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Local Bankruptcy Rules: Virginia (E.D. Va.)

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A Practice Note that summarizes selected local rules and procedures for the US Bankruptcy Court for the Eastern District of Virginia (E.D. Va.). This Practice Note offers guidance on a wide array of bankruptcy topics, including motions for relief from the automatic stay, bankruptcy appeals, section 363 sales, and proofs of claim. It places a significant emphasis on the unique requirements for complex Chapter 11 cases and mega cases, outlining the specific provisions of the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures). Key areas detailed include first-day motions, motions for use of cash collateral, DIP financing, and procedures for professional retention and interim compensation. This Practice Note also reviews the local requirements for reaffirmation agreements, setting bar dates, and retaining claims agents, and discusses the US Trustee for Region 4's operating guidelines and reporting obligations for debtors.

Automatic Stay

Background/Federal Requirements

An automatic stay:

- Except as provided in section 362(b) and (c) of the Bankruptcy Code, is triggered immediately on filing of the bankruptcy petition.
- Automatically stops substantially all acts and proceedings against the debtor and its property.
- Is a nationwide injunction barring almost all actions against the debtor and its property, including the exercise of remedies regarding collateral, enforcement of prepetition judgments, litigation, collection efforts, and acts to create, perfect, and enforce liens granted before the petition date.
- Generally applies only to prepetition events and does not, for instance, bar suit against a debtor based on a cause of action arising postpetition. The stay's broad scope applies to all creditors, whether secured or unsecured, and to all of the debtor's property, wherever located.
- Forbids creditors from pursuing both formal and informal actions and remedies against the debtor and its property. It also covers remedies that could be exercised outside of the US.

For more information about the stay, see Practice Note, Automatic Stay: Overview.

Local Rules

E.D. Va. Local Bankruptcy Court Rule 4001(a)-1 contains:

- Special noticing language for motions for relief from stay.
- A list of information that (when applicable) must be included with any motion for relief from stay (for example, statement of debt owed, description of property encumbered, description of security interest, statement of basis for relief, and amount of the valuation).
- Filing requirements (for example, payment of a filing fee and proof of service).
- Instructions regarding service of the motion.

A preliminary hearing on a motion for relief from stay must be non-evidentiary unless the bankruptcy court orders that evidence and testimony be presented at any scheduled preliminary hearing (E.D. Va. LBR 9014-1(B)(2)).

E.D. Va. Local Bankruptcy Court Rule 9013-1(K) adopts additional guidelines governing motions for relief from stay that are set out in Exhibit 7 to the E.D. Va. Local Bankruptcy Court Rules. These guidelines concern procedural matters, such as:

- Selecting a preliminary hearing date.
- The contents required in the notice.
- Service of the motion and notice.

E.D. Va. Local Bankruptcy Court Rule 9013-1(K) further provides that these additional guidelines will be published and updated periodically by the clerk and available from the court's website.

Stay Relief Motions in Complex Chapter 11 Cases and Mega Cases

Regarding motions for relief from stay in complex Chapter 11 cases and mega cases (see Complex Chapter 11 Case Procedures: Local Rules), Sections II.D and VI.E.1 of the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures), which apply to both complex Chapter 11 cases and mega cases, provide that:

- The initial hearing on any motion for relief from stay is a preliminary hearing unless otherwise agreed to by the debtors.
- Notwithstanding section 362(e) of the Bankruptcy Code, by setting a hearing on a motion for relief from the stay on an omnibus hearing date, a party is deemed to have consented to the stay remaining in full force and effect until the conclusion of the preliminary hearing.
- The court may continue the effectiveness of the automatic stay until a final hearing on the matter.
- Nothing in the Complex Case Procedures prevents a party from seeking expedited consideration of a motion for relief from stay.
- Motions for relief from stay must be served on each entity asserting a lien or encumbrance on the affected property.

Bankruptcy Appeals

Procedural Rules Applicable to Bankruptcy Appeals

Section 158 of the Judicial Code (28 U.S.C. § 158) generally governs bankruptcy appeals, but counsel must also review:

- The Federal Rules of Bankruptcy Procedure.
- The Federal Rules of Appellate Procedure.
- The Official Bankruptcy Forms.
- The E.D. Va. Local Civil Rules and Standing Orders.
- The E.D. Va. Local Bankruptcy Court Rules and Standing Orders.
- The Rules of the US Court of Appeals for the Fourth Circuit.

Consider whether the bankruptcy order is final or interlocutory (see Bankruptcy Appeals Checklist: Final Versus Interlocutory Orders and Practice Note, Appealing a Bankruptcy Court Order: Overview: Appeals "As of Right" Versus Appeals "By Permission"). If it is interlocutory, review Federal Rule of Bankruptcy Procedure 8004 on motions for leave to appeal an interlocutory order (see Bankruptcy Appeals Checklist: Permission for Interlocutory Appeals).

For more information on:

- Timing on filing the notice of appeal, review Federal Rule of Bankruptcy Procedure 8002 (see Bankruptcy Appeals Checklist: Timing Issues).
- Instructions on filing and the contents of the notice of appeal, review Federal Rule of Bankruptcy Procedure 8003 and Official Bankruptcy Form B417A (see Notice of Appeal).
- The effect of appeal on bankruptcy jurisdiction, see Bankruptcy Appeals Checklist: Effect of Appeal on Bankruptcy Jurisdiction.
- Extending the time to file a notice of appeal, review Federal Rule of Bankruptcy Procedure 8002(d)(2) (see Bankruptcy Appeals Checklist: Extension of Time to File Notice of Appeal).
- Disputes relating to the record on appeal, review Federal Rule of Bankruptcy Procedure 8009 (see Bankruptcy Appeals Checklist: Correcting or Modifying the Record).
- Appeals related to pending cases, provide the information required on the civil cover sheet (see E.D. Va.: Civil Cover Sheet).
- Filing fees, see Docket Fee.
- Docketing of appeal in the district court, review Federal Rule of Bankruptcy Procedure 8003(d) (see Bankruptcy Appeals Checklist: Docketing of Appeal in the District Court or BAP).

