 704(a)(9)].

6. Perform the duties specified in § 1106(a)(3) and § 1106(a)(4) of this title if the court, for cause and on request of a party in interest, the trustee, or the United States Trustee, so orders. Pursuant to this provision, the trustee is required to:
 - a. investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan [§ 1106(a)(3)]; and
 - b. once the investigation is completed, file a statement of the investigation [§ 1106(a)(4)(A)].
7. After confirmation of a plan, file such reports as are necessary and the court orders [§ 1106(a)(7)].
8. Appear and be heard at the status conference under § 1188 and any hearing that concerns:
 - a. The value of property subject to a lien;
 - b. Confirmation of a plan filed under subchapter V;
 - c. Modification of the plan after confirmation; or
 - d. The sale of property of the estate [§ 1183(b)(3)].
9. Ensure that the debtor commences making timely payments required by a confirmed plan [§ 1183(b)(4)].
10. If the debtor ceases to be a debtor in possession, pursuant to § 1183(b)(5), perform the duties specified in the following sections of the Bankruptcy Code, including operation of the debtor's business and:
 - a. Perform various duties specified in section 704(a), including: (2) be accountable for all property received; (5) examine proofs of claim and object to improper claims; (7) unless the court orders otherwise, provide information regarding the estate as requested to parties in interest; (8) file reports of operations if the debtor is authorized to be operated (9) make a final report and file a final account of the administration of the estate; (10) provide notice of the debtor's domestic support obligation; (11) administer any

employee benefit plan; (12) if debtor is a health care business, take reasonable steps to transfer patients. [§ 1106(a)(1)]

- b. File the list, schedules and statements required under section 521(1) if the debtor has not already done so. [§ 1106(a)(2)]
 - c. For any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information. [§ 1106(a)(6)]
- 11. If there is a claim for domestic support obligation, provide the applicable notice to the holder of the claim and appropriate State child support enforcement agency, as set forth in § 704(c). [§ 1183(b)(6)]
 - 12. Facilitate the development of a consensual plan of reorganization. [§ 1183(b)(7)]

This is not an exhaustive list of all duties that a subchapter V trustee may be required to perform when appointed in a case. For example, the trustee is required to follow certain banking and accounting practices to protect monies of the estate in the trustee's possession in accordance with the provisions of § 345; obtain and maintain an appropriate trustee bond for each case administered as required under § 322; and maintain and preserve adequate records for the cases administered, which duties also are discussed hereafter in this Handbook. In addition, when acting to facilitate the development of a consensual plan of reorganization, the trustee should be readily accessible to and actively engage with creditors. The trustee also should meet and confer with the committee of creditors pursuant to § 1103(d), if such a committee is appointed (in most cases, no committee will be appointed). In short, a subchapter V trustee is appointed to serve as a fiduciary in these small business cases, and the trustee must protect and preserve estate assets that are in the trustee's control, among other fiduciary duties.

The subchapter V trustee is encouraged to contact the United States Trustee when questions or concerns arise during the performance of these various duties, and the trustee should consult with the United States Trustee prior to filing certain objections in the cases that are administered, as further discussed hereafter.

F. TRUSTEE IN POSSESSION

As noted above, in those instances in which the debtor is removed as a debtor in possession, the trustee will be required to perform other duties, including operating the debtor's business and securing the assets of the estate, including all bank accounts held in the name of the debtor, among other additional duties.

CHAPTER 2

APPOINTMENT OF TRUSTEE

CHAPTER 2 – APPOINTMENT OF SUBCHAPTER V TRUSTEE

The United States Trustee may appoint a disinterested person to serve as a case-by-case trustee in each subchapter V case. Otherwise, the United States Trustee may appoint one or more individuals to serve as a standing trustee for cases filed under subchapter V. 28 U.S.C. § 586(b). If no qualified person can be found willing to serve as a trustee in a subchapter V case, the United States Trustee may serve as a trustee.

A. RECRUITMENT

When seeking applicants for a position as 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 as a subchapter V trustee. The advertising and recruitment process is described in more detail in the Legal Manual, chapter 3-17.14. The United States Trustee will try to recruit a broad and diverse 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.

The number of eligible 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.

B. BACKGROUND INVESTIGATION

All persons selected to serve as a trustee 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. *See* Legal Manual, chapter 3-17.13.3.

After the United States Trustee reviews the documents for completeness and accuracy, the documents and information will 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 already 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.

C. QUALIFICATION AND ACCEPTANCE

To ensure accountability, the United States Trustee generally will appoint individuals to serve as subchapter V trustees.⁶ 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 the Legal Manual, chapter 3-17.16.2, the trustee also must 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.

D. CONFLICTS

The subchapter V trustee is an independent third party and a fiduciary who must be fair and impartial to all parties in the case. 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.

The trustee must decline to accept any appointment where the trustee has a conflict of interest. Moreover, the trustee's duty to review 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.

⁶ 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.

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 the Executive Office for United States Trustees, may appoint another standing 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.

Prior to appointment in an individual case, all case-by-case trustees must submit a verified statement to the United States Trustee regarding their disinterestedness and proposed compensation in the case. The United States Trustee will file with the court the verified statement along with the notice of appointment to notify the court, the debtor and other interested parties of the trustee’s appointment. *See* the Supplemental Materials of this Handbook for copies of the notice of appointment and verified statement.

E. BONDING

Before beginning official duties in any case, a person selected to serve as trustee must post a bond in favor of the United States of America before seven days after selection. 11 U.S.C. § 322(a).⁷ The initial amount and sufficiency of the bond are determined by the United States Trustee. The United States Trustee may authorize use of a blanket bond that covers multiple cases and trustees. The trustee must thereafter monitor the bond amount throughout the pendency of the case, or tenure as a standing trustee, and ensure that it is adequate. The United States Trustee will assist the trustee in obtaining a bond.

The trustee is a principal on the bond, and all bonds are written in favor of the United States of America. The bonding company will require indemnification from the trustee for any payments the bonding company is required to make to third parties.

Subject to court approval, a trustee may recover appropriate portions of the bond premium as an administrative expense in the cases that the trustee administers. For blanket bonds, the trustee may seek to allocate the premium among all estates under the administration of the trustee, subject to court approval. The allocation methodology should be discussed with the United States Trustee annually.

⁷ Trustee bonds are further discussed in chapter 4, section D, and chapter 8, section B.1, of this Handbook.

F. RESIGNATION OF A TRUSTEE

If a trustee voluntarily resigns from a pending case, the trustee must take reasonable steps to ensure that such resignation does not unduly impede case administration, including submitting a written resignation to the United States Trustee, which can be filed with the court.

CHAPTER 3

CASE ADMINISTRATION

CHAPTER 3 – CASE ADMINISTRATION

A. REVIEW OF CHAPTER 11 SUBCHAPTER V CASES

1. CASE REVIEW

Prior to appointing a subchapter V trustee to a specific case, the United States Trustee will contact the potential trustee who will need to immediately review the initial case filings to make a determination whether the trustee has any connection to any parties in the case or conflicts and communicate the results of this initial review to the United States Trustee. This must be accomplished within two days of the case being filed. The trustee must decline to accept any appointment where the trustee has a conflict of interest. The Trustee also has an ongoing obligation to monitor the case and subsequent case filings for any potential conflicts or connections to any parties in the case, and to communicate any such connections or potential conflicts to the United States Trustee that are subsequently discovered.

Immediately upon appointment, the trustee must determine the status of the case. This can be accomplished by reviewing the docket; meeting with the debtor or employees of the debtor; examining the debtor's books and records, and meeting with the United States Trustee or creditors. In general, among the most important trustee 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.

a. SCHEDULES OF ASSETS AND LIABILITIES AND STATEMENT OF FINANCIAL AFFAIRS

Because a subchapter V trustee is generally appointed very shortly after the petition is filed, the case docket may not yet contain all of the required documents. A complete case file should contain a petition, creditor matrix, the debtor's statement of financial affairs, and schedules of the debtor's assets and liabilities. The schedules should include:

- Schedule A/B Real Property and Personal Property
- Schedule C Property Claimed as Exempt (individual case)
- Schedule D Creditors Holding Secured Claims
- Schedule E/F Creditors Holding Unsecured Priority and Non-Priority Claims
- Schedule G Executory Contracts and Unexpired Leases
- Schedule H Co-Debtors
- Schedule I Current Income of Individual Debtor(s)

Schedule J Current Expenditures of Individual Debtor(s)

The trustee should review the petition, list of creditors' names and addresses, statements and schedules, and other initial paperwork for consistency and completeness. Although the trustee has no duty to independently verify the factual accuracy of the debtor's documents, the trustee should exercise sound business judgment when evaluating them, including any possible need for further information or supporting documents if questions arise as to completeness or accuracy during such review. The trustee also should verify that the initial paperwork is complete and internally consistent. The trustee should communicate with the United States Trustee regarding any questions or concerns about important administrative matters or substantive issues in the case, including whether there are any issues regarding the debtor's subchapter V election or the debtor's eligibility for relief under SBRA.

The United States Trustee, after consultation with the trustee, may take appropriate action if there are problems or issues. For example, the United States Trustee may move to dismiss the bankruptcy case, if a debtor does not timely file the initial documents and does not file a request for an extension of time, or if the debtor's documents are incomplete or do not otherwise substantially comply with the Bankruptcy Code, Bankruptcy Rules or local rules, or if there are other issues or problems requiring appropriate action. The trustee also has standing to file such motions or take other appropriate action in each case in which the trustee is appointed.

