

Introduction and Definitions:

The Bankruptcy Code contains a number of provisions that seek to provide greater flexibility and expedited progression in moving small business cases toward successful completion of a confirmed Chapter 11 plan. See Richard F. Broude, Reorganizations Under Chapter 11, § 13A.01 (2010). It is important for practitioners to be aware of the special provisions applicable to small business cases. There are special, shortened deadlines, which if missed could prohibit confirmation of a plan and result in dismissal of the case. Upon the filing of a second petition for a small business debtor, the automatic stay may not apply. Moreover, there are numerous reports and other filing requirements which a failure to meet may lead to action by the U.S. Trustee.

The following is a summary of applicable provisions in the Code, Bankruptcy Rules and Local Rules. This is not intended to be exhaustive and attorneys must conduct a review of the law themselves to ensure compliance.

Chambers comments are indicated in italics.

“Small business” means a case filed under Chapter 11 in which the debtor is a small business debtor. 11 U.S.C. § 101 (51C). As defined in 11 U.S.C. 101 (51D), the term “small business”:

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than \$2,343,300* (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$2,343,300* (excluding debt owed to 1 or more affiliates or insiders).

* Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C. § 104.

Applicable Code Sections for a Small Business in Chapter 11:

11 U.S.C § 308(b) – Debtor reporting requirements

Pursuant to the Bankruptcy Code, a small business debtor *shall* file periodic financial and other reports containing financial information including:

- (1) the debtor's profitability;
- (2) reasonable approximations of the debtor's projected cash receipts and cash disbursements over a reasonable period;
- (3) comparisons of actual cash receipts and disbursements with projections in prior reports;
- (4) whether the debtor is--
 - (A) in compliance in all material respects with postpetition requirements imposed by this title and the Federal Rules of Bankruptcy Procedure; and
 - (B) timely filing tax returns and other required government filings and paying taxes and other administrative expenses when due;
- (5) if the debtor is not in compliance with the requirements referred to in subparagraph (4)(A) or filing tax returns and other required government filings and making the payments referred to in subparagraph (4)(B), what the failures are and how, at what cost, and when the debtor intends to remedy such failures; and
- (6) such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures under chapter 11 of this title.

11 U.S.C § 362(n) – Automatic stay

Except as provided in paragraph (2), section 362(n)(1) provides that the automatic stay does not apply in a case in which the debtor:

- (A) is a debtor in a small business case pending at the time the petition is filed;
- (B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;
- (C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

Section 362(n)(2) provides an exception for

(A) an involuntary case involving no collusion by the debtor with creditors; or

(B) the filing of a petition if--

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

11 U.S.C. § 1116 – Duties of trustee and debtor in possession in small business

Under section 1116 of the Bankruptcy Code, the court appointed trustee or the debtor in possession *shall*:

(1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief--

(A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or

(B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;

(2) attend, through its senior management personnel and counsel, meetings scheduled by the court or the United States trustee, including initial debtor interviews, scheduling conferences, and meetings of creditors convened under section 341 unless the court, after notice and a hearing, waives that requirement upon a finding of extraordinary and compelling circumstances;

(3) timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances;

(4) file all post-petition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;

(5) subject to section 363(c)(2), maintain insurance customary and appropriate to the industry;

(6)(A) timely file tax returns and other required government filings; and

(B) subject to section 363(c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted; and

(7) allow the United States trustee, or a designated representative of the United States trustee, to inspect the debtor's business premises, books, and records at reasonable times, after reasonable prior written notice, unless notice is waived by the debtor.

11 U.S.C § 1121(e) – Who may file a plan

The exclusivity period for a small business debtor to file a plan is outlined in 11 U.S.C. § 1121(e). Section 1121(e) provides:

(1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is--

(A) extended as provided by this subsection, after notice and a hearing; or

(B) the court, for cause, orders otherwise;

(2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and

(3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if--

(A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;

(B) a new deadline is imposed at the time the extension is granted; and

(C) the order extending time is signed before the existing deadline has expired.

A form of plan is on the Court's website as Official Form B25A.