- Obtaining a stay of a bankruptcy court order or judgment pending appeal, review Federal Rule of Bankruptcy Procedure 8007 (see Bankruptcy Appeals Checklist: Stay Pending Appeal).
- Designating the record on appeal and the statement of the issues on appeal, review Federal Rule of Bankruptcy Procedure 8009 and E.D. Va. Local Bankruptcy Court Rule 8009-1 (see Designation of Record and Statement of Issues and Bankruptcy Appeals Checklist: Record on Appeal).
- Designating sealed documents, review Federal Rule of Bankruptcy Procedure 8009(f) (see Bankruptcy Appeals Checklist: Sealed Documents).
- The duties of the parties to provide a transcript, review Federal Rule of Bankruptcy Procedure 8009(b) (see Bankr. E.D. Va.: Transcripts and Bankruptcy Appeals Checklist: Transcripts).
- Certifying an appeal directly to the Fourth Circuit, review 28 U.S.C. Section 158, Federal Rule of Bankruptcy Procedure 8006, and Official Bankruptcy Form B424 (see Bankruptcy Appeals Checklist: Direct Appeals to the Circuit Court of Appeals and Practice Note, Appealing a Bankruptcy Court Order: Overview: Appealing a Bankruptcy Court Order Directly to the Court of Appeals in Limited Circumstances).
- Alternatives to an appeal, including motions for amended or new findings or to seek relief from a bankruptcy court order or judgment, review Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024 (see Alternatives to Appeal).
- Notice to the bankruptcy court of preliminary appellate motions, review Federal Rule of Bankruptcy Procedure 8010(c) (see Bankruptcy Appeals Checklist: Notice to Bankruptcy Court of Preliminary Appellate Motions).
- District court review of a judgment the bankruptcy court lacked constitutional authority to enter, review Federal Rule of Bankruptcy Procedure 8018.1 (see Bankruptcy Appeals Checklist: Challenges to Bankruptcy Court Authority).
- Page or word limitations and other rules relating to appellate briefs, review Federal Rules of Bankruptcy Procedure 8013, 8014, 8015, 8016, and 8017, Official Bankruptcy Form B417C, and E.D. Va. L. Civ. R. 7(F)(3) (see Bankruptcy Appeals Checklist: Other Appeal Responsibilities). See also the policies and procedures of the assigned judge regarding page limitations, courtesy copies, and other requirements.
- Appeal bonds, review E.D. Va. Local Bankruptcy Court Rule 8007-1 (see Other Appeal Requirements).

For more information on bankruptcy appeals generally, see Practice Note, Appealing a Bankruptcy Court Order: Overview and Bankruptcy Appeals Checklist.

Notice of Appeal

Regardless of whether a bankruptcy court order is final or interlocutory, a party seeking to appeal must file a notice of appeal that substantially conforms to Official Bankruptcy Form B417A, attaching a copy of the order, judgment, or decree (Fed. R. Bankr. P. 8003(a)(3)). The notice of appeal must be electronically filed in the bankruptcy court from which the appeal is taken.

The appellant must also:

- Include in the notice of appeal the names of all parties to the order, judgment, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys, if any.
- Pay the docket fee when the notice of appeal is filed (see Bankr. E.D. Va.: Fee Schedule).
- Complete the civil cover sheet (see E.D. Va.: Civil Cover Sheet).

Docket Fee

The filing fee for a notice of appeal can be found on the bankruptcy court's website (see Bankr. E.D. Va.: Fee Schedule). The fee may be paid by signed check, money order, cash (except at the Newport News Clerk's Office), or credit card. There is no local rule addressing whether these fees can be refunded if the appeal is dismissed or denied. However, an attorney or trustee may file a motion for refund of a filing fee in which payment was made by credit card when:

- A fee was paid for filing a duplicate document.
- A fee was paid for filing a document in the wrong case.
- The movant is entitled to an exemption from the filing fee.
- A debtor is eligible for a deferral of the filing fee in a case in which no funds from the estate exist for payment of the fee.

(Bank. E.D. Va. R. 1006-1(D)(1).) Any motion for a refund of a filing fee must be made promptly and contain a full explanation about why the payment should be refunded (E.D. Va. LBR 1006-1(D)(2)).

An appellant that cannot afford to pay the fee may apply to the district court for *in forma pauperis* (IFP) status (see US Courts: Fee Waiver Application Forms).

Designation of Record and Statement of Issues

Appellants must file with the bankruptcy court and serve on the appellee a designation of items to be included in the record on appeal and a statement of the issues to be presented within 14 days after the notice of appeal is filed with the bankruptcy court (Fed. R. Bankr. P. 8009).

The designation of the record includes a list of the items from the bankruptcy docket and adversary proceeding docket that are relevant to the issues on appeal. The designation also includes:

- The docket entry number.
- The title of the docket entry.
- The date the item was entered on the docket.

In choosing the docket items to designate for the record on the appeal, appellants should:

- Include all items that are relevant to the issues on appeal.
- Include all items that may be helpful to their argument even if the item is not directly relevant to the issues on appeal.
- Omit items that are not helpful to their argument unless directly relevant to the issues on appeal.

Within 14 days after being served with the designation, the appellee may file with the bankruptcy court and serve on the appellant a designation of additional items to be included in the record and a statement of issues to be presented on cross-appeal.

On receipt of the complete record, the bankruptcy clerk then transmits to the district court clerk the record or notice that the record is available electronically (Fed. R. Bankr. P. 8010(b)(1)). The district court must notify all parties that the record has been entered on the district court docket.

No paper copies of designated items are required except if ordered by the court where the appeal is pending (Fed. R. Bankr. P. 8010(b)(4)).

Paper copies filed under seal must be delivered to the district court judge (E.D. Va. L. Civ. R. 5(D)). Additional information about what the judges in each division require in terms of courtesy copies of documents filed electronically can be found on the district court's website (see E.D. Va.: Norfolk/Newport News Courtesy Copy and Other Division-Specific Information, E.D. Va.: Richmond Courtesy Copy and Other Division-Specific Information, and E.D. Va.: Alexandria Chambers Copy and Other Division-Specific Information.

E.D. Va. Local Bankruptcy Court Rule 8009-1 provides that:

- Unless the bankruptcy court directs otherwise, the record on appeal does not include counsel's opening statements and arguments (E.D. Va. LBR 8009-1(A)).
- If the parties fail to timely designate the record under Federal Rule of Bankruptcy Procedure 8009, the clerk must forward to the appellate court a certification that no designation of record was filed (E.D. Va. LBR 8009-1(B)).
- The party filing a designation of items to be included in the record on appeal must file with the designation a complete and correct copy of all designated exhibits that were not filed electronically (E.D. Va. LBR 8009-1(C)).

Alternatives to Appeal

There are alternatives that parties may wish to exhaust before filing an appeal, such as filing a motion to reconsider or reargue with the bankruptcy court. Federal Rule of Civil Procedure 59, made applicable to bankruptcy proceedings under Federal Rule of Bankruptcy Procedure 9023, permits a party to make a motion to alter or amend a judgment. Federal Rule of Bankruptcy Procedure 9024 permits a party to move for reconsideration.

The Fourth Circuit has held that the major grounds justifying reconsideration are:

- An intervening change in controlling law.
- The availability of new evidence.
- The need to correct clear error of law or prevent manifest injustice.

(See *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012).)

Parties considering these devices should review Federal Rules of Bankruptcy Procedure 9023 and 9024. A party may also file a motion seeking new or amended findings with the bankruptcy court within 14 days of the entry of the court's order (Fed. R. Bankr. P. 7052).

Parties should review Federal Rule of Bankruptcy Procedure 8002(b) related to the timing for filing a notice of appeal (see Practice Note, Appealing a Bankruptcy Court Order: Overview: Later Motions May Extend the Time to Appeal).

Other Appeal Requirements

E.D. Va. Local Bankruptcy Court Rule 8007-1 provides that:

- The Commonwealth of Virginia or any political subdivision or any office or agent thereof is not required to post a bond or other security for the payment of costs on appeal, unless the bankruptcy court orders otherwise (E.D. Va. LBR 8007-1(A)).
- In any case where a monetary judgment is entered or where the bankruptcy court so orders, any party appealing from the adverse effect of the judgment must, unless otherwise ordered by the bankruptcy court, post a bond or other security to respond to the judgment of the court in the event of affirmance on appeal. If this bond or other security is not posted, the prevailing party may enforce the judgment as provided by law without regard to the pending appeal (E.D. Va. LBR 8007-1(B)).
- Instead of any bond or other security, the parties may stipulate concerning any agreement or undertaking (E.D. Va. LBR 8007-1(C)).