Even if the debtor has filed the statement of financial affairs and schedules, the trustee may find, after a reasonable investigation and review, that it is necessary to request appropriate amendments. The accuracy of the list of creditors, statement of financial affairs, and schedules of assets and liabilities is important for a number of reasons, including providing adequate notice of the case to all creditors, identifying and protecting estate assets, and ensuring that creditor claims are properly listed and identified as disputed, contingent, or unliquidated, where appropriate.

b. FIRST DAY PLEADINGS

In addition to the petition, statement of financial affairs, and schedules, the trustee should review relevant pleadings and documents that are filed in the case. Generally, these will involve employment of professionals and retainer agreements, use of cash collateral, post-petition borrowing, sales of estate property, and assumption or rejection of unexpired leases or executory contracts.

c. TAX RETURNS

Upon electing to be a debtor under this subchapter, the debtor is required to file with the court a copy of the Federal income tax return required under applicable law (or at the debtor's election, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal tax return was filed and also the debtor's most recent balance sheet, statement of operations, and cash-flow statement (or an affidavit that one or more of these documents have not been prepared). 11 U.S.C. § 1187, incorporating § 1116(1). The trustee should verify that the debtor has timely submitted the returns, and the trustee should review them along with any other documents that are filed by the debtor. The trustee may need to request a copy of the tax returns from the debtor if they are not filed with, or accessible from, the court.

If the trustee retains a copy of the tax returns of the debtor, appropriate procedures must be in place to comply with the United States Trustee directives and applicable law as to the retention of tax returns. *See also* chapter 4, section C of this Handbook. Debtor tax returns in the trustee's possession must be destroyed following the meeting of creditors unless the trustee deems it necessary to maintain them for use in conjunction with further proceedings in the case. Alternatively, the trustee may return all copies of the returns to the debtor at the meeting of creditors or at some other point, when the trustee determines that it is no longer necessary that they be retained. Hard copies shall be destroyed by shredding in the trustee's office or by a qualified professional firm, to the extent they are not returned to the debtor. Electronic copies must be permanently deleted following industry standards and best practices.

d. THE INITIAL DEBTOR INTERVIEW

The United States Trustee will conduct an initial debtor interview ("IDI") with the debtor and debtor's counsel within 10 days after the case is filed. At the IDI, the United States Trustee will discuss the facts of the case and explain the administrative requirements of the case to the debtor and debtor's attorney, including required financial information, taxes, insurance, debtor in possession bank accounts, and monthly reports.

Trustees should attend the IDI in person or telephonically, if the trustee is unable to appear in person. Trustees should also begin discussions with the debtor regarding the creation of a consensual plan.

e. MONTHLY OPERATING REPORTS

As the case progresses, the trustee should carefully review all monthly operating reports filed by the debtor in possession. The monthly operating reports should provide the trustee with an overview of the debtor's financial activities and business operation after the commencement of the case.

f. THE DEBTOR'S PLAN

Only the debtor may file a subchapter V plan, and the plan must be filed not later than 90 days after the order for relief under chapter 11. 11 U.S.C. §§ 1189(a), (b). In some cases, the debtor may file the plan on or shortly after the bankruptcy petition date. In other cases, the debtor may not file the plan until after the initial status conference or at such time as the debtor has commenced or concluded negotiations with the creditors over the plan. As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose. The trustee should be proactive and encourage communication between all parties in interest regarding the plan. The trustee also should carefully review the plan when it is filed. *See* section G for further discussion of Review and Confirmation of Plan.

g. EXEMPTIONS

Individual debtors may claim exemptions in Schedule C of their bankruptcy schedules, which may have bearing on the terms of the plans of reorganization that are proposed or negotiated, as well as the confirmability of such plans.

The deadline for filing objections is within thirty (30) days following the conclusion of the § 341 meeting of creditors or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Fed. R. Bankr. P. 4003(b); *see also Taylor v. Freeland and Kronz*, 503 U.S. 638, 643-645 (1992). The trustee should consult with the United States Trustee prior to filing any objections to the debtor's exemptions.

2. ELIGIBILITY OF DEBTOR

A small business debtor is defined as a debtor that is engaged in commercial or business activities and has no more than \$ 2,725,625 (excluding debts owed to affiliates or insiders) in noncontingent liquidated secured and unsecured debt, not less than 50 percent of which arose from the commercial or business activities of the debtor. 11 U.S.C.

§ 101(51D).⁸ If the primary activity of the debtor is the business of owning single asset real estate, the debtor is not a small business debtor. *Id.* A debtor who is an “affiliate” [as defined in 11 U.S.C. § 101(2)] of a small business debtor also will be considered a small business debtor so long as aggregate non-insider debts of the affiliated debtors do not exceed the \$2,725,625 debt limit. *Id.* If, therefore, both an individual and that person’s closely held corporation or limited liability company (LLC) file chapter 11 petitions and, if the aggregate debts of the two entities do not exceed the \$2,725,625 limit, both entities will be treated as small business debtors. Besides eligibility for subchapter V, the debtor must be eligible generally under § 109 of the Bankruptcy Code.

Election to proceed under subchapter V is at the discretion of each debtor who qualifies as a small business 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 Interim Fed. 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 Bankruptcy Rule 1009.

In the event that issues arise as to the debtor’s election or eligibility for relief under SBRA, the trustee should consult with the United States Trustee.

B. EXAMINATION OF THE DEBTOR AT THE MEETING OF CREDITORS

The debtor must attend the meeting of creditors. 11 U.S.C. § 343. This is true even if no creditors attend. Neither the trustee nor the United States Trustee may waive the requirement for the appearance of the debtor at the meeting. *See* 11 U.S.C. §§ 341, 343. When spouses have filed jointly, the Bankruptcy Code requires both debtors to attend the meeting. 11 U.S.C. § 343, Fed. R. Bankr. P. 2003(b), Fed. R. Bankr. P. 4002.

The United States Trustee will be the presiding officer at the meeting of creditors and examine the debtor or debtor’s principal under oath. However, the trustee is expected to appear and actively participate in this meeting. All meetings will be electronically recorded by the United States Trustee, and the recordings are preserved and made available to parties upon request. Fed. R. Bankr. P. 2003(c). The United States Trustee will work with the trustee and the clerk of court to ensure the prompt scheduling and noticing of the meeting of creditors within the time provided by Bankruptcy Rule 2003.

The permissible scope of the examination of the debtor at the meeting of creditors is broad. *See* 11 U.S.C. § 343; Fed. R. Bankr. P. 2003(b). The debtor will be questioned about the accuracy and completeness of the disclosures in the petition, schedules and statement of financial affairs, the debtor’s financial situation and conduct, the debtor’s

⁸ As of April 1, 2019. This amount is adjusted every three years by the Judicial Conference of the United States to account for inflation. 11 U.S.C. § 104.

business operation, and other matters pertaining to the administration of the case. The role of the trustee at these meetings is to also ask appropriate questions to the debtor as to these matters and other matters relating to the plan of reorganization to be effectuated in the case. Creditors are invited to attend the meeting, and they are given an opportunity to ask the debtor questions. Upon conclusion of the debtor's examination, the United States Trustee will conclude the meeting of creditors.

The trustee should use the meeting of creditors as another opportunity to continue a dialogue with the debtor and creditors over the plan to be proposed in the case. The trustee's demeanor toward all parties must be appropriate and professional and the trustee should not give legal advice to debtors or creditors.

C. NOTICE TO DOMESTIC SUPPORT OBLIGATION HOLDERS

During the meeting of creditors, individual debtors should be asked to confirm whether they have a domestic support obligation ("DSO"). If so, the trustee should make sure they have the necessary addresses to send notices that are required to be sent.

Specifically, the trustee must provide the two statutorily required written notices to the holder of a DSO claim and the appropriate State child support enforcement agency.

11 U.S.C. § 1183(b)(6), incorporating § 704(c).

The first notice to a DSO claim holder advises of the right to payment in the bankruptcy case, the right to use the collection services of the State child support enforcement agency of the State where they reside, and the contact information for the agency. At the same time, a notice is sent to the agency providing them with the claim holder's contact information. While the Bankruptcy Code is silent on the timing of the first required notices, the trustee should send these notices generally no later than a week after the meeting of creditors is held. However, if the information is otherwise available to the trustee, the trustee may send the notices at any time prior to the meeting of creditors.

The trustee must send the second required notice to the DSO claim holder and the State child support enforcement agency when a discharge is granted. This notice must contain the debtor's last known address, the last known name and address of the debtor's employer, as well as contact information for certain creditors whose claims were either reaffirmed or not discharged. 11 U.S.C. § 1183(b)(6). The notices shall be sent within a reasonable period of time following the granting of the debtor's discharge. If the case is closed by the trustee while an applicable § 523 dischargeability action is pending against the debtor, the trustee shall send the discharge notice and include the name of the creditor, with a notation that an action to determine the dischargeability of the creditor's claim is pending.

In order to assist State child support enforcement agencies in identifying debtors with DSOs, the trustee must include the debtor's full Social Security number on those notices going to the State child support enforcement agency, except where prohibited by law or regulation. The debtor's full Social Security number must not be included on the notices going to the DSO claim holder. If the trustee chooses to file the notice with the court, the trustee must ensure that the first five digits of the debtor's Social Security number are redacted from the notice. Fed. R. Bankr. P. 9037.