11 U.S.C § 1125(f) – Post-petition disclosure and solicitation

Disclosure statements and solicitation of plan votes for a small business are governed by section 1125(f) of the Bankruptcy Code. Section 1125(f) states, notwithstanding subsection (b), in a small business case:

(1) the court may determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary;

(2) the court may approve a disclosure statement submitted on standard forms approved by the court or adopted under section 2075 of title 28; and

(3)(A) the court may conditionally approve a disclosure statement subject to final approval after notice and a hearing;

(B) acceptances and rejections of a plan may be solicited based on a conditionally approved disclosure statement if the debtor provides adequate information to each holder of a claim or interest that is solicited, but a conditionally approved disclosure statement shall be mailed not later than 25 days before the date of the hearing on confirmation of the plan; and

(C) the hearing on the disclosure statement may be combined with the hearing on confirmation of a plan.

Relevant factors for determining whether a disclosure statement contains adequate information include:

- *The events that led to the filing of the bankruptcy petition*
- *A description of available assets and their value*
- *The anticipated future of the company*
- *The source of information stated in the disclosure statement*
- *A disclaimer*
- *The present condition of the debtor while in Chapter 11*
- *The scheduled claims*
- *The estimated return to the creditors under a Chapter 7 liquidation*
- *The accounting method utilized to produce financial information and the name of the accountants responsible for such information*
- *The future management of the debtor*
- *The chapter 11 plan or summary thereof*
- *The estimated administrative expenses, including attorneys' and accountants' fees-*
- *The collectability of accounts receivable-*
- *Financial information, data, valuations, or projections relevant to the creditors' decision to accept or reject the plan*
- *Information relevant to the risks posed to creditors under the plan*

- *The actual or projected realized value from recovery of preferences or otherwise avoidable transfers*
- *Litigation likely to arise in a non-bankruptcy context*
- *Tax attributes of the debtor*
- *The relationship of the debtor with affiliates*

In re Metrocraft Pub. Services, Inc., 39 B.R. 567 (Bankr. N.D. Ga. 1984).

A form of disclosure statement is on the Court's website as Official Form B25B.

11 U.S.C § 1129(e) – Confirmation of plan

A small business debtor has a specified, expedited time frame within which it may confirm a plan after the plan is filed. Section 1129(e) provides:

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

Debtor's counsel should come to the confirmation hearing prepared to put a principal of the debtor on the stand to testify as to each element of confirmation set out in section 1129. The Court may accept a proffer of such testimony.

Applicable Code Sections for All Debtors in Chapter 11:

11 U.S.C. § 327 – Employment of Professional Persons

The employment of professionals in chapter 11 is governed by Bankruptcy Code section 327 and Federal Rules of Bankruptcy Procedure 2014 and 6003. Section 327 states in relevant part:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C § 1128 – Confirmation hearing

The procedure for a confirmation hearing is set forth in section 1128 of the Bankruptcy Code. Section 1128 states:

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) A party in interest may object to confirmation of a plan.

Applicable Federal Rules of Bankruptcy Procedure Related to a Small Business Chapter 11:

Fed. R. Bankr. P. 1020 – Small Business in Chapter 11 Reorganization Case

Federal Rule of Bankruptcy Procedure 1020 sets forth how and when a small business debtor must designate itself as a small business. Rule 1020 also sets forth the procedure for any party to object to such designation. Rule 1020 states:

(a) Small business debtor designation

In a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. In an involuntary chapter 11 case, the debtor shall file within 14 days after entry of the order for relief a statement as to whether the debtor is a small business debtor. Except as provided in subdivision (c), the status of the case as a small business case shall be in accordance with the debtor's statement under this subdivision, unless and until the court enters an order finding that the debtor's statement is incorrect.

(b) Objecting to designation

Except as provided in subdivision (c), the United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.

(c) Appointment of committee of unsecured creditors

If a committee of unsecured creditors has been appointed under § 1102(a)(1), the case shall proceed as a small business case only if, and from the time when, the court enters an order determining that the committee has not been sufficiently active and representative to provide effective oversight of the debtor and that the debtor satisfies all the other requirements for being a small business. A request for a determination under this subdivision may be filed by the United States trustee or a party in interest only within a reasonable time after the failure of the committee to be sufficiently active and representative. The debtor may file a request for a determination at any time as to whether the committee has been sufficiently active and representative.

(d) Procedure for objection or determination

Any objection or request for a determination under this rule shall be governed by Rule 9014 and served on: the debtor; the debtor's attorney; the United States trustee; the trustee; any committee appointed under § 1102 or its authorized agent, or, if no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and any other entity as the court directs.

Applicable Federal Rules of Bankruptcy Procedure Related to All Debtors in Chapter 11:

Fed. R. Bankr. P. 1007 – Lists, Schedules, Statements and Other Documents; Time Limits

Bankruptcy Rule 1007 sets forth the documents that must be filed with the Court and the applicable time frame in which to file the aforementioned documents. Rule 1007 states in part:

(a) Corporate ownership statement, list of creditors and equity security holders, and other lists

(1) Voluntary case

In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate...