Bankruptcy Exemptions

Background/Federal Requirements

An individual debtor is entitled to claim certain property as exempt from the bankruptcy estate, which means the property cannot be used to satisfy claims against the estate. Bankruptcy exemptions do not operate automatically, and all property remains property of the estate until the debtor claims it exempt and the objection period expires. A properly claimed exemption will immunize exempt property from seizure or attachment for satisfaction of debts incurred before the debtor's bankruptcy proceeding. Bankruptcy exemptions are intended to ensure that a debtor can emerge from bankruptcy with enough possessions to make a fresh start.

Under section 522(b) of the Bankruptcy Code, an individual debtor can choose which exemption system is most favorable for the debtor's circumstances. The debtor can use exemptions granted either:

- Under the federal Bankruptcy Code.
- By the state of the debtor's domicile, with exemptions provided under other federal laws.

The debtor cannot choose exemptions from both the federal Bankruptcy Code and the state law scheme. The debtor must choose one or the other.

For more information on bankruptcy exemptions, see Practice Note, Bankruptcy Exemptions for Individual Debtors: Overview.

Bankruptcy Rule 4003(a)

The debtor must list all exempt property on Schedule C: The Property You Claim as Exempt (Individuals) (Official Bankruptcy Form B106C). If the debtor fails to timely file a list of exemptions, a dependent of the debtor may file the list within 30 days after the expiration of the time allowed by Federal Rule of Bankruptcy Procedure 1007 (Fed. R. Bankr. P. 4003(a)).

Bankruptcy Rule 4003(b)

A party in interest may object to an exemption claim:

- Within 30 days of the conclusion of the section 341 meeting of creditors.
- If the debtor amends or supplements the list of exemptions, within 30 days of that amendment or supplement.

An extension of time to object to an exemption claim may be granted for cause only if the extension is requested before the expiration of the time to object (Fed. R. Bankr. P. 4003(b)(1)).

The trustee can object to an exemption on the basis that the claim was fraudulent for up to one year after the closing of the case (Fed. R. Bankr. P. 4003(b)(2)).

An objection based on the state homestead exemption under section 522(q) of the Bankruptcy Code must be filed before the closing of the case (Fed. R. Bankr. P. 4003(b)(3)).

Copies of any objection are given to:

- The trustee.
- The debtor.
- The debtor's attorney.
- The person filing the list of exemptions and that person's attorney.

(Fed. R. Bankr. P. 4003(b)(4).)

Bankruptcy Rule 4003(c)

It is the objecting party's initial burden to demonstrate that the exemption is not valid (Fed. R. Bankr. P. 4003(c)).

Bankruptcy Rule 4003(d)

To avoid a lien under section 522(f) of the Bankruptcy Code, the debtor must commence a contested matter, governed by Federal Rule of Bankruptcy Procedure 9014, or serve a Chapter 12 or Chapter 13 plan on an affected creditor in the manner of service of a summons and complaint provided by Federal Rule of Bankruptcy Procedure 1004 (Fed. R. Bankr. P. 4003(d)).

Local Rules

All motions filed under Federal Rule of Bankruptcy Procedure 4003(d) are contested matters and are governed by section 522(f) of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the E.D. Va. Local Bankruptcy Court Rules. If no response to a motion for lien avoidance is filed within 21 days after service of the motion, relief may be granted without a hearing (E.D. Va. LBR 4003-2).

The Commonwealth of Virginia has elected not to authorize debtors to avail themselves of the federal bankruptcy exemptions (Va. Code Ann. § 34-3.1). The debtor therefore is relegated to the state exemption options in Virginia. The vast majority of the exemptions granted by Virginia can be found in Title 34 of the Virginia Code, entitled "Homestead and Other Exemptions" (Va. Code Ann. §§ 34-1 to 34-34).

Cash Collateral

Background/Federal Requirements

The bankruptcy court, after notice and a hearing, may approve a debtor's request for use of cash collateral (§ 363(a), (c)(2), Bankruptcy Code). A debtor-in-possession or trustee seeking permission to use cash collateral must comply with:

- Section 363 of the Bankruptcy Code (see Section 363(c) of the Bankruptcy Code).
- Federal Rule of Bankruptcy Procedure (b) (see Bankruptcy Rule 4001(b)).
- Any applicable local bankruptcy court rules (see Cash Collateral: Local Rules).

This Note assumes that the prepetition lender is not providing DIP financing and, therefore, does not discuss any provisions that normally apply when the prepetition lender is the DIP lender.

For more information on the use of cash collateral in bankruptcy, see Practice Note, Cash Collateral: Overview.

Section 363(c) of the Bankruptcy Code

A debtor-in-possession can continue to use noncash property that has been pledged as collateral in the ordinary course, such as equipment, inventory, or other tangible assets, without the need to obtain permission from the bankruptcy court (§ 363(c)(1), Bankruptcy Code). However, a debtor-in-possession that seeks to use its lender's cash collateral must obtain either:

- The consent of all lenders holding security interests in the cash collateral.
- An order from the bankruptcy court permitting use of cash collateral, usually based on a showing that the secured creditor is adequately protected (see Practice Note, Cash Collateral: Overview: Adequate Protection).

(§ 363(c)(2), Bankruptcy Code.)

The limitations on the use of cash collateral, such as lender consent or bankruptcy court approval, help ensure that the secured lender's interest in cash collateral is adequately protected and that the lender is afforded due process.

To use cash collateral, the following requirements must be satisfied:

- **Notice and a hearing.** The court must determine that reasonable notice has been given to parties in interest regarding the motion and hearing, to the extent one is necessary (§ 363(c)(2), (c)(3), Bankruptcy Code). The court may hold an interim cash collateral hearing on the first day of the case to avoid immediate and irreparable harm to the debtor but cannot hold a final hearing earlier than 14 days from the date the cash collateral motion is filed (Fed. R. Bankr. P. 4001(b)(2) and see *In re Dynaco Corp.*, 158 B.R. 552 (Bankr. D. N.H. 1993) and *In re Post-Tron Sys. Corp.*, 106 B.R. 345, 346 (Bankr. D. R.I. 1989)).

- **Adequate protection.** On request of a party with an interest in the debtor's cash collateral, the debtor must show that such party's interest is adequately protected from any diminution in the value of its collateral caused by using cash collateral (§ 363(e), Bankruptcy Code). The adequate protection provided depends on the circumstances of the case (see Practice Notes, Cash Collateral: Overview: Adequate Protection and Adequate Protection: Overview).

Though not required, a debtor may choose to submit a written declaration from a business person or a financial advisor to the debtor in support of the debtor's need to use its lender's cash collateral (see Standard Document, Declaration: General (Federal)). It is common practice and sometimes required by local bankruptcy court rules for the declarant, a business person from the debtor (who may also be the declarant), and a lender representative to attend the cash collateral hearing or be reasonably available by telephone to address questions and, if necessary, authorize revisions to the proposed use of cash collateral.