D. INVESTIGATION AND REPORT

If the court for cause so orders, at the request of a party in interest, the trustee must investigate the “acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan.” 11 U.S.C. § 1183(b)(2); 11 U.S.C. § 1106(a)(3). The trustee must then file a statement of the results of the investigation, setting forth any facts concerning “fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor. . . .” 11 U.S.C. § 1183(b)(2); 11 U.S.C. § 1106(a)(4)(A). A copy of this report is to be served on the United States Trustee and the committee of unsecured creditors, if one exists, and other parties designated by the court.

Upon the court's order, the trustee should promptly complete a proper investigation of the business affairs of the debtor but should take care not to devote time or expense to matters that will have little benefit to the estate. Because each case is different, no standard rule can be applied with regard to the scope or extent of a proper investigation. Rather, if concerned, the trustee may seek further guidance or clarification from the court regarding the proper scope of the court-ordered investigation.

Investigations may be particularly necessary when a trustee has taken possession of the estate based upon the fraud, gross mismanagement, or dishonesty of the principals of the debtor. The trustee will need to investigate the prior management to determine if significant causes of action against former officers and directors exist. However, the trustee should not unnecessarily duplicate investigative work that has already been performed by other parties in interest.

Any investigation conducted by the trustee should proceed when practicable without causing delay to the potential successful reorganization of the case. For example, negotiations regarding a plan of reorganization should continue if the information available is sufficient for creditors to determine whether a prompt confirmation is warranted or whether a more detailed investigation is needed. Further, the trustee should not request that the court postpone the plan confirmation hearing unless the trustee believes that the investigation is necessary for the court to evaluate the accuracy of the

information provided in the plan or disclosure statement, if one is ordered. The pendency of an investigation should, however, be included in any plan or, if applicable, any proposed disclosure statement.

E. STATUS CONFERENCE AND OTHER COURT HEARINGS

Generally, within 60 days after the petition date, the bankruptcy court will hold a status conference “to further the expeditious and economical resolution” of each subchapter V case. 11 U.S.C. § 1188(a). Not later than 14 days before the status conference, the debtor is required to file with the court and serve on the trustee and all parties in interest a report that details the efforts the debtor has undertaken and will undertake to attain a consensual plan. 11 U.S.C. § 1188(c).

The trustee should review the debtor’s report carefully, and the trustee is required to attend the status conference and be heard. 11 U.S.C. § 1183(b)(3). The trustee should be prepared to discuss the debtor’s report, to respond to any questions by the court, and to discuss any other related matters that may be raised at the status conference.

During the administration of the case, the trustee also is required to attend any court hearings that concern the confirmation of a plan, modification of a plan, value of any debtor property that is subject to a lien or the sale of property of the bankruptcy estate. 11 U.S.C. § 1183(b)(3).

F. TRUSTEE IN POSSESSION

The default status for subchapter V cases is that the debtor will remain in possession of the property of the estate. If the court for cause under § 1185(a) determines that the debtor should no longer be in possession, the trustee shall perform the duties required by § 704(a)(8) and §§ 1106(a)(1), (2), and (6): operate the debtor’s business; file any required schedules and statements; file periodic operating reports; serve as the administrator of any employee benefit plan; make reasonable efforts to transfer patients from a closing health care business to a new provider offering similar services; and, for any year in which a tax return has not been filed, furnish such information as may be required by the applicable governmental entity. 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 § 1185(b) provides that on request of a party in interest and after notice and a hearing, the court may reinstate the debtor in possession.

G. REVIEW AND CONFIRMATION OF PLAN

1. FACILITATING A CONSENSUAL PLAN

Section 1183(b)(7) of the Bankruptcy Code provides that a principal duty of the trustee is to facilitate the development of a consensual plan of reorganization. As soon as possible, the trustee should begin discussions with the debtor and principal creditors about the plan the debtor will propose, and the trustee should encourage communication between all parties in interest as the plan is developed. The trustee should be proactive in communicating with the debtor and debtor's counsel and with creditors, and in promoting and facilitating plan negotiations. Depending upon the circumstances, the trustee also may participate in the plan negotiations between the debtor and creditors and should carefully review the plan and any plan amendments that are filed.

2. FILING OF A PLAN

Only the debtor may file a subchapter V plan, and the 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." *Id.* The trustee must ensure that debtors timely file plans, and if plans are not timely filed, should consult with the United States Trustee. The trustee should consider whether objecting to an extension request is appropriate and consult with the United States Trustee prior to filing any objection.

When the plan is filed, the trustee should review the plan and communicate any concerns to the debtor about the plan prior to the confirmation hearing. The trustee has standing to object to the plan, and the trustee should consult with the United States Trustee regarding any concerns or objections, prior to filing any objection to the plan. The requirements for a subchapter V plan may be found in § 1190 and § 1191, which incorporates many of the provisions of § 1129, and are discussed hereafter.

3. PLAN REQUIREMENTS

Absent a court order, a separate disclosure statement is not required in subchapter V cases. 11 U.S.C. § 1181(b). However, the plan itself must include certain information normally found in disclosure statements, including: "(A) a brief history of the business operations of the debtor; (B) a liquidation analysis; and (C) projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization" 11 U.S.C. § 1190(1). These disclosures will assist creditors in making an informed decision when voting on the plan. The trustee may object to the plan if the plan does not contain these disclosures. The trustee should consult with the United States Trustee if the

trustee has concerns regarding the adequacy of disclosure of this information in the plan prior to filing any objection.

The disclosures required in the plan are necessary for determining the plan's compliance with the requirements of section 1129(a), all of which except one apply to subchapter V cases just as they do to other chapter 11 cases.⁹ For the liquidation analysis, the court may only confirm a plan if each impaired class of creditors has either accepted the plan or would receive, as of the effective date of the plan, property of a value that is not less than the amount that would be paid on their claims if the estate of the debtor were liquidated under chapter 7. 11 U.S.C. § 1129(a)(7). The plan's proposed payments must also be feasible, meaning that the debtor is not likely to default and require liquidation or further financial reorganization. 11 U.S.C. § 1129(a)(11). The trustee may object if these requirements or any of the other applicable section 1129(a) requirements are not met. The trustee should consult with the United States Trustee if the trustee has concerns that these requirements are not met, prior to filing any objection.

a. CONSENSUAL PLAN

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).

Consensual confirmation is a goal of subchapter V, and the trustee should take steps to encourage that outcome. Nevertheless, if any class of impaired creditors does not accept the plan, confirmation may still be possible on a non-consensual or **cramdown** basis.

b. NON-CONSENSUAL OR CRAMDOWN PLAN

A plan that is not confirmed consensually under section 1191(a) can be confirmed non-consensually under section 1191(b). Whereas section 1129(b) provides the cramdown requirements for other chapter 11 cases, subchapter V cases have their

⁹ 11 U.S.C. § 1129(a)(15), which requires the debtor's disposable income over a five year period to be devoted to the plan, does not apply to subchapter V cases.

own specific cramdown criteria in 11 U.S.C. § 1191(b). 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 cramdown 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.

Section 1191(b) provides that a non-consensual plan may be confirmed if it does not discriminate unfairly, and the plan is fair and equitable, with respect to each class of claims or interests that is impaired and has not accepted the plan. Cramdown confirmation is possible in subchapter V cases even if § 1129(a)(10) is not satisfied and no impaired class of creditors accepts the plan.

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). 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).

The trustee may object to confirmation if the criteria of subsections 1191(b) and (c) are not met in cramdown cases. 11 U.S.C. § 1183(b)(3). The trustee should consult with the United States Trustee prior to filing an objection if the trustee has concerns that these criteria are not met.

4. PLAN CONFIRMATION HEARING

The court is required to hold a hearing regarding the confirmation of the plan and the trustee is required to appear and be heard at this plan confirmation hearing. 11 U.S.C. § 1183(b)(3)(B). The trustee should be prepared to discuss the debtor’s plan and to respond to any questions by the court regarding confirmation of the plan. As noted

previously, the trustee has standing to object to the plan, but should consult with the United States Trustee prior to filing an objection to the plan.

At the confirmation hearing, the court may ask the trustee to make a recommendation, state a position or provide other information or comments regarding the confirmation of the plan -- even if the trustee has not objected to the plan. The trustee should become familiar with the local rules and practice of the court regarding the plan confirmation hearing and any requirements or deadlines for filing objections, comments or recommendations regarding confirmation of the plan.

5. MODIFICATION OF A SUBCHAPTER V PLAN

In other chapter 11 cases, the debtor is permitted to modify the plan under certain circumstances in accordance with section 1127 of the Bankruptcy Code. While section 1127 of the Bankruptcy Code does not apply in subchapter V cases, many aspects of section 1127 allowing plan modification have been retained in some form under SBRA pursuant to 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. 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 after confirmation, as long as the requirements of section 1191(b) for non-consensual plans are met. Finally, as with the initial proposed plan, disclosure requirements under section 1125 are not required for plan modifications in subchapter V cases.

The trustee is required to appear at any hearing regarding the confirmation of a modified plan and at any hearing regarding the modification of a confirmed plan. 11 U.S.C. § 1183(b)(3). The trustee has standing to object to modified plans and modifications to confirmed plans, and the trustee should consult with the United States Trustee if the trustee has concerns or objections regarding a modified plan or any modifications to a confirmed plan, prior to filing any objection.

a. 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 Bankruptcy 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.

b. 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 Bankruptcy 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).

