

CHAPTER 11 TRUSTEE HANDBOOK



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CHAPTER 3: QUALIFICATIONS AND ACCEPTANCE

A. GENERALLY

A chapter 11 trustee or examiner must be a “disinterested person,” successfully complete a background investigation, and, in the case of a trustee, post a bond. In addition, pursuant to § 321(a), the trustee must be competent to perform the statutory duties set out in § 1106, which are discussed in more detail in Chapter 6, *infra*. Additional considerations for the selection will be based on the unique circumstances of the specific case. The unique circumstances of the case frequently dictate the terms of the court order directing the appointment.

Some persons are automatically precluded from serving as a trustee or examiner. For example, an examiner appointed in a case may not serve as a trustee in the same case, 11 U.S.C. § 321(b); and the United States Trustee is precluded from serving as either a chapter 11 trustee, 11 U.S.C. §§ 321(c), 1104(d), or examiner, 11 U.S.C. § 1104(d). Finally, relatives of the United States Trustee in the region where the case is pending, or of the bankruptcy judge approving the appointment, are ineligible to serve. Fed. R. Bankr. P. 5002(a).

The United States Trustee does not select the chapter 11 trustee or examiner in isolation from other parties in the case. Section 1104(d) requires the United States Trustee to consult with the parties in interest prior to the appointment. 11 U.S.C. § 1104(d). The United States Trustee will give full and fair consideration to each candidate. Although the United States Trustee is not required to select one of the candidates nominated by the parties, the qualifications of the person(s) recommended and the views of parties in interest will be given due consideration. Further, unsecured creditors may seek the election of a trustee if they are dissatisfied with the United States Trustee’s selection. *See* Chapter 4, *infra*.

B. A TRUSTEE OR EXAMINER MUST BE A “DISINTERESTED PERSON”

The word “person” is defined at § 101(41) and includes partnerships and corporations, as well as individuals. Pursuant to § 321(a)(2), partnerships and corporations that are authorized by their charters or bylaws to act as trustee are eligible to serve as trustees. However, the United States Trustee generally appoints individuals.

The term “disinterested person” is defined at § 101(14). The trustee or examiner must not be one of the following:

- a creditor, equity security holder, or insider (which includes relatives of an individual debtor and persons in control of a debtor that is a corporation or partnership; see § 101(31) for definition of “insider”);

- an investment banker for any outstanding security of the debtor, either at present or at any time in the past;
- an investment banker for a security of the debtor within three years before the filing of the petition, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
- a present director, officer, or employee of the debtor or of the debtor's investment banker;
- a former director, officer, or employee of the debtor or of the debtor's investment banker within the two years prior to the date of the filing of the petition;
- a person holding an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in the debtor or the debtor's investment banker or attorney for the debtor's investment banker.

See 11 U.S.C. § 101(14).

1. Full Disclosure

When the United States Trustee files an application for court approval of the appointment of a trustee or examiner, the application must be accompanied by an affidavit of the person being appointed. Fed. R. Bankr. P. 2007.1(c). The application and affidavit must describe all of the connections of the proposed trustee or examiner to other persons involved in the case. *Id.* This allows the bankruptcy judge to ensure that the person appointed satisfies all the requirements for appointment, particularly the requirement of disinterestedness. Because the determination of "disinterestedness" can turn on so many variables, it is imperative that the trustee or examiner candidate disclose all connections to the debtor, all other parties, and all professionals in the case prior to selection. Determining these connections early in the process will also facilitate the appointment approval process if the person is selected.

In addition to the United States Trustee's application, Bankruptcy Rule 2007.1 also requires the designated person to submit a verified statement listing all connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, and any employee of the United States Trustee. *Id.* Although the term "connections" is not defined in the rules, the Advisory Committee note accompanying Bankruptcy Rule 2007.1 contains the following explanation:

The requirement that connections with the United States trustee or persons employed in the United States trustee's office be revealed is not intended to enlarge

the definition of “disinterested person” in § 101(13) [redesignated as § 101(14)] of the Code, to supersede executive regulations or other laws relating to appointments by United States trustees, or to otherwise restrict the United States trustee’s discretion in making appointments. This information is required, however, in the interest of full disclosure and confidence in the appointment process and to give the court all information that may be relevant to the exercise of judicial discretion in approving the appointment of a trustee or examiner in a chapter 11 case.