(3) Equity security holders

In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 14 days after entry of the order for relief a list of the debtor's equity security holders of each class showing the number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder....

(5) Extension of time

Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to the United States trustee and to any trustee, committee elected under § 705 or appointed under § 1102 of the Code, or other party as the court may direct.

(b) Schedules, statements, and other documents required

(1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file the following schedules, statements, and other documents, prepared as prescribed by the appropriate Official Forms, if any:

(A) schedules of assets and liabilities;

(B) a schedule of current income and expenditures;

(C) a schedule of executory contracts and unexpired leases;

(D) a statement of financial affairs;

(E) copies of all payment advices or other evidence of payment, if any, received by the debtor from an employer within 60 days before the filing of the petition, with redaction of all but the last four digits of the debtor's social-security number or individual taxpayer-identification number; and

(F) a record of any interest that the debtor has in an account or program of the type specified in § 521(c) of the Code...

(5) An individual debtor in a chapter 11 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form...

(8) If an individual debtor in a chapter 11, 12, or 13 case has claimed an exemption under § 522(b)(3)(A) in property of the kind described in § 522(p)(1) with a value in excess of the amount set out in § 522(q)(1), the debtor shall file a statement as to whether there is any proceeding pending in which the debtor may be found guilty of a felony of a kind described in § 522(q)(1)(A) or found liable for a debt of the kind described in § 522(q)(1)(B).

(c) Time limits

In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief. In a voluntary case, the documents required by paragraphs (A), (C), and (D) of subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise, a debtor who has filed a statement under subdivision (b)(3)(B), shall file the documents required by subdivision (b)(3)(A) within 14 days of the order for relief. In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7) within 60 days after the first date set for the meeting of creditors under § 341 of the Code, and in a chapter 11 or 13 case no later than the date when the last payment was made by the debtor as required by the plan or the filing of a motion for a discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any time and in its discretion, enlarge the time to file the statement required by subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8) no earlier than the date of the last payment made under the plan or the date of the filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the Code. Lists, schedules, statements, and other documents filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Except as provided in § 1116(3), any extension of time to file schedules,

statements, and other documents required under this rule may be granted only on motion for cause shown and on notice to the United States trustee, any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

(d) List of 20 largest creditors in chapter 9 municipality case or chapter 11 reorganization case

In addition to the list required by subdivision (a) of this rule, a debtor in a chapter 9 municipality case or a debtor in a voluntary chapter 11 reorganization case shall file with the petition a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form. In an involuntary chapter 11 reorganization case, such list shall be filed by the debtor within 2 days after entry of the order for relief under § 303(h) of the Code...

(f) Statement of social security number

An individual debtor shall submit a verified statement that sets out the debtor's social security number, or states that the debtor does not have a social security number. In a voluntary case, the debtor shall submit the statement with the petition. In an involuntary case, the debtor shall submit the statement within 14 days after the entry of the order for relief.

(g) Partnership and partners

The general partners of a debtor partnership shall prepare and file the list required under subdivision (a), the schedules of the assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.

(h) Interests acquired or arising after petition

If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues

notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.

(i) Disclosure of list of security holders

After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to produce the list or a true copy thereof, or permit inspection or copying, or otherwise disclose the information contained on the list.

(j) Impounding of lists

On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of the lists, however, by any party in interest on terms prescribed by the court.

(k) Preparation of list, schedules, or statements on default of debtor

If a list, schedule, or statement, other than a statement of intention, is not prepared and filed as required by this rule, the court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these papers within a time fixed by the court. The court may approve reimbursement of the cost incurred in complying with such an order as an administrative expense.

(l) Transmission to United States trustee

The clerk shall forthwith transmit to the United States trustee a copy of every list, schedule, and statement filed pursuant to subdivision (a)(1), (a)(2), (b), (d), or (h) of this rule...

Fed. R. Bankr. P. 2002(b) – Notices to creditors, equity security holders, administrators in foreign proceedings, persons against whom provisional relief is sought in ancillary and other cross-border cases, United States and United States Trustee

In a small business case, just as in any other Chapter 11 case, Federal Rule of Bankruptcy Procedure 2002(b) requires that the trustee, all creditors and all parties in interest must receive at least twenty-eight (28) days notice by mail of the deadline:

(1) for filing objections and the hearing to consider approval of a disclosure statement or, under § 1125(f), to make a final determination whether the plan

provides adequate information so that a separate disclosure statement is not necessary; and

(2) for filing objections and the hearing to consider confirmation of a chapter 9, chapter 11, or chapter 13 plan.