H. CLAIMS AND ADMINISTRATIVE EXPENSES

1. PROOFS OF CLAIMS

The court will set a deadline for the debtor's creditors to file their claims for purposes of voting on the debtor's plan and receiving a distribution under the plan. Fed. R. Bankr. P. 3003. The official claim form is a Proof of Claim, which is deemed allowed as filed for purposes of plan voting and distribution, unless an objection is filed to the claim. 11 U.S.C. § 502(a). While creditors must file a proof of claim in order to receive a dividend in chapter 7 cases, in chapter 11 cases creditors whose claims are not scheduled as disputed, contingent, or unliquidated need not file claims, but may rely on the debtor's schedules for purposes of voting on the plan and receiving a distribution thereunder. *See* 11 U.S.C. § 1111(a); Fed. R. Bankr. P. 3003(b)(1), (c)(2).

The trustee has a duty to examine proofs of claim and object to the allowance of any claim that is improper, if a purpose is to be served. 11 U.S.C. § 704(a)(5) (made applicable by § 1183(b)). The debtor has this same power and duty. 11 U.S.C. § 704(a)(5) (made applicable by § 1184 and § 1183(b)).

The trustee should bear in mind the goal of subchapter V to reduce expenses and not undertake work on claims that duplicates efforts by the debtor or holds no prospect of benefit to the case that would outweigh the administrative costs expended in objecting to claims. In addition, depending upon the deadline for filing claims and the terms of the plan, the trustee may complete or substantially complete all required trustee duties without necessity or benefit to objecting to claims. Prior to filing any objections to claims, the trustee should consult with the United States Trustee.

2. ADMINISTRATIVE EXPENSES

Obligations incurred after the filing of the case and not paid in the ordinary course of business constitute administrative expenses, if the expenses were actual and necessary to preserve the estate. *See generally* 11 U.S.C. § 503. Entities that have such unpaid obligations do not submit proofs of claims, but instead file requests for payment of administrative expenses. 11 U.S.C. § 503(a). Administrative expenses may include the fees and costs incurred by professionals who are employed in the case, and the trustee's fees and expenses (*see* discussion in sections K & L below). Prior to filing any objections to administrative expenses, the trustee should consult with the United States Trustee.

I. POST-CONFIRMATION CASE ADMINISTRATION

1. DEFINING THE TRUSTEE'S POST-CONFIRMATION ROLE

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 trustee, the United States Trustee, and all parties in interest. 11 U.S.C. § 1183(c)(2).

If the plan is consensually confirmed, unless otherwise provided in the plan or ordered by the court, the trustee's duties terminate with substantial consummation of the plan. 11 U.S.C. § 1183(c)(1). Terminated trustees should file their compensation and expense requests, pursuant to 11 U.S.C. § 330 for case-by-case trustees or 28 U.S.C. § 586 for standing trustees, and distribute any funds on hand in accordance with the plan. In addition, terminated trustees should make their final report and file their account of their administration of the estate with the court and the United States Trustee in accordance with § 1183(b)(1), which incorporates § 704(a)(9). *See* Supplemental Materials for instructions and forms prescribed by the United States Trustee.

If the plan is confirmed on a nonconsensual basis pursuant to section 1191(b), the trustee will collect the plan payments and distribute them to creditors, unless otherwise provided in the plan or confirmation order. 11 U.S.C. § 1194(b). Instead of being terminated, the trustee will remain in place for the life of the plan, regardless of whether the trustee or the

debtor make the plan payments. Upon completion of all plan payments, trustees should submit their final report and account of their administration of the estate in accordance with § 1183(b)(1), which incorporates § 704(a)(9). *See* Supplemental Materials for instructions and forms prescribed by the United States Trustee.

The trustee's final report will certify that the trustee has completed all trustee duties in administering the case and request that the trustee be discharged from any further duties as trustee. *See* Supplemental Materials.

The trustee may have additional post-confirmation reporting requirements in cases, particularly if the trustee will be collecting and distributing plan payments. *See generally*, chapter 8 of this Handbook, section A.4 for additional details.

Alternatively, 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.

2. NOTICE TO DOMESTIC SUPPORT OBLIGATION HOLDERS

If there is a claim for a domestic support obligation (DSO) with respect to the debtor, when the discharge is granted, the trustee must provide a second statutorily required written notice to the holder of the DSO claim and the appropriate State child support enforcement agency. 11 U.S.C. §§ 704(c), 1183(b). *See* subsection C of this chapter for additional details.

3. FINAL DECREE AND CASE CLOSING

After substantial consummation of a consensual plan, as provided in § 1101(2), and termination of the trustee's services pursuant to § 1183(c)(1), the debtor may proceed to seek entry of a final decree closing the case pursuant § 350(a) and Fed R. Bankr. P. 3022, upon a showing that the estate has been fully administered, the court has discharged the trustee, and 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 the plan payments to creditors, the case ordinarily will remain open after substantial consummation until all payments have been made by the trustee, 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).

J. DISMISSAL OR CONVERSION OF CASES

The debtor may voluntarily convert the case to another chapter, or request that the case be dismissed. 11 U.S.C. §§ 1112(a), (b). The court may order that the case be converted to another chapter, or dismissed, on request of a party in interest and for cause shown pursuant to 11 U.S.C. § 1112(b). Dismissal or conversion may occur at any time – regardless of whether a plan is confirmed. Prior to filing a motion to dismiss or convert a case, the trustee should consult with the United States Trustee.

If the case is converted or dismissed, the trustee should file a final report certifying that the trustee has completed their subchapter V trustee duties in administering the case and requesting the trustee be discharged from any further duties as trustee. *See* Supplemental Materials and chapter 8 of this Handbook. The trustee may also seek compensation for their work in the case prior to conversion or dismissal.

If the case is converted to a chapter 7 liquidation, the United States Trustee will appoint an interim trustee to administer the chapter 7 case. The United States Trustee may appoint the trustee, or a member of the chapter 7 panel of trustees, to administer the case, in the exercise of the United States Trustee’s discretion. 11 U.S.C. § 701(a)(1).

K. EMPLOYMENT OF PROFESSIONALS

1. GENERAL STANDARDS

Under § 327, the debtor and, in appropriate circumstances, the trustee may employ professionals, including attorneys, accountants, appraisers or auctioneers to assist the debtor or the trustee in performing trustee duties under title 11. Those professionals may be awarded compensation for actual and necessary services and reimbursement for actual and necessary expenses, pursuant to § 330. Bearing in mind the goal of subchapter V to contain expenses, the trustee should carefully consider whether a professional is needed in any given case.

The employment of professionals must be approved by the court, and court approval should be requested prior to the commencement of work. 11 U.S.C. § 327(a). Although the trustee may employ professionals under section 327(a), SBRA 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 and the debtor

already has employed professionals to perform many of the duties that the trustee might seek to employ the professionals to perform. *See* 11 U.S.C. § 1184. The trustee should keep the statutory purpose of SBRA in mind when carefully considering whether employment of the professional is warranted under the specific circumstances of each case.

2. EMPLOYMENT STANDARDS

The threshold question for the employment of any professional is the necessity of employment in the particular case. The trustee must determine whether the services of a professional are needed and whether the cost is warranted. 11 U.S.C. §§ 330, 704(a). Further, the trustee needs to determine at the outset the level of professional work required, and the estimated costs and benefits associated with the work. In many cases, trustees may not need to hire professionals.

As a general rule, professional persons employed by a trustee must be disinterested and must not have an interest adverse to the estate. 11 U.S.C. §§ 327(a), 101(14). There are some exceptions. If a trustee is authorized to operate the debtor's business under § 1185(a), and if the debtor has regularly employed professional persons, the trustee may retain or replace such professional persons. 11 U.S.C. § 327(b). Representation of a creditor does not disqualify a person from representing the trustee, unless there is an objection from another creditor or the United States Trustee and the court finds there is an actual conflict of interest. 11 U.S.C. § 327(c). The trustee may retain an attorney for a "specified special purpose," even though the attorney previously represented the debtor, if the attorney does not hold or represent an adverse interest to the debtor or the estate with respect to the subject matter of the employment. 11 U.S.C. § 327(e).

The employment of a professional with a conflict of interest can result in denial of compensation to the professional under § 328(c), and may adversely affect, or result in denial of, the trustee's compensation.

3. EMPLOYMENT PROCEDURES

Section 327 does not require notice and hearing procedures to hire professionals, only court approval. The trustee must provide a copy of the employment application to the United States Trustee. Fed. R. Bankr. P. 2014(a).

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

- a. specific facts necessitating employment;
- b. name of the person employed;

- c. reasons for selecting the firm or individual;
- d. professional services to be rendered;
- e. proposed arrangements for compensation; and
- f. professional's connections with the trustee, debtor, creditors, and other parties in interest.

Fed. R. Bankr. P. 2014(a). The application must be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, including the trustee, their respective attorneys and accountants, the United States Trustee, or any person employed by the United States Trustee. Fed. R. Bankr. P. 2014(a).

Fee sharing arrangements are prohibited. 11 U.S.C. § 504.

The trustee and the professional should discuss and agree upon the terms and conditions of employment, including the manner of compensation, with the understanding that the court must approve the fee for the professional and may increase or decrease it depending upon the circumstances, even to the extent of recapturing monies paid as interim fees. 11 U.S.C. § 328(a).

4. SUPERVISION OF PROFESSIONALS

It is critical that the trustee oversees the work performed by any professionals that are employed by the trustee. The trustee must exercise appropriate business judgment on all key decisions regarding the performance of the trustee's duties. The trustee must actively supervise the trustee's professionals to ensure prompt and appropriate execution of duties, compliance with required procedures and reasonable and necessary fees and expenses.

The trustee also is advised to pay particular attention to the activities of other professionals who are not closely regulated by state authorities or who take physical possession of estate property and funds, such as auctioneers, liquidators, brokers, collection agents and property managers.