Fed. R. Bankr. P. 2007.1 Advisory Committee Note (1991).

A former employee of the United States Trustee’s office responsible for the case, or anyone with a past professional relationship with either the United States Trustee or an employee of the United States Trustee in the region where the case is pending, must disclose that relationship. Other factors may be significant and any reasonable doubts regarding the relevance of a particular set of circumstances should be resolved in favor of full disclosure. *See In re The Leslie Fay Cos., Inc.*, 175 B.R. 525, 533 (Bankr. S.D.N.Y. 1994).

2. Full Disclosure – A Continuing Obligation

The determination of “disinterestedness” does not end with the appointment. Any new connections that the trustee or examiner, or any professional employed by the trustee or examiner, establishes or discovers after appointment should be brought to the attention of the court and the United States Trustee through the filing of a supplemental verified statement. *See e.g., In re Granite Partners, L.P.*, 219 B.R. 22, 35 (S.D.N.Y. 1998) (Rule 2014 and § 327 contain implied duty of continuing disclosure). Failure to reveal connections that are later determined to have rendered the trustee or examiner not “disinterested” could result in removal as well as the denial or disgorgement of compensation. *See* 11 U.S.C. §§ 327, 328; *United States v. Schilling (In re Big Rivers Elec. Corp.)*, 355 F.3d 415 (6th Cir. 2004).

3. Conflicts and Related Estates

In the interest of judicial economy and cost reduction, a single trustee is sometimes appointed to serve in two or more related chapter 11 cases. *See* Fed. R. Bankr. P. 2009(c)(2). Generally, the trustee appointed in multiple cases will employ the same set of professionals to represent each of the related estates. However, both the trustee and the professionals appointed to serve in more than one related case must be extremely sensitive to the independent duty imposed upon them to identify and disclose any actual or potential conflicts among the estates.

Although some courts have determined that multiple representation in related estates creates a rebuttable presumption that the representation is *per se* improper, *see, e.g., In re Lee*, 94 B.R. 172, 180 (Bankr. C.D. Cal. 1988), the greater weight of authority favors a case by case

review of the facts to determine the propriety of the representation. See *In re BH&P, Inc.*, 949 F.2d 1300, 1312 (3d Cir. 1991) (citing *In re Martin*, 817 F.2d 175 (1st Cir. 1987)).

Whenever the interests of separate, related estates diverge, the trustee should immediately consult with the United States Trustee and file such disclosures as are necessary and appropriate to protect each estate and the trustee from charges of a lack of “disinterestedness.” Based on the particular facts, a trustee appointed in multiple cases may be required to resign from one or more of the cases. *Accord* Fed. R. Bankr. P. 2009(d) (court shall order separate trustees for jointly administered estates where conflict of interest).

C. BACKGROUND INVESTIGATION

All persons appointed to serve as trustees or examiners in a chapter 11 case must undergo a security background investigation. In addition to the initial application form, the appointee is required to complete an affidavit in a format prescribed by the Executive Office for United States Trustees and provide the information necessary for completion of name, fingerprint, tax, and credit checks. This information will be forwarded by the local Office of the United States Trustee to the Office of Review and Oversight (“ORO”), Executive Office for United States Trustees, within ten working days after an appointment is made. If additional or clarifying information is needed, ORO will contact the United States Trustee who will then notify the appointee. The resolution of questionable information may require an affidavit from the trustee or examiner, and/or additional information or documents.

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.

D. BOND

To qualify as a chapter 11 trustee, the trustee must post a bond in favor of the United States of America within five days after selection. 11 U.S.C. § 322(a). The initial amount and sufficiency of the bond is determined by the United States Trustee, 11 U.S.C. § 322(b)(2); however, it is the trustee’s duty to monitor the bond and ensure that it is maintained in an appropriate amount throughout the pendency of the case. The United States Trustee can assist the trustee in obtaining a bond by providing contact with bonding companies used by other trustees. If the trustee wishes to obtain a bond from a different company, the trustee must ensure that the company appears on Treasury Circular 570, which lists those companies holding certificates of authority as acceptable sureties on federal bonds. Only companies appearing on this list are approved by the United States Trustee as sureties on trustee bonds.

discovers or verifies the existence of fraudulent activity, the trustee should notify the United States Trustee immediately.