Bankruptcy Rule 4001(b)

A request to use cash collateral in any jurisdiction must comply with Bankruptcy Rule 4001(b), which contains requirements regarding:

- The contents of a cash collateral motion (see Contents of the Cash Collateral Motion).
- Service of the cash collateral motion (see Service of the Cash Collateral Motion).
- Notice and hearing on the cash collateral motion (see Notice and Hearing on the Cash Collateral Motion).

Contents of the Cash Collateral Motion

In all jurisdictions, a cash collateral motion must be:

- Brought as a contested matter under Federal Rule of Bankruptcy Procedure 9014 (Bankruptcy Rule 9014).
- Accompanied by a proposed form of order.

(Fed. R. Bankr. P. 4001(b)(1)(A).)

The cash collateral motion must include a concise statement of the relief requested that summarizes and identifies the location within the relevant documents of, all the material provisions of the proposed cash collateral agreement and form of order, including:

- The name of each secured lender with an interest in the cash collateral.
- The purposes for using the cash collateral.
- The material terms of the agreement, including the duration of the debtor's use of cash collateral.
- Any liens, cash payments, or adequate protection that the secured lender is to receive or an explanation of why each secured creditor's interest is adequately protected.

(Fed. R. Bankr. P. 4001(b)(1)(B).)

Service of the Cash Collateral Motion

The cash collateral motion must be served on:

- Any entity with an interest in the cash collateral.
- Any committee or its authorized agent formed under:
  - section 705 of the Bankruptcy Code in a Chapter 7 case; or
  - section 1102 of the Bankruptcy Code in a Chapter 11 case (see Practice Notes, Chapter 11 Creditors' Committees and Chapter 11 Equity Committees).
- The top 20 unsecured creditors identified on the list filed under Federal Rule of Bankruptcy Procedure 1007(d) if the case is a Chapter 9 municipality case or a Chapter 11 case in which no committee has been appointed (see Standard Document, List of Largest Unsecured Creditors).
- Any other entity that the court may direct.

(Fed. R. Bankr. P. 4001(b)(1)(C).)

A cash collateral motion is a contested matter for which a motion must be made under Federal Rule of Bankruptcy Procedure 9014 (Fed. R. Bankr. P. 4001(b)(1)(A)). Under Bankruptcy Rule 9014, the debtor must serve the motion in the same manner provided for service of a summons and complaint under Federal Rule of Bankruptcy Procedure 7004.

The debtor need not submit a written declaration in support of its cash collateral motion, but may choose to do so if the circumstances of the case and the need for use of cash collateral warrant further support. If the motion is supported by an affidavit or declaration, the debtor must serve them together and any written response must be served no later than one day before the hearing, unless otherwise permitted by the court (Fed. R. Bankr. P. 9006(d)) (see Section 363(c) of the Bankruptcy Code).

Notice and Hearing on the Cash Collateral Motion

The court may hold an interim hearing to authorize the immediate access to cash collateral to the extent necessary to avoid immediate and irreparable harm to the estate, but it cannot hold a final hearing earlier than 14 days from the date the debtor serves the cash collateral motion (Fed. R. Bankr. P. 4001(b)(2)).

The debtor must give notice of the cash collateral hearing to all parties it must serve with the cash collateral motion and to any other entities as the court may direct (Fed. R. Bankr. P. 4001(b)(3) and see Service of the Cash Collateral Motion).

Local Rules

The E.D. Va. does not have any local rules that generally supplement the requirements of Bankruptcy Rule 4001(b). However, the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures) include additional provisions regarding the contents of cash collateral motions in complex Chapter 11 cases and mega cases (see Complex Chapter 11 Case Procedures: Local Rules).

In complex Chapter 11 cases and mega cases, practitioners should refer to section VI.D.14 of the Complex Case Procedures, which includes relevant provisions concerning motions to use cash collateral.

Interim Relief

Section VI.D.14.a of the Complex Case Procedures provides that on motion by the debtor, an interim hearing will routinely be conducted within three business days to consider entry of an interim cash collateral order. The interim hearing typically will be conducted as part of the first day hearing.

Section VI.D.14.a of the Complex Case Procedures further provides that at the interim hearing, the debtor must introduce a cash flow projection showing its sources and uses of cash necessary for ongoing operations on a weekly basis for not less than the first three weeks of the case (Interim Budget). The Interim Budget also must be filed with the court and served no later than noon on the first business day after the filing or on the date of the filing if the interim hearing is to occur before the second business day after the petition date. The debtor also must provide a copy of the Interim Budget in native file format on request.

Final Hearing

Section VI.D.14.b of the Complex Case Procedures provides that the court will set a final hearing to consider use of cash collateral according to section 363 of the Bankruptcy Code and Bankruptcy Rule 4001.

Section VI.D.14.b of the Complex Case Procedures further provides that at the final hearing, the debtors must introduce a cash flow projection for sources and uses of cash for the period of cash collateral use that is proposed (Final Financing Budget). The Final Financing Budget must be filed two calendar days before the final hearing, and the debtor must provide a copy in native file format on request. The court will consider whether it is appropriate to order long-term use of cash collateral according to section 363 of the Bankruptcy Code and Bankruptcy Rule 4001.

Contents of Cash Collateral Motion

Section VI.D.14.c of the Complex Case Procedures directs debtors to highlight certain provisions of proposed interim and final cash collateral orders, including:

- Sale, plan confirmation, and other milestones.
- Cross-collateralization or cross-default provisions (see Practice Note, Cash Collateral: Overview: Cross-Collateralization).
- The collateral package, including any proposed liens on avoidance actions or proceeds of avoidance actions (see Practice Note, Cash Collateral: Overview: Liens on Avoidance Actions).
- Default provisions and remedies, including provisions:
  - terminating the automatic stay without further order;
  - waiving rights to challenge lenders' ability to exercise post-default remedies; and
  - limiting required proof or altering the burden of proof at post-default hearings.

- Releases of claims against lenders or others.
- Limitations on the use of cash collateral other than general carve-outs to pay approved fees and expenses of advisors to official committees or future trustees.
- Priming liens.
- Any provision that limits the ability of estate fiduciaries to fulfill the duties under the Bankruptcy Code and applicable law.
- Carve-outs for payment of US Trustee quarterly fees, fees incurred by a trustee under section 726(b) of the Bankruptcy Code, and professional fees.
- Waiver of the right to charge against or recover proceeds of collateral under section 506(c) of the Bankruptcy Code, the equities of the case exception contained in section 552(b) of the Bankruptcy Code, or both (see Practice Notes, The Section 506(c) Surcharge on Collateral and Treatment of Prepetition Liens in Postpetition Property: Equity Exception).
- Stipulations by the debtors concerning any existing agreements, liens, and security interests.
- Obligations to indemnify lenders, agents, or other parties for costs and expenses, including the payment of their reasonable and documented professional fees and expenses without the requirement that these professionals file retention motions or fee applications.

Under Section VI.D.14.d of the Complex Case Procedures, if a cash collateral motion seeks to include any of the above terms, the motion should list all these provisions in a separate section or chart and provide specific reasons why each provision should be approved.