5. PROFESSIONAL FEE APPLICATIONS

Pursuant to § 330, after notice and a hearing, and subject to § 328, the court may award a professional person employed pursuant to § 327 reasonable compensation for actual, necessary services. *See* 11 U.S.C. § 330. Section 330 also allows the recovery of actual, necessary expenses. Overhead expenses of a trustee or professional are not reimbursable from the estate. Unless otherwise permitted by the court, a professional may apply for interim compensation and reimbursement of expenses not more than once every 120

days. *See* 11 U.S.C. § 331. Professionals also are required to file final applications for compensation.

Pursuant to Bankruptcy Rule 2016(a), each application for interim or final fees and expenses must include the following:

- a. a detailed statement of services rendered, time expended, and expenses incurred;
- b. a statement of the amount of fees and expenses requested;
- c. a statement of payments received or promised for services rendered or to be rendered in any capacity in connection with the case;
- d. a statement of the source of compensation paid or promised; and
- e. a statement of whether an agreement or understanding exists for the sharing of compensation received or to be received.

In determining the amount of reasonable compensation to be awarded under § 330, the court considers the nature, extent, and value of the professional's services, taking into account all relevant factors, including the following:

- a. the time spent on such services;
- b. the rates charged for such services;
- c. whether the services were necessary to the administration of the case, or beneficial at the time at which the services were rendered;
- d. whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- e. whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under title 11.

Unless otherwise ordered by the court, all creditors and parties in interest must receive notice of all fee applications over \$1,000. Fed. R. Bankr. P. 2002(a)(6). Pursuant to 28 U.S.C. § 586(a)(3), as amended, the United States Trustee reviews professional fee applications in accordance with the procedural guidelines adopted by the Executive Office for United States Trustees. *See* 28 C.F.R. Part 58, Appendix A (guidelines for review of fee applications). The trustee should be familiar with these fee guidelines and any other court guidelines.

The trustee should review the fee applications by the trustee's professionals to ensure that all requested fees are reasonable considering the nature, extent and value of the services provided, and the trustee should object when appropriate. If the trustee has concerns or objections about the fees and expenses requested by other professionals, the trustee

should communicate them to the debtor and the United States Trustee, and the trustee should consult with the United States Trustee prior to filing an objection.

L. TRUSTEE COMPENSATION AND BENEFITS

The statutory basis of subchapter V trustee compensation is 11 U.S.C. § 330 for case-by-case trustees and 28 U.S.C. § 586(e) for standing trustees. Case-by-case trustees must apply to the court for an award of compensation similar to the application process that is used by professionals. Standing trustee compensation is set by statute.

The method of payment of trustee compensation depends in part on the outcome of the case. For cases with plans confirmed under the “cramdown” provision in § 1191(b), the trustee will remain in place throughout the life of the plan, and the trustee may collect compensation as the trustee disburses payments received from the debtor, except as provided in the plan or ordered in the confirmation order. By contrast, in cases with plans confirmed on a consensual basis, the trustee’s service ends with substantial consummation of the plan under § 1183(c)(1), and the trustee may collect compensation for all services. Administrative expenses, including the trustee’s allowed compensation, generally are payable on the effective date of the plan, unless the holders of such claims have agreed to different treatment. 11 U.S.C. § 1129(a)(9). However, the trustee’s compensation (and other administrative expenses) may be paid over time through the debtor’s plan if the plan is confirmed non-consensually pursuant to § 1191(e), for any compensation awarded by the court.

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 § 1194 directs that the trustee either distribute those funds in accordance with a confirmed plan or return those funds to the debtor if the plan is not confirmed, after deducting any (1) unpaid administrative expenses, (2) adequate protection payments due to a secured lender, and (3) fees owing to the trustee.

1. CASE-BY-CASE TRUSTEE COMPENSATION

Case-by-case trustees are compensated through § 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.” In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including:

- a. the time spent on such services;
- b. the rates charged for such services;

- c. whether the services were necessary to the administration of the case, or beneficial at the time at which the services were rendered; and
- d. whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed.

Case-by-case trustees 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).¹⁰

Trustees are encouraged to keep in mind Congress’ stated intent that subchapter V cases not be burdened with excessive administrative expenses when planning their work and submitting their fee applications for review and approval by the court. The trustee’s fee applications are subject to notice and opportunity for objection by the debtor and creditors, and the United States Trustee also will review them and object to the requested compensation if it is excessive or unreasonable.

In cases where the trustee’s services are terminated by dismissal or conversion or upon substantial consummation of a consensual plan, a case-by-case trustee may still request reasonable compensation under section 330, based on the time spent and value of the services provided, which is subject to court review and approval.

2. 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 the Executive Office for

¹⁰ 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).

United States Trustees, 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). In addition, SBRA amended 28 U.S.C. § 586(e) to add a new subsection (5) specifically for subchapter V standing trustees in the event the trustee's services are terminated by dismissal or conversion or upon substantial consummation of a consensual plan. SBRA § 4(b)(1)(D)(3). While a standing trustee in cramdown cases ordinarily will remain in place and collect compensation through disbursed plan payments, 28 U.S.C. § 586(e)(5) provides that if a subchapter V standing trustee's services are terminated because the case is converted or dismissed, or because a consensual plan is substantially consummated, the court may allow compensation consistent with the services performed by the standing trustee and subject to limits on the trustee's overall compensation established by the Attorney General.

CHAPTER 4

FINANCIAL AND OPERATIONAL PRACTICES AND PROCEDURES FOR CASE-BY-CASE TRUSTEES

CHAPTER 4 – FINANCIAL AND OPERATIONAL PRACTICES AND PROCEDURES FOR CASE-BY-CASE TRUSTEES

The requirements in this chapter are designed to ensure that case-by-case trustees have adequate procedures in place to protect the property they receive from the debtor, primarily plan payments or adequate protection payments as ordered by the court, and adequate record keeping to ensure that they are properly accountable for the property they receive and the cases they administer. *See* 28 U.S.C. § 586(b), 11 U.S.C. § 704(a)(2) as made applicable to trustees by 11 U.S.C. § 1183.

If the court for cause under section 1185 removes the debtor from possession and control of the estate assets and the operation of the business, the trustee will be required to perform additional duties, which necessarily will involve additional financial and operational practices and procedures.

A. BANK ACCOUNTS

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).

The trustee who holds estate funds or acts as 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 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).

1. BANK ACCOUNTS, GENERALLY

The case-by-case trustee must open a single bank account for each case administered by the trustee in which funds are received. All receipt and disbursement activity of the trustee related to the case are made through the estate bank account. The trustee must deposit all receipts in a banking institution that:

- a. is insured by the Federal Deposit Insurance Corporation;
- b. complies with the requirements of the Bankruptcy Code and guidelines of the United States Trustee; and
- c. is approved by the United States Trustee to hold deposits of bankruptcy estate accounts (*see* further discussion below regarding authorized depositories and collateralization of deposits).¹¹ The trustee must disclose to the United States Trustee the identity of each banking institution in which the trustee has an estate account. 11 U.S.C. § 345.

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. All trustee bank accounts should include the trustee's name and capacity as trustee for the estate and include the case name and number. All bank account information must be supplied to the United States Trustee.

2. REQUIREMENTS FOR DEPOSITORIES HOLDING ESTATE FUNDS

The trustee may only use a depository that has agreed to comply with 11 U.S.C. § 345, 31 C.F.R. § 225, and the requirements of the United States Trustee. 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, 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 region maintains a list of authorized depositories, which the trustee should request immediately upon appointment. If a bank wishes to be added to the list, it should contact the United States Trustee for the current requirements.

The trustee must assist the United States Trustee in obtaining bank records, documents and information related to the trustee's accounts. The trustee must provide an authorization for the bank's release of information to the United States Trustee when requested (*See* "Release" in the Supplemental Materials).

3. COLLATERALIZATION OF THE TRUSTEE'S DEPOSITS

It is the responsibility of the trustee to ensure that the banking institution is in compliance with § 345 to the extent of the trustee's deposits. If the aggregate funds on deposit for an estate in a single institution exceed the \$250,000 FDIC limits, the excess funds must be

¹¹ To be approved by the United States Trustee, the banking institution must execute a Uniform Depository Agreement.

bonded or be collateralized by securities deposited with the appropriate Federal Reserve Bank. The trustee must notify the United States Trustee if the amount on deposit in an estate in any single depository exceeds or is expected to exceed \$250,000.

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 obtains summaries of the amounts on deposit from each bank that is used by a trustee to assist in monitoring trustee accounts and bonding requirements. The United States Trustee also receives a report from the Federal Reserve to review the sufficiency of the collateral posted by the banking institutions. The trustee must assist the United States Trustee in obtaining bank statements or summaries of amounts on deposit. An authorization for the bank's release of information to the United States Trustee may be required from the trustee.

4. RECEIPTS

Upon receipt, checks and money orders must be recorded in a cash receipts log or alternatively documented in a manner approved by the United States Trustee. Checks must be restrictively endorsed in writing or by stamping "For deposit only to _____." Currency and checks must be kept in a safe or locked cabinet until deposited. Funds must be deposited on the date of receipt, to the extent practical, but no later than one business day after receipt.

5. DISBURSEMENTS

Blank check stock must be kept in a safe or locked file cabinet or room with restricted access to prevent unauthorized access and use. If there is no pre-printed check number on the front of the check, the checks must contain a control number on the back assigned by the check stock vendor. The trustee should maintain a log of those control numbers and account for every check. If the check numbers are pre-printed, the trustee must maintain a log of those numbers and account for every check.