1. Duty to Report Criminal Conduct

Unless a judge or receiver has already made such report, 18 U.S.C. § 3057 requires a trustee to report suspected violations of federal criminal law to the appropriate United States Attorney. 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. 28 U.S.C. § 586(a)(3)(F).

A chapter 11 trustee should coordinate efforts with the United States Trustee in the criminal referral process. As noted above, if the trustee has 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(a). However, depending on local practice, the trustee should either submit the referral through the United States Trustee or provide a copy of the referral to the United States Trustee. The mechanics of the actual referral should be discussed with the United States Trustee, the Assistant United States Trustee, or the Regional Criminal Coordinator for the Criminal Enforcement Unit, as they have developed specific procedures with the local offices of the United States Attorney and the Federal Bureau of Investigation.

In making a criminal referral, it is important to provide specific factual and documentary information. At a minimum, the referral should include:

- the bankruptcy case name, file number, and chapter;
- a chronological summary, including dates and specific facts related to the who, what, where, when, and how of the suspected crime;
- a brief narrative of what occurred in relation to each allegation, referring to copies of relevant documents;
- an estimate of the amount of loss involved;
- names, addresses, phone numbers, titles, and descriptions of likely witnesses;
- copies of all written documents relevant to the allegations; and
- a statement of other related referrals made to law enforcement agencies.

2. Types of Criminal Conduct

The most common bankruptcy crimes are set forth in 18 U.S.C. § 152. Section 152 makes it a crime for any individual 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) make a false proof of claim; (5) receive a material amount of property from the debtor 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 with the intent to defeat the Bankruptcy Code; (8) conceal, destroy, mutilate, or falsify documents relating to the debtor's property or affairs; or (9) withhold documents related to the debtor's property or financial affairs from a trustee or other officer of the court. 18 U.S.C. § 152.

Persons other than the debtor, the debtor's principals, or the debtor's management may commit bankruptcy crimes. For example, a chapter 11 trustee may discover potential theft or embezzlement by professionals employed by the debtor, or by the debtor's employees.

Sections 153 and 154 of title 18 are specifically directed to trustees and other officers of the court. Section 153 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. The Bankruptcy Reform Act of 1994, Pub. L. 103-394, 108 Stat. 4106, 4139 (1994), broadened the scope of those affected by this statute to include an agent, employee, or other person engaged by the trustee or officer of the court.

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

The Bankruptcy Reform Act of 1994 added 18 U.S.C. § 156, "Knowing Disregard of Bankruptcy Law or Rule," and 18 U.S.C. § 157, "Bankruptcy Fraud." See Pub. L. 103-394, 108 Stat. 4106, 4140 (1994). Section 156 makes it a misdemeanor if a bankruptcy case or related proceeding is dismissed because of a knowing attempt by a "bankruptcy petition preparer" in any manner to disregard the requirements of the Bankruptcy Code or the Federal Bankruptcy Rules. 18 U.S.C. § 156. The term "bankruptcy petition preparer" does not include the debtor's attorney or an employee of the debtor's attorney, but applies to a person who prepares for compensation a document for filing by a debtor in bankruptcy court or district court. 18 U.S.C. § 156(a).



Section 157 is similar to the federal mail fraud and wire fraud statutes in that it requires a person to devise or intend to devise a scheme or artifice to defraud. A person, not only a debtor, commits bankruptcy fraud if, for the purpose of executing or concealing this scheme or artifice to defraud, that person:

- (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.

See 18 U.S.C. § 157.

If a person falsely claims to be in bankruptcy, this is a violation of § 157.

Further, the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2000), added 18 U.S.C. § 1519, making the “destruction, alteration, or falsification of records in federal investigations and bankruptcy” a felony. Under § 1519,

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.

There are several other criminal statutes that may be relevant to bankruptcy crimes including those relating to bank fraud, tax fraud, mail and wire fraud, and money laundering.