Fed. R. Bankr. P. 2014- Employment of Professional Persons

Rule 2014 addresses the application for an order of employment in a bankruptcy case and specifies the required items that must be set forth in the application. Rule 2014(a) states:

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall 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, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 6003 – Interim and Final Relief Immediately Following the Commencement of the Case

Bankruptcy Rule 6003 prohibits relief within the first twenty-one (21) days of a bankruptcy case except to the extent it is necessary to avoid immediate and irreparable harm. Rule 6003 states:

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding the following:

(a) an application under Rule 2014;

(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and

(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

Orders on applications to employ shall make specific reference to a verification set forth under Rule 2014 and shall provide that the United States Trustee and any party in interest shall have twenty-one (21) days from the entry of the order approving employment to object to such employment. Lastly, the order shall provide that debtor's counsel shall promptly serve a copy of the order approving employment upon the United States Trustee, the 20 largest unsecured creditors and any attorneys who have filed a notice of appearance.

Applicable Local Rules Related to All Debtors in Chapter 11:

Bankruptcy Local Rule 3018-1 – Procedure for filing and counting ballots in connection with Chapter 11 plan confirmation

- (a) **Ballot Filing Procedure.** Unless the Bankruptcy Code orders otherwise, a plan of reorganization proposed by any party in interest in a case under Chapter 11 shall provide that original completed ballots accepting or rejecting the plan be filed with the Bankruptcy Clerk.

- (b) **Plan Proponent’s Duties Regarding Ballot Tabulation and Preparation of Report of Balloting.** Prior to the hearing on confirmation of the plan but after the last day for filing written acceptances or rejections of the plan, counsel for the plan proponent shall count and tally all ballots filed with and maintained by the Bankruptcy Clerk or other authorized person, and shall prepare a Report of Balloting, which at a minimum shall include:
 - 1. A description of each class as designated in the plan and whether or not it is impaired as defined in the United States Bankruptcy Code, for example, “Class I, unsecured claim holders, impaired”;
 - 2. For each impaired class, the total number of ballots filed, the number of ballots voting to accept and their aggregate dollar amount, and the number of ballots voting to reject and their aggregate dollar amount (any discrepancy between dollar amounts as indicated on a ballot and either a filed proof of claim or the debtor’s schedules should also be noted);
 - 3. A conclusory paragraph indicating whether the plan has received the requisite acceptances to be confirmed under the Bankruptcy Code;
 - 4. Regarding ballots that are not counted, a separate written statement explaining why such ballots were not counted with copies of all such ballots appended thereto; and finally,
 - 5. A separate written certificate signed by counsel for the plan proponent that all ballots as filed and maintained by the Bankruptcy Clerk or other authorized person were counted and tallied for the classes for which those ballots were filed except for those ballots appended to the aforementioned statement.

- (c) **Filing Report of Balloting and Proof of Service.** At least three business days prior to the hearing on confirmation, the plan proponent shall file the Report of Balloting with the Bankruptcy Clerk and shall serve a copy of the Report and Notice that shows the date of filing upon the Office of the United States Trustee and all parties who have filed objections to confirmation. Proof of service thereof shall also be filed prior to said hearing with a copy thereof served upon the United States Trustee.

Relevant Case Law:

11 U.S.C. § 1121(e)

- In re Florida Coastal Airlines, Inc., 361 B.R. 286 (Bankr. S.D. Fla. 2007)
- In re Castle Horizon Real Estate, LLC, 2010 WL 3636160 (Bankr. E.D.N.C. 2010)
- In re Save Our Springs (S.O.S.) Alliance, Inc., 388 B.R. 202 (Bankr. W.D. Tex. 2008)
- In re Caring Heart Home Health Corp, 380 B.R. 908 (Bankr. S.D. Fla. 2008)

11 U.S.C. § 1125

- In re Metrocraft Pub. Services, Inc., 39 B.R. 567 (Bankr. N.D. Ga. 1984)

11 U.S.C. § 1129

- In re Caring Heart Home Health Corp, 380 B.R. 908 (Bankr. S.D. Fla. 2008)

Helpful Resources:

Treatises:

- Richard F. Broude, Reorganizations Under Chapter 11 (2010) – available on Westlaw at REORG11B § 13A.01

United States Trustee Information:

- At a small business Chapter 11 initial debtor interview, the United States Trustee’s office will provide debtor’s counsel with a checklist of applicable Bankruptcy Code provisions and Bankruptcy Rules. The United States Trustee’s website also makes available a document entitled “Frequently Asked Questions” applicable to Chapter 11 small business cases. A copy of the “checklist” and “Frequently Asked Questions” documents are attached as Exhibit 1.