Section VI.D.14.e of the Complex Case Procedures also provides that if a proposed cash collateral order contains a release by the debtor of claims against lenders and other third parties, the debtor should provide that an official committee of unsecured creditors has at least 60 days from the date of the committee's formation to investigate these claims and challenge the extent and validity of any liens or appropriateness of this release. The challenge period may be extended consensually without court approval, and nothing in the Complex Case Procedures prevents a party from seeking an order providing for a nonconsensual extension of the challenge period.

Chapter 15

Background/Federal Requirements

Chapter 15 of the Bankruptcy Code, enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), is designed to help the US recognize foreign insolvency proceedings and increase international cooperation among courts in multinational insolvency cases to more effectively address cross-border insolvency issues. Chapter 15 expands the scope of its predecessor, section 304 of the Bankruptcy Code, which is now repealed. It codifies the Model Law on Cross-Border Insolvency in substantially the same way it was written by the United Nations Commission on International Trade Law (UNCITRAL). In the US, Chapter 15 is the exclusive remedy for a foreign representative seeking injunctive relief against litigation in US courts that would interfere with a foreign bankruptcy proceeding.

The following Bankruptcy Rules apply in Chapter 15 cases:

- Federal Rule of Bankruptcy Procedure 1002.
- Federal Rule of Bankruptcy Procedure 1004.2.
- Federal Rule of Bankruptcy Procedure 1007(a)(4).
- Federal Rule of Bankruptcy Procedure 1010.
- Federal Rule of Bankruptcy Procedure 1011.
- Federal Rule of Bankruptcy Procedure 1012.
- Federal Rule of Bankruptcy Procedure 2002(q).
- Federal Rule of Bankruptcy Procedure 2015(d).
- Federal Rule of Bankruptcy Procedure 3002.
- Federal Rule of Bankruptcy Procedure 5012.

For more information on Chapter 15, see Practice Note, Chapter 15 Overview: US Bankruptcy Cases Ancillary to Foreign Proceedings.

Local Rules

The E.D. Va. does not have any local rules regarding Chapter 15 cases.

Claims Trading

Background/Federal Requirements

Bankruptcy claims trading generally involves the buying and selling of claims against companies seeking relief under the Bankruptcy Code. Estimates of the size of the bankruptcy claims trading market vary widely, and range in recent years from an estimated $25 billion in 2016 to over $40 billion in 2018 to about $200 billion in 2024. The vast majority of the claims trading market centers on those claims which are, at least to some degree, liquidated and undisputed. Buyers and sellers trade secured claims, trade claims, and counterparty claims.

The claims trading market is not limited to traditional buy and hold investors. Particularly in large Chapter 11 cases, claims are often traded and re-traded many times by large-scale market players and those who practice arbitrage, either as part of a buy low, sell high strategy, or as part of a larger strategic effort to exercise control in a debtor's case.

For more information on claims trading, see Practice Note, Bankruptcy Claims Trading: Basic Concepts.

Bankruptcy Rule 3001(e)(1)

If a proof of claim has not been filed before the time of the transfer, then the buyer may file a proof of claim if the claim has been transferred other than for security. A claim is transferred other than for security if it is not transferred for the purpose of providing collateral. (Fed. R. Bankr. P. 3001(e)(1).)

Bankruptcy Rule 3001(e)(2)

If a claim, other than one based on a publicly traded note, bond, or debenture, has been transferred other than for security **after** a proof of claim has been filed, the buyer must file evidence of the transfer. Once the evidence has been filed, the court clerk notifies the seller by mail of the filing. The seller then has 21 days after the mailing of the notice to object. The court holds a hearing if the seller files a timely objection. If the court finds that the claim has been transferred other than for security, it enters an order substituting the buyer for the seller as the new owner of the claim on the books and records of the bankruptcy court. If the seller does not file an objection, the buyer is automatically substituted for the seller. (Fed. R. Bankr. P. 3001(e)(2).)

Bankruptcy Rule 3001(e)(3)

If a claim, other than one based on a publicly traded note, bond, or debenture, has been transferred for security **before** a proof of claim has been filed, either the buyer or the seller or both can file a proof of claim for the full amount. A claim is transferred for security if it is transferred to provide collateral. The proof of claim must be supported by a statement setting out the terms of the transfer. (Fed. R. Bankr. P. 3001(e)(3) and see Bankruptcy Rule 3001(e)(1).)

Bankruptcy Rule 3001(e)(4)

If a claim, other than one based on a publicly traded note, bond, or debenture, has been transferred for security **after** a proof of claim has been filed, the buyer must file evidence of the transfer (Fed. R. Bankr. P. 3001(e)(4) and see Bankruptcy Rule 3001(e)(2)).

Local Rules

The E.D. Va. does not have any local rules concerning claims trading.

Closing and Reopening a Chapter 7 Case

Background/Federal Requirements

Closing the Case

The court closes a Chapter 7 bankruptcy case either:

- When the Chapter 7 trustee has fully administered the case.
- If the debtor fails to file a statement of completion of a personal financial management course before the 60th day after the initial date set for the section 341 meeting of creditors.

(Fed. R. Bankr. P. 5009(a), (b).)

A case is fully administered when:

- The Chapter 7 trustee files a final report and account.
- Neither the US Trustee nor a party in interest objects to the final report in 30 days from its filing.
- The Chapter 7 trustee has addressed all administrative claims.

For more information on closing a case, see Practice Note, Closing and Reopening a Chapter 7 Bankruptcy Case: Closing a Fully Administered Chapter 7 Case and Closing a Chapter 7 Case for Failure to File Statement of Completion of Personal Financial Management Course.

The Chapter 7 trustee files a notice of the filing of the final report and account providing:

- The date and time of a hearing to consider:
  - the final report; and
  - requests for allowance of compensation requested by the Chapter 7 trustee and its professionals.
- The total amount of:
  - receipts and disbursements;
  - other paid claims; and
  - allowed general unsecured claims.
- The time and date of any hearing on the abandonment of estate property.

(See Practice Note, Closing and Reopening a Chapter 7 Bankruptcy Case: Final Report and Account.)

Reopening a Chapter 7 Case

The court has discretion to reopen a closed case under section 350(b) of the Bankruptcy Code on a motion by:

- The debtor.
- A party in interest.

(Fed. R. Bankr. P. 5010.)

The court only appoints a Chapter 7 trustee if the court determines that a trustee is necessary to either:

- Protect the interests of:
  - creditors; and
  - the debtor.
- Insure efficient administration of the estate.

(Fed. R. Bankr. P. 5010.)

For more information on reopening a Chapter 7 case, see Practice Note, Closing and Reopening a Chapter 7 Bankruptcy Case: Reopening a Closed Chapter 7 Case.

Local Rules

Closing a Chapter 7 Case

The E.D. Va. does not have any local rules concerning closing a Chapter 7 case.

Reopening a Chapter 7 Case

A motion to reopen a case must be scheduled for hearing according to E.D. Va. Local Bankruptcy Court Rule 9013-1(H)(3) (E.D. Va. LBR 5010-1).