Except as provided below, all checks must state that the check will be void if not cashed within 90 days. Stale outstanding checks must be canceled and reissued within 120 days.

B. FINANCIAL PROCEDURES AND RECORD KEEPING

The trustee, as fiduciary, must institute strong internal controls and an appropriate accounting system for both the cases and the funds administered.

At a minimum, all cash management duties (e.g., handling mail, processing receipts, issuing checks, opening and closing bank accounts, and reconciling bank accounts) must be conducted at the trustee's primary business location under the trustee's supervision. In addition, the trustee must:

1. Verify that incoming receipts are promptly and properly deposited by comparing the cash receipts log to bank statements.
2. Review and sign all checks.
3. Authorize stop payment requests in writing.
4. Receive the monthly bank statements directly before employees have access to them; review the statements and canceled checks for errors, unusual transfers and endorsements, alterations and forged or unauthorized signatures within 10 days of receipt and immediately report discrepancies to the bank and the United States Trustee.
5. Ensure that bank accounts are reconciled within 30 days after the month-end and bank account reconciling items requiring correction must be resolved timely.
6. Review, date, and initial the monthly bank account reconciliations.
7. Set up and maintain appropriate password and access controls for any automated banking or case management systems.
8. Maintain up-to-date records regarding the status of open cases.
9. To facilitate case administration and preparation of reports to the United States Trustee, (1) maintain an individual receipts and disbursement ledger for each open case in which the trustee is appointed and (2) for cases which the trustee is receiving compensation under a plan, maintain a log of such receipts.

C. RETENTION OF RECORDS

The trustee must maintain individual case receipts and disbursement records and all related bank records, including bank statements, monthly bank reconciliations, canceled checks, and deposit slips, for at least two years after an order closing the case and discharging the trustee is entered by the court. All bank records may be kept in an electronic format.

Individual case files must be retained in either paper or electronic form for at least two years after entry of the order closing the case and the discharge of the trustee. The decision whether to maintain case files more than two years after closing should be based upon the trustee's individual need to refer to the file for subsequent inquiries from creditors or debtors. If the trustee has possession of original court documents, such as proofs of claim, their disposition must be in accordance with the guidelines or directives from the court or the clerk.

If the trustee retains a copy of the tax returns of the debtor, appropriate procedures must be in place to comply with the United States Trustee directives as to the retention of tax returns. Debtor tax returns in the trustee's possession must be destroyed following the meeting of creditors unless the trustee deems it appropriate to maintain them for use in conjunction with further proceedings in the case. Hard copies shall be destroyed by shredding in the trustee's office or by a qualified professional firm. Electronic copies must be permanently deleted following industry standards and best practices.

D. BONDING

The trustee has a duty to maintain a surety bond in favor of the United States conditioned on faithful performance for each case in which the trustee is appointed. The bond must be approved by the United States Trustee. 11 U.S.C. § 322. The United States Trustee will direct the trustee whether to participate in the blanket bond or procure an individual bond.¹²

The initial minimum amount of the bond for the trustee is \$50,000. When a trustee's highest daily balance exceeds \$50,000, the bond is set at 150% of the highest daily total bank balance estimated by the trustee for the upcoming year. The bank balance includes all bank accounts, certificates of deposit or other permissible investments maintained by the trustee. The balance is determined from the bank records and reviewed at least quarterly by the trustee and the United States Trustee.

The trustee must discuss with the United States Trustee any significant increases in the bank balance or any anticipated increase in funds. 11 U.S.C. § 322. When the highest daily total balance has reached the point where the trustee's bond is less than 150% of the total balance, the trustee must confer with the United States Trustee whether to raise the bond amount. Adjustments to the bond should be made only as approved by the United

¹² Definitions: An individual case bond insures a single case for a single amount. A blanket bond covers multiple cases for one or more trustees. 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.

States Trustee. The amount of a blanket bond covering multiple trustees shall be set by the United States Trustee.

A trustee who assumes the duties of a debtor in possession under § 1185 in a case must discuss with the United States Trustee whether a separate bond is required in the case or whether anticipated activity in the case requires an increase to the existing bond. The amount of a separate bond is determined by the United States Trustee in consultation with the trustee.

The trustee must notify the United States Trustee immediately if the trustee learns that a surety bond is or will be canceled. The trustee also must notify the United States Trustee immediately if the trustee learns of any claim made against the surety bond. 11 U.S.C. § 322.

E. DUTY TO PROVIDE INFORMATION TO INTERESTED PARTIES

The Bankruptcy Code requires the trustee to furnish information concerning a case and case administration as is requested by a party in interest, unless the court orders otherwise. 11 U.S.C. §§ 1183(b)(1), 704(a)(7).

A trustee must endeavor to ensure that case information is reasonably and promptly available to the debtor, creditors and other interested parties, during business hours. 11 U.S.C. § 1183(b)(1), incorporating 11 U.S.C. § 704(a)(7). Subject to court approval, the cost of performing this statutory duty may be considered a cost of the trustee under 11 U.S.C. § 330. In fulfilling the trustee's duty to furnish information, a trustee may direct parties to the clerk's office to obtain copies or other information not reasonably or readily available at the office of the trustee.

If a trustee maintains a website to furnish case information, the trustee should take appropriate measures to protect any personally identifiable information ("PII"), including social security numbers. *See* chapter 3-17.16.3 of the Legal Manual regarding the trustee's duty to report the loss or potential loss of PII.

CHAPTER 5

ADDITIONAL SUBCHAPTER V TRUSTEE RESPONSIBILITIES

CHAPTER 5 – ADDITIONAL SUBCHAPTER V TRUSTEE RESPONSIBILITIES

A. DUTY TO REPORT AND REFER SUSPECTED CRIMINAL ACTIVITY

1. DUTY

The trustee is often in the best position to initially identify fraud or criminal activity in subchapter V cases. The United States Code requires a trustee to refer suspected violations of federal criminal law to the appropriate United States Attorney. 18 U.S.C. § 3057. The duty extends beyond referring bankruptcy crimes and covers all suspected violations of federal criminal statutes such as bank fraud, mail fraud, wire fraud, or tax fraud. A similar duty is imposed on the United States Trustee by 28 U.S.C. § 586(a)(3)(F).

2. DETECTING CRIMINAL ACTIVITY

The initial review of bankruptcy schedules may alert the trustee to potential crimes. Schedules and statements may indicate sham or fraudulent transactions, such as creation of false secured creditors, gross undervaluation of assets, sudden depletion of inventory, fraudulent transfers to fictitious entities (e.g., affiliates), credit “bust-outs”, bank fraud, wire fraud, mail fraud, investor fraud, tax fraud, real estate fraud, or identity theft. The trustee’s review of the debtor’s records such as financial statements and records, UCC filings and title searches, insurance records, bank loan documents, proofs of claim, and tax returns also may reveal gross discrepancies in the assets identified in the debtor’s schedules and statements. In addition, the debtor’s lack of financial records or the debtor’s recent destruction of financial documents may raise suspicion of potential criminal wrongdoing.

The meeting of creditors is another opportunity to gather information about the debtor’s operations and to uncover potential wrongdoing either before or after the case is filed. Creditors, victims of pre-petition schemes and other third parties may contact the trustee with additional information including allegations of fraud. By way of example, former employees, trade creditors, or other third-parties may have knowledge of undisclosed assets that the debtor failed to list on the schedules (e.g., transferred assets, financial accounts, and businesses) while victims may be able to provide valuable insights concerning the debtor’s pre-petition conduct. Information from these sources may also prove useful in questioning the debtor at the meeting of creditors and lead to uncovering potential false statements and assets.

The trustee should take appropriate action if the trustee discovers gross discrepancies in the debtor's documentation or the bankruptcy schedules and statements, the trustee discovers evidence of potential fraud, or the trustee otherwise suspects any criminal misconduct. *See also* discussion in section B in this chapter of the Handbook regarding civil enforcement remedies. In all cases where the trustee suspects criminal activity, the trustee should promptly prepare and submit a written referral of the suspected criminal conduct to the United States Trustee, unless otherwise directed.

3. REFERRAL PROCEDURE

Section 3057 of title 18 of the United States Code requires a trustee "having reasonable grounds for believing that any violation" of federal law may have occurred must report the suspected conduct to the appropriate United States Attorney. It is important to note that a wide range of criminal activity intersects with the bankruptcy system and that all suspected conduct must be reported regardless of whether a possible bankruptcy crime is involved. The trustee should report and refer when a trustee reasonably suspects that any federal criminal law may have been violated and is not limited by civil or criminal standards of proof. Section 586 of title 28 imposes a similar duty on the United States Trustee to refer any matter that may constitute a violation of criminal law to the United States Attorney and, upon request, to assist the United States Attorney in prosecuting the matter.

Accordingly, the trustee should contact the United States Trustee regarding matters which relate to any action which the trustee believes may constitute a crime. A few examples include bank fraud, tax fraud, mail and wire fraud, money laundering, public corruption, and corporate fraud. It is important that the trustee and the United States Trustee coordinate their efforts in the criminal referral process. Upon determining that there are reasonable grounds to believe that a crime has been committed, the trustee is required to refer the matter to the United States Attorney. 18 U.S.C. § 3057. Depending upon local practice, the trustee must either submit the referral through the United States Trustee or furnish a copy to the United States Trustee. 28 U.S.C. § 586. The mechanics of the referral process should be discussed with the United States Trustee or the Assistant United States Trustee, as they may have developed specific procedures with the local offices of the United States Attorney, the Federal Bureau of Investigation, and other law enforcement agencies.