Exhibit 1

SMALL BUSINESS DEBTORS

Bankruptcy Code section 101(51C) defines a “small business case” as one filed under chapter 11 in which the debtor is a small business debtor. Section 101(51D) defines a “small business debtor” as:

- (A) a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the date of the order for relief in an amount not more than \$2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and
- (B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$2,000,000 (excluding debt owed to 1 or more affiliates or insiders).

Rule 1020 provides that a voluntary chapter 11 debtor must state on the petition whether it is a small business debtor, and this will be the status of the case unless the court orders otherwise. The United States Trustee or any party in interest may object to the debtor’s statement within **30 days** of the conclusion of the meeting of creditors (or within 30 days of any amendment to the statement). Any such objection or a request for determination is a contested matter.

Section 586(a)(7) of title 28 of the United States Code requires the United States Trustee to comply with the following duties in every small business case:

(A) conduct an initial debtor interview as soon as practicable after the date of the order for relief but before the first meeting scheduled under section 341(a) of title 11, at which time the United States trustee shall—

- (i) begin to investigate the debtor's viability;
- (ii) inquire about the debtor's business plan;
- (iii) explain the debtor's obligation to file monthly operating reports and other required reports;
- (iv) attempt to develop an agreed scheduling order; and
- (v) inform the debtor of other obligations;

(B) if determined to be appropriate and advisable, visit the appropriate business premises of the debtor, ascertain the state of the debtor's books and records, and verify that the debtor has filed its tax returns; and

(C) review and monitor diligently the debtor's activities, to identify as promptly as possible whether the debtor will be unable to confirm a plan

Pursuant to **Rule 1020**, if the United States Trustee appoints a committee of unsecured creditors in a small business case, then the case will only proceed as a small business case if (and from such time as) the court determines that such committee "has not been sufficiently active and representative to provide effective oversight of the debtor." The United States Trustee or any party in interest may request such a determination within a reasonable time after the alleged failure of the committee to be "sufficiently active and representative." Further, the debtor may request a determination at any time.

Bankruptcy Code section 1116 provides that in a small business case, the debtor-in- possession must:

- (1) with the petition, file its most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or a sworn statement that it has not prepared such financial documents or filed the tax return;
- (2) attend meetings scheduled by the Court and the United States Trustee, including the Initial Debtor Interview, scheduling conferences, and meetings of creditors;
- (3) timely file the schedules and statement of financial affairs, unless the Court grants an extension, after notice and hearing, not to exceed 30 days after filing the bankruptcy absent extraordinary and compelling circumstances;
- (4) file post-petition reports required by the Federal Rules of Bankruptcy Procedure or local rules;
- (5) subject to the limitations on the use of cash collateral (section 363(c)(2)), maintain insurance customary and appropriate to the industry;
- (6) timely file tax returns and other required filings with the government, and subject to the limitations on the use of case collateral, timely pay all taxes entitled to priority as administrative expenses (except those being contested); and
- (7) allow the UST to inspect its business premises, books, and records at reasonable times, after reasonable written notice unless the debtor waives notice.

Bankruptcy Code section 1121(e)(2) requires small business debtors to file a plan and disclosure statement not later than **300 days** after the date of the order for relief.

Bankruptcy Code section 1129(e) states that confirmation of a plan in a small business case must occur within 45 days after the plan is filed unless the time for confirmation is extended in accordance with **section 1121(e)(3)**.

Monthly Operating Report Frequently Asked Questions (FAQs)

Can I file my reports on the accrual basis? No. The activity of the Debtor in Possession should be reported on the cash basis. There are some sections of the Monthly Operating Report that specifically ask for accrual information (i.e. accounts receivable, accounts payable); however, unless specifically requested, all information should be reported on the cash basis.

Do I need to include copies of insurance policies each period? No. Each policy's Certificate of Insurance should be included with the first Monthly Operating Report. After the initial report, certificates should be included only when there is a change (i.e. termination, change in limits, renewal, etc.).