E.D. Va. Local Bankruptcy Court Rule 5010-1 also provides that notice of a motion to reopen a Chapter 7 case must be given according to E.D. Va. Local Bankruptcy Court Rule 9013-1(M)(2) and must:

- Be served on:
  - the US Trustee;
  - the previously appointed trustee;
  - any affected party; and
  - any party being added as a creditor or party in interest in the case.
- Be accompanied by:
  - the appropriate fee to reopen the case or a request for waiver of the reopening fee; and
  - proof of service.

Complex Chapter 11 Case Procedures

Background/Federal Requirements

Many bankruptcy courts have adopted case management procedures and processes designed to facilitate the filing and administration of complex Chapter 11 cases, or mega cases, to ensure the least possible disruption to the debtor's business and to enhance the chances for success. These procedures make courts more responsive, predictable, and accessible.

Complex Chapter 11 cases are typically defined as those exhibiting a combination of one or more of the following factors, including:

- Debt over a specified amount.
- More than a certain number of creditors or other parties in interest.

- Publicly traded debt or equity.
- The need for simplification of noticing and hearing procedures to reduce delays and expense.

Complex Chapter 11 case procedures provide processes and requirements for certain aspects of the case, including:

- Expedited first day hearings.
- Preset omnibus hearing dates on a weekly, bi-weekly, or monthly basis.
- Operational guidelines for:
  - paying professional fees;
  - selling assets; and
  - obtaining DIP financing.

If counsel believes their case should be classified as a complex Chapter 11 case, they typically must file with the petition a notice, request, or motion to have the case designated as complex. The court, in its discretion, weighs the factors in deciding whether to designate a case as complex. If the court approves the designation, then the case is designated as complex, and the complex Chapter 11 case procedures apply.

Local Rules

Complex Chapter 11 cases are governed by the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures), annexed as Exhibit 15 to the E.D. Va. Local Bankruptcy Court Rules (E.D. Va. LBR 1075-1). Any inconsistencies between the E.D. Va. Local Bankruptcy Rules and the Complex Case Procedures are resolved in favor of the Complex Case Procedures (E.D. Va. LBR 1075-1).

The Complex Case Procedures provide that a complex Chapter 11 case is:

- Any case, other than a single asset real estate (SARE) case, in which the noncontingent, liquidated debt owed by the debtor exceeds $15 million.
- Any case, other than a SARE case, with noncontingent, liquidated debt above $7.5 million and not more than $15 million, in which the debtor elects treatment as a complex case by filing a notice of this election with the voluntary petition or within seven days after the order for relief.

The court designates as complex, on motion of the debtor or the US Trustee, any case that may be heard as a first day motion. The Complex Case Procedures also provide that these procedures apply to involuntary Chapter 11 cases initiated under section 303 of the Bankruptcy Code that meet this criteria.

Mega Chapter 11 cases are governed by the Procedures for Assignment and Administration of Mega Cases in the Eastern District of Virginia (Mega Case Procedures) annexed as Exhibit 16 to the E.D. Va. Local Bankruptcy Court Rules (E.D. Va. LBR 1075-2). A mega case is a defined in Section I of the Mega Case Procedures to be a case or group of affiliated cases filed under Chapter 11 of the Bankruptcy Code in which the total noncontingent, liquidated, and non-insider liabilities or assets of the collective debtors exceeds $100 million.

Concerning the administration of mega cases, the Complex Case Procedures also apply to mega cases (Mega Case Procedures, § III.B).

Section II.A of the Mega Case Procedures provides that mega cases are randomly assigned by the Chief Judge to any bankruptcy judge in the E.D. Va. (excluding the Chief Judge) irrespective of whether the case is filed in Alexandria, Richmond, or Norfolk and Newport News Divisions, and all filings must occur in the Division in which the assigned bankruptcy judge is located. When appropriate, the assigned bankruptcy judge, in their discretion, may conduct hearings where some of or all the participants appear remotely.

Notwithstanding the random assignment of mega cases, Section III.A of the Mega Case Procedures provides that, to the extent necessary for the expedient administration of a mega case, any bankruptcy judge in the E.D. Va. may conduct and preside over any first day hearings requested if the assigned and presiding bankruptcy judge is otherwise unavailable. Section III.A of the Mega Case Procedures further provides that first day hearings in mega cases will be conducted virtually or by remote participation with no in-person attendance required.

Section II.B of the Mega Case Procedures also provides that, if the basis for Divisional venue of the mega case is principal place of business or principal assets under 28 U.S.C. Section 1408 or if the Division where the mega case was filed is the headquarters of the debtors or the location of their principal executive offices, the assigned bankruptcy judge, if located in a different division, may determine, in their discretion, consistent with the efficient administration of justice and public access, to transfer that mega case to the filing Division and must travel to the Division where the mega case was filed to conduct hearings or conduct hearings virtually or by other remote participation.

Section II.C of the Mega Case Procedures also provides that if the bankruptcy judge to whom a mega case is assigned cannot administer that mega case, the Chief Judge will randomly reassign that mega case.

In practice, the Complex Case Procedures are intended to be default rules for complex Chapter 11 cases and mega cases and apply automatically on filing of a complex Chapter 11 case or mega case. However, a debtor may request a determination that any of or all the Complex Case Procedures not apply or request alternative or additional procedures. Before the implementation of the Complex Case Procedures, the E.D. Va. routinely approved notice, case management, and administrative procedures in large Chapter 11 cases that included provisions similar to those procedures contained in the Complex Case Procedures. The Complex Case Procedures contain additional requirements relating to:

- Cash collateral (see Cash Collateral: Local Rules).
- DIP financing (see DIP Financing: Local Rules).
- First day motions (see First Day Motions: Local Rules).
- Bar dates (see Bar Dates in Complex Chapter 11 Cases and Mega Cases).
- Omnibus claim objection procedures (see Proofs of Claim and Omnibus Claim Objection Procedures in Complex Chapter 11 Cases and Mega Cases).
- Professional retention applications (see Professional Retention Applications in Complex Chapter 11 Cases and Mega Cases).
- Retaining a claims agent (see Retaining a Claims Agent: Local Rules).
- Remote hearing participation (see Procedures for Remote Hearing Participation).
- Motions for relief from the automatic stay (see Stay Relief Motions in Complex Chapter 11 Cases and Mega Cases).
- Agendas (see Agendas).
- Service lists (see Service List).
- Mediation (see Mediation).
- Conditional approval of disclosure statements (see Conditional Approval of Disclosure Statements).
- Proposed orders, certificates of no objection, and certificates of counsel (see Submission of Proposed Orders, Certificate of No Objection, and Certificate of Counsel).
- Settlement (see Settlement).
- Bid procedures motions (see Guidelines for Bid Procedures Motions in Complex Chapter 11 Cases and Mega Cases).

Procedures for Remote Hearing Participation

Under the Complex Case Procedures, the court may allow counsel to participate in any hearing by telephone or video conference (Complex Case Procedures, § IV.A).

No motion is required to authorize telephonic participation at hearings (Complex Case Procedures, § IV.B). Unless otherwise provided in the notice of hearing, instructions for telephonic appearances are available on the court's website. If a party appears telephonically at an evidentiary hearing, the party may only present argument and cannot examine witnesses or submit evidence unless otherwise permitted by the bankruptcy judge.