In making a criminal referral it is important to promptly provide as much specific factual and documentary information as possible in a clear and concise manner. At a minimum, the referral should include:

- 1) the bankruptcy case name and file number;

- 2) an executive summary including dates and specific facts related to the who, what, where, when and how of the suspected crime(s);
- 3) a concise and brief narrative of what occurred in relation to each allegation, and the names, addresses, phone numbers, titles, of potential witnesses, if available;
- 4) an estimate of the amount of loss involved if known; and
- 5) a copy of all key written documents relevant to the allegations.

In certain time-sensitive situations, such as when the crime is in progress or there are potential safety concerns, an immediate oral referral should be made to the local United States Trustee office.

4. BANKRUPTCY CRIMES

The most common bankruptcy crimes are set forth in §§ 152, 157 of title 18. Section 152 addresses concealment of assets, and false oaths and claims by any person. Section 157 prohibits any person who, having devised or intending to devise a scheme or artifice to defraud, uses the bankruptcy system to execute or conceal the scheme or artifice to defraud.

Section 152 makes it a crime for any person to “knowingly and fraudulently” –

- 1) conceal property of the estate;
- 2) make a false oath or account in relation to a bankruptcy case;
- 3) make a false declaration, certification, verification or statement in relation to a bankruptcy case;
- 4) present any false proof of claim against the estate;
- 5) receive a material amount of property from the debtor after the filing of a case with intent to defeat the Bankruptcy Code;
- 6) give, offer, receive or attempt to obtain money, property, reward or advantage for acting or forbearing to act in a bankruptcy case;
- 7) transfer or conceal property in contemplation of filing bankruptcy or with the intent to defeat the Bankruptcy Code;

8) conceal, destroy, mutilate or falsify documents relating to the debtor's property or affairs in contemplation of or after the filing of a bankruptcy case; or

9) withhold documents related to the debtor's property or financial affairs from a trustee or other officer of the court after the filing of the bankruptcy case.

During the course of the administration of the estate, a trustee may discover wrongdoing by persons involved in the administration of the estate such as lawyers, accountants, debtors, or employees of the debtor or trustee that involves the taking or transferring of estate property or documents. Sections 153 and 154 of title 18 are specifically directed to trustees and other officers of the court.

Section 153 of title 18 relates to the knowing and fraudulent misappropriation, embezzlement or transfer of property, or destruction of any estate document, by the trustee or other officer of the court, including an agent, employee or other person engaged by the trustee or officer of the court. 18 U.S.C. § 153.

Section 154 of title 18 prohibits a trustee or other officer of the court from knowingly purchasing, directly or indirectly, any property of the estate of which such person is a trustee or officer; or the knowing refusal to permit a reasonable opportunity for the inspection of estate documents or accounts when directed by the court to do so. It also specifically identifies the United States Trustee as the only party in interest who does not require a court order directing the trustee or court officer to permit a reasonable opportunity for inspection. 18 U.S.C. § 154(3).

Section 155 of title 18 makes it a crime for any party in interest or their attorney to knowingly and fraudulently enter into an agreement with another party in interest or their attorney, for the purpose of fixing the fee or compensation to be paid to them for services rendered in connection therewith, from assets of the estate. 18 U.S.C. § 155.

Section 156 of title 18 makes it a crime for a "bankruptcy petition preparer" to knowingly attempt in any manner to disregard the requirements of the Bankruptcy Code or the Bankruptcy Rules, which causes a bankruptcy case or related proceeding to be dismissed. 18 U.S.C. § 156. A bankruptcy petition preparer does not include a debtor's attorney or an employee of such attorney, but applies to a person who prepares for compensation a document for filing by a debtor in bankruptcy or district court. 18 U.S.C. § 156(a)(1).

Section 157 of title 18 is similar to the federal mail fraud and wire fraud statutes. It provides that a person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or to do so:

- 1) files a petition under title 11;
- 2) files a document in a proceeding under title 11; or
- 3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title.

18 U.S.C. § 157.

Section 1519 of title 18 addresses the destruction, alteration or falsification of records in federal investigations and in all bankruptcy cases by any person. The statute states that:

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

18 U.S.C. § 1519.

5. CRIMINAL ACTIVITY BY TRUSTEE EMPLOYEES

In the event the trustee suspects or finds that one of the employees of the trustee has committed theft or embezzlement, or any other criminal activity in one or more subchapter V cases, the trustee must immediately notify the United States Trustee. The trustee must cooperate with the United States Trustee in the investigation and institute all procedures directed by the United States Trustee concerning such allegations. 18 U.S.C. § 3057, 28 U.S.C. § 586(a)(3)(F).

B. CIVIL ENFORCEMENT AND PREVENTION OF ABUSE

A trustee with knowledge of civil fraud or abuse also should report those matters to the United States Trustee. As an example, if the trustee becomes aware that the debtor has failed to disclose assets or income, or otherwise improperly disposed of assets of the estate, the trustee should notify the United States Trustee and may take other appropriate action, such as object to the debtor's discharge, if advisable. 11 U.S.C. § 704(a)(6). Prior to objecting to the debtor's discharge, the trustee should consult with the United States Trustee.

C. DUTY TO REPORT LOSS OR POTENTIAL LOSS OF PII

The trustee is required to report to the United States Trustee the loss or potential loss of PII, including loss or potential loss arising from the theft of paper files, personal computers, laptops, electronic devices, and removable drives such as USB flash drives and CDs in connection with the cases that the trustee administers. The Program has adopted the definition of PII used by the Office of Management and Budget (OMB), which defines PII as “[i]nformation which can be used to distinguish or trace an individual’s identity, such as their name, social security number or biometric records, etc. alone, or when combined with other personal or identifying information, which is linked or linkable to a specific individual, such as date and place of birth, mother’s maiden name, etc.”

The trustee must promptly report any loss or potential loss of PII to the United States Trustee upon discovery even though the trustee may have limited information about the extent of the loss at that time. The trustee must provide updates to the United States Trustee as further information is obtained and apprise the United States Trustee of the trustee’s proposed course of action.

Upon discovery of the loss or potential loss, the trustee must promptly determine the appropriate course of action and the level of notification required to affected individuals, the resources needed, and any appropriate remedial actions. Some of the risk factors that the trustee may use to determine the appropriate response are: sensitivity of the data lost; amount of data lost and number of individuals affected; likelihood data is usable or may cause harm; likelihood the data was intentionally targeted; strength and effectiveness of security technologies protecting data; nature of the data (operational or personal); and ability of the trustee to mitigate the risk of harm. The trustee also should continue to assess the sufficiency of the response and potential remediation as additional information is obtained.

The trustee must notify law enforcement officers and insurance carriers as appropriate or required by law. The trustee also must take appropriate actions to mitigate the risk of further losses. The action to be taken will depend largely on the circumstances of the suspected breach.

D. PROHIBITION OF SOLICITATION OF GRATUITIES, GIFTS OR OTHER REMUNERATION OR THING OF VALUE

It is a violation of federal criminal law for a trustee to purchase directly or indirectly or otherwise deal in property of the estate for which the trustee serves. 18 U.S.C. § 154. Neither the trustee nor any employee of the trustee may solicit or accept any gratuity, gift, or other remuneration or thing of value from any person with whom the trustee deals

in the performance of the trustee's duties and responsibilities. An exception is made if the gift is of nominal value and in connection with a holiday or special event. Also, the incidental receipt of unsolicited advertising and promotional material of a nominal intrinsic value, or the receipt of food and refreshments in the ordinary course of a business meeting, generally are permissible.

CHAPTER 6

FINANCIAL AND OPERATIONAL PRACTICES AND PROCEDURES FOR STANDING TRUSTEES

**[RESERVED FOR FUTURE
DEVELOPMENT]**

CHAPTER 7

STANDING TRUSTEE BUDGETS

**[RESERVED FOR FUTURE
DEVELOPMENT]**

CHAPTER 8

TRUSTEE REPORTING AND SUPERVISION BY THE UNITED STATES TRUSTEE

CHAPTER 8 – TRUSTEE REPORTING AND SUPERVISION BY THE UNITED STATES TRUSTEE

A. TRUSTEE REPORTING

Trustees are required to 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). The form and content of these reports will vary depending on whether the trustee is appointed on a case-by-case basis or appointed as a standing trustee. These reports are further described below.

In addition, trustees are required to file and serve their final reports and accounts, and the trustees may be required to file post-confirmation reports, in the cases in which they are appointed to serve. 11 U.S.C. § 1183(b)(1), incorporating 11 U.S.C. § 704(9), 11 U.S.C. § 1183(b)(2), incorporating 11 U.S.C. § 1106(a)(7). These reports also are further described below.

1. MONTHLY REPORTS

Trustees must submit to the United States Trustee a monthly report on a cash basis in the form prescribed by the United States Trustee. 28 U.S.C. § 586(a)(3). *See* Supplemental Materials for forms.

The case-by-case trustee's monthly report lists all cases in which the trustee is appointed and reports the activity in the estate account(s) for each case: beginning balance, receipts, disbursements, and ending balance. The report also contains other information related to collateralization of funds and the amount 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. The monthly report, together with corresponding estate bank statements and estate bank account reconciliations, must be sent 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 standing trustee's monthly report shows activity in the trust account and expense account, case filing and closure statistics, a ledger that shows beginning balance, receipts, disbursements, and ending balance by case, information related to collateralization of funds and the amount of the trustee's bond, and such other information as is required by the United States Trustee. The monthly report, together with corresponding bank statements and four-column bank reconciliations, must be sent 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).