Should I report any receipts or disbursements that did not flow through my bank accounts? Yes. All receipts and disbursements paid by you, or on your behalf by another party, should be included on the Monthly Operating Report. These payments include, but are not limited to, real estate closings, payment of business expenses or note payments by a principal or any other, unrelated party. Such disbursements are also subject to United States Trustee Quarterly Fees.

Should I include a transfer of funds from one Debtor In Possession Bank account to another Debtor In Possession Bank account as a disbursement? No. Transfers between Debtor in Possession accounts are not considered disbursements or receipts. Transfers involving other bank accounts are included as a disbursement or receipt and should be explained in detail on the Monthly Operating Report.

Can I send my quarterly fee payment to any United States Trustee Field Office for processing? No. Unless specifically instructed otherwise, all quarterly fee payments should be mailed to the lockbox address provided in the initial filing requirement package. On occasion you may be instructed to send a payment to the field office assigned to your case. If so, be sure to put the case number on the check so it will be properly applied to your account.

Can I open more than three Debtor In Possession accounts? Yes, but only after approval by the U. S. Trustee. Justification for opening additional accounts must be made (i.e., required by a lender). The accounts must also be reported on the Monthly Operating Report in the same manner as the three mandatory Debtor in Possession accounts.

Can I open less than three Debtor In Possession accounts? No, unless you obtain approval from the United States Trustee. In rare instances, such as when an individual files Chapter 11, there is no need for a payroll or tax account.

I filed my case a few days before the end of the month. Can I combine these few days with the next report and just file one large report? No. Each month should be reported separately unless special permission is obtained from the United States Trustee. Each report should include information from the first day of the month through the last day of the month. For the first report, a partial month may be reported. Similarly, the final report may be for a partial month and should report all information. Under no circumstances should the last month of a quarter be combined with the first month of a new quarter.

Small Business Case FAQs

What is a "small business" chapter 11 debtor? Under 11 U.S.C. § 101(51D), a "small business debtor" is defined as a debtor and any debtor affiliates that hold in the aggregate no more than \$2 million of noncontingent liquidated secured and unsecured debts, and that are not in the primary business of owning or operating real property. If the U.S. Trustee appoints an unsecured creditors' committee, however, such a debtor is not defined as a small business debtor unless the creditors' committee provides ineffective oversight. The dollar limitation is subject to adjustment every three years, as set out in 11 U.S.C. § 104(b)(1).

What are the U.S. Trustee's additional duties in a small business case? The U.S. Trustee's additional duties are set forth in 28 U.S.C. § 586. Pursuant to section 586 and in addition to any other chapter 11 duties, the U.S. Trustee must conduct an initial debtor interview (IDI) in every small business case. The IDI shall include an investigation of the debtor's viability, a review of the debtor's business plan, an explanation of financial reporting requirements, an attempt to agree on a scheduling order, and other matters. In addition, the U.S. Trustee must review and monitor the debtor's progress toward plan confirmation. The U.S. Trustee may conduct site visits at the debtor's location after reasonable written notice to the debtor.

What are the additional duties of the trustee or debtor-in-possession in a small business case? The additional duties of a trustee or debtor-in-possession in a small business case are set forth in 11 U.S.C. § 1116. They include: filing the most recent balance sheet, statement of operations, cash flow statement, and federal income tax return when the petition is filed; if those documents are not available, filing a statement under penalty of perjury that the documents do not exist; filing schedules and the Statement of Financial Affairs; participating in an initial debtor interview conducted by the U.S. Trustee; appearing at the section 341 meeting; appearing at meetings scheduled by the U.S. Trustee or the court; filing required post-petition reports; maintaining customary insurance; and timely filing tax returns and paying taxes. A small business debtor is also required to file a plan and disclosure statement within 300 days unless the time is extended by the court. 11 U.S.C. § 1121(e)(2). A small business debtor must also comply with all other chapter 11 duties and all other applicable laws.

Who determines if a debtor falls within the definition of small business debtor, and how is the debtor notified? The debtor will be required to indicate on its petition whether it believes it is a small business debtor. If the United States Trustee or another party disagrees with the debtor's statement, it may ask the court to make a determination.

Do the small business provisions apply if the U.S. Trustee appoints an unsecured creditors' committee? No. By definition, a small business debtor is one "in which the United States trustee has not appointed . . . a committee of unsecured creditors." 11 U.S.C. § 101(51D).

Does the timing of the confirmation hearing change in a small business chapter 11? The court shall confirm a plan that complies with the Bankruptcy Code within 45 days after the plan is filed.