The Complex Case Procedures also provide that at the court's discretion, a hearing may be conducted by remote video conference (Complex Case Procedures, § IV.C). As with telephonic participation, no motion is required to participate by remote video conference but participants must pre-register (see Bankr. E.D. Va.: Temporary Emergency Provisions Regarding ZoomGov Remote Proceeding Access Information).

Participants and listeners cannot record or broadcast any proceedings (Complex Case Procedures, § IV.D).

Agendas

Section III.D of the Complex Case Procedures provides that the debtor must file a proposed hearing agenda no later than two calendar days before each scheduled omnibus hearing.

Service List

Section II.B of the Complex Case Procedures requires the debtors to maintain a master service list that must initially include:

- The Assistant US Trustee for the E.D. Va.
- The debtors.
- The debtors' counsel.
- Counsel for any committee appointed under section 1102 of the Bankruptcy Code.
- Counsel for the debtors' prepetition lenders.
- Counsel for the debtors' postpetition lenders, if any.
- All applicable government agencies to the extent required by the Federal Rules of Bankruptcy Procedure and the E.D. Va. Local Bankruptcy Court Rules.
- Any party that has requested notice under Federal Rule of Bankruptcy Procedure 2002.
- Any other party or counsel designated by the debtors.

Concerning the application to retain the claims agent, the debtors should seek for the claims agent to maintain the master service list. Unless the court authorizes the claims agent to maintain the master service list instead of the debtors, the list must be filed by the debtors within three days after the petition date in complex Chapter 11 cases and mega cases (Complex Case Procedures, § II.C). A revised list must be filed seven days after the initial list if any revisions are necessary. The debtors or the claims agent must update the list as necessary at least every 15 days during the first 60 days of the Chapter 11 case, and thereafter at least every 30 days, until confirmation of a proposed Chapter 11 plan or conversion of the Chapter 11 case to another chapter.

Mediation

Section IX of the Complex Case Procedures allows parties to mediate any dispute using a non-judicial mediator or neutral without court approval. Under E.D. Va. Local Bankruptcy Court Rule 9019-1(H), a non-judicial mediator cannot be compensated by a contingent fee and any contingent compensation from the estate is subject to court approval after notice and a hearing or as the court otherwise orders. Mediation by virtual meeting (for example, Zoom) is acceptable, but in-person mediation is encouraged.

Practitioners seeking mediation in the E.D. Va. should note that under E.D. Va. Local Bankruptcy Court Rule 9019-1(B), parties may request mediation by motion or joint motion. If mediation is not consensual, the motion must state the basis for the request and that the party undertook a good faith effort to seek mediation by consent without success. Parties have 14 days from the date of service to object to this motion, and the court will decide the motion on notice and a hearing.

Practitioners also should note that under E.D. Va. Local Bankruptcy Court Rule 9019-1(I), the appointment of a mediator or neutral neither postpones or stays the scheduling of any case or controversy nor provides grounds for a continuance or extension of a previously scheduled deadline.

E.D. Va. Local Bankruptcy Court Rule 9019-1(J) further provides that, unless otherwise agreed to by the party, communications and writings between a party and a mediator are considered privileged and confidential and not subject to discovery. No party is deemed to have waived the attorney-client or work-product privileges by communicating privileged information to the mediator.

Debtors in a complex Chapter 11 case or mega case in the E.D. Va. often move for entry of an order establishing mediation procedures for certain types of actions, including avoidance and preference actions. These orders typically provide:

- A list of preapproved non-judicial mediators or neutrals and their applicable rates of compensation.
- Procedures regarding the selection of a mediator.
- An extension or stay of applicable deadlines.
- A requirement that the mediation procedures be served with a copy of the documents initiating the action.
- Alternative procedures if an opposing party fails to respond to or refuses the debtors' request for mediation.

Conditional Approval of Disclosure Statements

Under section VI.F.3 of the Complex Case Procedures, "[a] plan proponent may propose to combine the disclosure statement and plan into a single document."

The plan proponent also may file contemporaneously with the filing of the disclosure statement and plan a motion requesting:

- Conditional approval of the disclosure statement.
- Approval of solicitation procedures.

- The scheduling of a hearing on shortened notice to consider conditional approval of the proposed disclosure statement.
- The scheduling of a joint hearing to consider final approval of the adequacy of the disclosure statement and confirmation of the proposed plan.

The motion must identify:

- The proposed balloting agent, if any.
- Any voting procedures in addition to those required by the Complex Case Procedures.
- The proposed hearing date for final approval of the disclosure statement and confirmation of the proposed plan (Combined Hearing).

As part of seeking conditional approval of disclosure statements, a plan proponent also may request for cause, under section 341(e) of the Bankruptcy Code, that the US Trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan regarding which the debtor solicitated acceptances before the commencement of the case (Complex Case Procedures, § VI.F.3.c).

If the motion is granted at the Combined Hearing, the court will enter its form order granting this relief unless the plan proponent requests entry of a modified order.

Submission of Proposed Orders, Certificate of No Objection, and Certificate of Counsel

The court may grant a request for relief without a hearing where no objection is filed if both:

- The notice filed with the request for relief includes a statement that the request for relief may be granted and an order entered without a hearing unless a timely objection is made.
- No objection has been timely and properly filed or served.

(Complex Case Procedures, § V.E.). Counsel to the proponent may file a certification indicating no party has filed an objection to the requested relief and submit an order granting the relief requested. If the certification relates to a proposed form of order that varies from the original proposed order, the certification must include:

- A redline of the revised form of order against the order filed with the request for relief.
- A clean copy of the form of order.

The hearing scheduled on the request for relief is canceled after the order is entered.

Similarly, the court may grant the request for relief without a hearing where an objection is filed if the proponent files a certification indicating all known objections have been resolved by an agreed form of order filed with the certification (Complex Case Procedures, § V.E). If the agreed form of order varies from the original proposed order, the certification must include:

- A redline of the revised form of order against the order filed with the subject motion.
- A clean copy of the form of order.

Settlement

The parties may announce the settlement of a dispute at a properly noticed and scheduled hearing (Complex Case Procedures, § V.G). The court may approve the settlement at the hearing without further notice if the court determines that the terms of the settlement are not materially different from what parties in interest could have expected if the dispute were fully litigated.

DIP Financing

Background/Federal Requirements

The bankruptcy court, after notice and a hearing, may approve a debtor's DIP financing arrangements (§ 364(c), (d), Bankruptcy Code). A debtor-in-possession or trustee seeking DIP financing must comply with:

- Section 364 of the Bankruptcy Code (see Section 364(d) of the Bankruptcy Code).
- Federal Rule of Bankruptcy Procedure 4001(c) (see Bankruptcy Rule 4001(c)).
- Any applicable local bankruptcy court rules (see DIP Financing: Local Rules).

This Note assumes that the DIP financing does not include provisions regarding use of cash collateral.

For more information on DIP financing, see Practice Note, DIP Financing: Overview and Timeline of DIP Financing Process.