2. ANNUAL REPORTS

Trustees must submit to the United States Trustee annual reports on a cash basis in the form prescribed by the United States Trustee. 28 U.S.C. § 586(a)(3). The case-by-case trustee's annual report is due 45 days after the end of the fiscal year. The standing trustee's annual report is due 45 days after the end of the fiscal year, or 45 days from the end of the period in which the standing trustee served. *See Supplemental Materials* for forms.

The annual reports will provide the following case-specific information for each case administered by the trustee and each case in which the trustee is receiving compensation under a plan: case number, debtor name, date filed, date confirmed, estimated completion date, trustee appointment date, date of substantial consummation, trustee discharge date, compensation received by the trustee during the year, and other case filing and closure information as required.

The case-by-case trustee's annual report also will provide the following financial information for each applicable case: beginning of year account balance, receipts received by the trustee, disbursements made by the trustee, and the account balance on hand at the end of the fiscal year.

The standing trustee's annual report will provide the following information regarding activity in the trust account and the expense account for the fiscal year: beginning of year account balance, receipts received by the trustee, disbursements made by the trustee, and the account balances on hand at the end of the fiscal year.

3. FINAL REPORTS

The trustee is required to file a final report and account of the trustee's administration of the estate. 11 U.S.C. § 1183(b)(1), incorporating by 11 U.S.C. § 704(a)(9). This obligation applies to every trustee regardless of whether the trustee was appointed on a case-by-case basis or appointed as a standing trustee, and regardless of whether a plan is confirmed. The form and content of the final report and account will vary depending upon these and other factual circumstances, including whether the trustee handled any funds or collected any awarded compensation as of the filing of the final report and account.

The trustee must be familiar with the following criteria and with any additional local rules or policies that may apply with regard to their filing of their final reports and

accounts. The trustees should use the form reports prescribed below. 28 U.S.C. §§ 586(a)(3), 589b(d).

- a. Upon substantial consummation of a consensual plan in a case in which the trustee is terminated and the trustee did not handle estate funds, the trustee will file the Chapter 11 Subchapter V Trustee's Report of No Distribution ("NDR"). The form of the NDR will vary depending whether the trustee collected any awarded compensation as of the filing. *See Supplemental Materials for forms.*
- b. Upon substantial consummation of a consensual plan in a case in which the trustee did handle funds, the trustee will file the Chapter 11 Subchapter V Trustee's Final Report and Account ("TFR"). The TFR will be required to be filed after the service of the trustee is terminated by operation of § 1183(c)(1) or after conclusion of the trustee's administration of the case. *See Supplemental Materials for forms.*
- c. If the plan is confirmed on a non-consensual basis pursuant to § 1191(b), the trustee will file the TFR upon the completion of the plan payments by the trustee. If the debtor made the plan payments, and the trustee did not handle estate funds, the trustee will file the NDR after completion of the plan payments under the non-consensual plan and the conclusion of the trustee's administration of the case. *See Supplemental Materials for forms.*
- d. Upon dismissal or conversion of a case – before or after plan confirmation – the trustee will file either the NDR or the TFR, depending upon whether the trustee previously handled funds or made any plan payments. *See Supplemental Materials for forms.*

These reports must be filed with the court and the United States Trustee. 11 U.S.C. § 704(a)(9). The reports should be served on such parties in interest as required by the court or local rule. The TFR must be submitted to the United States Trustee for review before filing it with the court. All bank statements and canceled checks (from all estate accounts) must also be provided to the United States Trustee. 28 U.S.C. § 586.

4. POST-CONFIRMATION REPORTS

In cases in which the trustee is required to disburse the plan payments, the court may require the trustee to file with the court periodic post-confirmation reports.¹³ 11 U.S.C.

¹³ Pursuant to section 1183(c)(1), the terminated trustee under a consensually confirmed plan may be re-appointed to perform certain duties, in which event the trustee may be required or ordered to file additional post-confirmation reports. See chapter 3 section H.1 of this Handbook for additional discussion.

§§ 1191(b), 1194(b), and 1183(b)(2), incorporating 11 U.S.C. § 1106(a)(7). The form, content and frequency of any post-confirmation reports may vary depending upon the reporting requirements that are specified in the confirmed plan, the plan confirmation order, and/or local rule or practice. Any such reports should be served on the parties as required by the plan, the court and local rule or practice and a copy should be submitted to the United States Trustee.

B. UNITED STATES TRUSTEE SUPERVISION

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 for¹⁴, 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 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 United States Trustee oversight functions are further described below.

1. BONDING

To qualify as a subchapter V trustee, the trustee has a duty to obtain 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. § 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

¹⁴ See specific discussion of financial and operational policies and procedures in chapters 4 and 5 of the Handbook.

a standing trustee. 11 U.S.C. § 322(a). 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. 2010.¹⁵ 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 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 trustee also must notify the United States Trustee immediately if the trustee learns that the bond has been cancelled. 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.

¹⁵ 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.

2. AUDITS, PERIODIC REVIEWS AND EVALUATIONS

In addition to monitoring trustee performance and compliance as described elsewhere in this Handbook, the United States Trustee will conduct periodic audits, reviews and evaluations of trustees' performance of their duties similar to those conducted for trustees who the United States Trustee regularly appoints and supervises 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. They are further described below.

a. INDEPENDENT AUDITS

1. Purpose and Frequency

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 trustee must submit to an audit at least every three years regarding the cases and bank accounts administered by the trustee. The audit is designed to determine the adequacy of internal controls over estate accounts, the accuracy of the trustee's reporting to the United States Trustee, and compliance with United States Trustee's practices and procedures. Audits are the starting point for determining the adequacy of the trustee's financial management, internal control procedures, and organizational support.

2. Selection and Compensation of the Audit Firm

Audits firms are selected by the Office of Oversight, and the expense of the audit is paid from United States Trustee Program funds. The scope of the audit and audit procedures are determined by the United States Trustee in discussion with the selected audit firms and pursuant to the statement of work specified in the audit contracts.

3. Entrance Conferences

The trustee should bring to the attention of the auditor any issues or extraordinary items to be reviewed or reported before the conduct of the audit.

4. Exit Conferences and Follow-up

At the completion of the audit, the auditor, trustee, and the United States Trustee will participate in an exit conference during which the auditor will explain the results of the examination. As part of this exit conference, the auditor also may make recommendations to improve the trustee's internal controls, record keeping, and, if applicable, case administration procedures.

5. Audit Report

After conclusion of the exit conference, the auditor will issue a written report on the results of the audit. This report is issued to the trustee, United States Trustee and the Office of Oversight; it must be issued no later than sixty days after the exit conference.

The United States Trustee will ask the trustee to respond to all findings noted in the audit report. The trustee is required to satisfactorily respond to any noted deficiencies and inadequate findings, and to take corrective action as necessary or appropriate. Within 45 days of the date of the written audit report, the trustee must submit a written statement identifying what corrective actions, if any, have been taken on any noted deficiencies, confirming the changes implemented in response to the recommendations, and raising any dispute with any audit finding or recommendation.

6. Follow-up Office Visits

Whenever in the judgment of the United States Trustee an audit report contains, serious findings, the United States Trustee may make a follow-up visit to the trustee's office to verify subsequent corrective actions and compliance upon reasonable notice to the trustee. A follow-up visit also may result from the auditor's disclosure of material weaknesses in internal control or from issuance of a qualified opinion, adverse opinion or disclaimer of opinion.

7. Resolution of Audit Deficiencies

The trustee is expected to promptly and satisfactorily resolve audit deficiencies and implement necessary corrective action in a timely manner. Resolution of

audit deficiencies is an integral component of the United States Trustee's effective supervision of trustees. Failure to implement necessary changes shall result in appropriate remedial action by the United States Trustee.

b. OFFICE VISITS

In those years in which no independent audit is performed, the United States Trustee may conduct an office visit of the trustee. The scope of the office visit generally is more limited than an audit, largely will be dictated by the results of the trustee's past performance and may focus on performance areas previously identified as warranting further review, if any.

The trustee will be expected to satisfactorily address and resolve any performance issues or problems that are detected in connection with office visits. The trustee's failure to implement any necessary changes may result in appropriate remedial action by the United States Trustee.

c. EVALUATIONS

In addition to audits and field office visits, the United States Trustee will evaluate the trustee's performance on a periodic basis as part of the United States Trustee's ongoing supervisory responsibility. The United States Trustee monitors the trustee's legal administration, financial administration, professional conduct, and cooperation with the United States Trustee. 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 standing trustee evaluations will be documented in a formal written report. The United States Trustee also may evaluate standing trustee performance more frequently.

The trustee will be expected to satisfactorily address and resolve any performance issues or problems that are identified in the evaluations. Performance issues or the trustee's failure to implement any necessary changes may result in appropriate remedial action 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, office visits, or performance reviews.

3. REMEDIAL AND ENFORCEMENT ACTIONS

a. CIVIL ENFORCEMENT ACTIONS

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 trustee improperly receives compensation or makes unauthorized expenditures, the United States Trustee will demand that the funds be returned. If the trustee fails to promptly repay the sums demanded, the United States Trustee may take further action, including bringing a removal action or a suit against the trustee and the trustee's surety. If the United States Trustee has reason to believe that the trustee has engaged in other misconduct during the administration of a case that has resulted in a loss to the estate or harm to the debtor, creditors or other parties in interest, the United States Trustee also may commence a recovery action against the trustee to remedy such loss or 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).

b. CRIMINAL REFERRAL

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).