Section 364(d) of the Bankruptcy Code

A DIP financing request in any jurisdiction must provide:

- **Notice and a hearing.** The court must determine that reasonable notice has been given to parties in interest and that there has been a hearing, to the extent one is necessary (§ 364(c), (d), Bankruptcy Code and see Notice and Hearing on the DIP Financing Motion).
- **A showing of the inability to obtain credit on less onerous terms.** The debtor must demonstrate that it made efforts to obtain financing elsewhere on better terms (§ 364(c), (d)(1)(A), Bankruptcy Code). The debtor's efforts do not have to be exhaustive, just sufficient under the circumstances, which means that for:
  - non-priming DIPs, the debtor tried but was unable to obtain financing on an unsecured, administrative priority basis (see Practice Note, DIP Financing: Overview: Non-Priming DIPs and Box, Unsecured Postpetition Financing); and
  - priming DIPs, the debtor tried but was unable to obtain a non-priming DIP (see Practice Note, DIP Financing: Overview: Priming DIPs).

  The debtor commonly submits a written declaration of a business person or a financial advisor in support of its motion that discusses the debtor's efforts to obtain financing on better terms (see Standard Document, Declaration: General (Federal)). It is also common practice and sometimes required by local bankruptcy court rules for the declarant, a business person from the debtor (who may also be the declarant), and a lender representative to attend the hearing or be reasonably available by telephone to address questions and, if necessary, authorize revisions to the proposed financing.
- **Adequate protection.** This requirement only applies to priming DIPs. The debtor must show that the holder of the existing lien on property on which a senior or equal lien is granted is adequately protected from any diminution in the value of its collateral caused by the priming of its lien (§ 364(d)(1)(B), Bankruptcy Code). This requirement is usually difficult to satisfy if the primed lender objects, unless there is a substantial equity cushion for the objecting lender (see Practice Note, DIP Financing: Overview: Perspective of the Primed Lender). The adequate protection provided depends on the circumstances of the case (see Practice Note, Adequate Protection: Overview: Methods of Adequate Protection).

Bankruptcy Rule 4001(c)

A DIP financing request in any jurisdiction must comply with Bankruptcy Rule 4001(c), which sets out requirements regarding:

- The contents of a DIP financing motion (see DIP Financing Motion Attachments and Contents).
- Service of the DIP financing motion (see Service of the DIP Financing Motion).
- Notice and hearing on the DIP financing motion (see Notice and Hearing on the DIP Financing Motion).

DIP Financing Motion Attachments and Contents

A DIP financing motion must be accompanied by:

- A copy of the proposed DIP financing credit agreement.
- The proposed form of order.

(Fed. R. Bankr. P. 4001(c)(1)(A).)

The DIP financing motion must include a concise statement of the relief requested, summarizing, and setting out the location within relevant documents of, all the material provisions of the proposed credit agreement and form of order, including:

- The interest rate.
- Maturity.
- Events of default.
- Liens.
- Borrowing limits.
- Borrowing conditions.

(Fed. R. Bankr. P. 4001(c)(1)(B).)

If the proposed credit agreement or form of order includes any of the provisions below, the concise statement must also:

- Briefly list or summarize each provision.
- Identify their location in the proposed agreement or form of order.
- Identify any provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Bankruptcy Rule 4001(c)(2).

(Fed. R. Bankr. P. 4001(c)(1)(B).)

The motion must also describe the nature and extent of each of the following provisions:

- A grant of priority or a lien on property of the estate under:
  - section 364(c) of the Bankruptcy Code, which addresses non-priming DIPs (see Practice Note, DIP Financing: Overview: Non-Priming DIPs); or
  - section 364(d) of the Bankruptcy Code, which addresses priming DIPs (see Practice Note, DIP Financing: Overview: Priming DIPs).

  (Fed. R. Bankr. P. 4001(c)(1)(B)(i).)
- The method of providing adequate protection or priority for a prepetition claim, including:
  - granting a lien on property of the estate to secure the claim (see Practice Note, Adequate Protection: Overview: Additional or Replacement Lien); or
  - using property of the estate or credit obtained under section 364 of the Bankruptcy Code to make cash payments on account of the claim (see Practice Note, Adequate Protection: Overview: Cash Payment or Periodic Cash Payments).

  (Fed. R. Bankr. P. 4001(c)(1)(B)(ii).)
- A determination of the validity, enforceability, priority, or amount of a prepetition claim or of any lien securing the claim (Fed. R. Bankr. P. 4001(c)(1)(B)(iii)).
- A waiver or modification of the automatic stay (Fed. R. Bankr. P. 4001(c)(1)(B)(iv) and see Practice Note, Automatic Stay: Overview: Relief from the Stay and Waivers of the Stay).
- A waiver or modification of any party's authority or right to:
  - file a plan (see Practice Note, Chapter 11 Plan Process: Overview: Filing a Plan);
  - seek an extension of the debtor's exclusivity period to file a plan (see Practice Note, Chapter 11 Plan Process: Overview: Contesting Exclusivity);
  - request the use of cash collateral under section 363(c) of the Bankruptcy Code (see Practice Note, Cash Collateral: Overview); or
  - request authority to obtain credit under section 364 of the Bankruptcy Code (see Practice Note, DIP Financing: Overview).

  (Fed. R. Bankr. P. 4001(c)(1)(B)(v).)
- The setting of a deadline for:
  - filing a plan of reorganization;
  - approval of a disclosure statement;
  - a hearing on confirmation; or
  - entry of a confirmation order.

  (Fed. R. Bankr. P. 4001(c)(1)(B)(vi) and see Practice Note, Chapter 11 Plan Process: Overview.)
- A waiver or modification of the applicability of nonbankruptcy law relating to:
  - the perfection of a lien on property of the estate; or
  - the foreclosure or other enforcement of the lien.

  (Fed. R. Bankr. P. 4001(c)(1)(B)(vii).)
- A release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to file an action (Fed. R. Bankr. P. 4001(c)(1)(B)(viii)).
- The indemnification of any entity (Fed. R. Bankr. P. 4001(c)(1)(B)(ix)).
- A release, waiver, or limitation of any right to surcharge collateral under section 506(c) of the Bankruptcy Code (Fed. R. Bankr. P. 4001(c)(1)(B)(x) and see Practice Note, The Section 506(c) Surcharge on Collateral).
- The granting of a lien on any claim or cause of action arising under:
  - section 544 of the Bankruptcy Code (transfers avoidable under applicable state law);
  - section 545 of the Bankruptcy Code (avoidable statutory liens);
  - section 547 of the Bankruptcy Code (transfers avoidable as preferences);
  - section 548 of the Bankruptcy Code (transfers avoidable as fraudulent conveyances);
  - section 549 of the Bankruptcy Code (transfers avoidable as postpetition transactions);
  - section 553(b) of the Bankruptcy Code (setoffs made during the 90-day period before bankruptcy that improve a creditor's position);
  - section 723(a) of the Bankruptcy Code (claims against general partners who are personally liable for any deficiency of the partnership debtor's property to meet claims against the partnership); and

  - section 724(a) of the Bankruptcy Code (avoidable liens that secure a fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, but not to the extent these liens secure claims for actual pecuniary loss).

Service of the DIP Financing Motion

The DIP financing motion must be served on:

- Any committee or its authorized agent formed under:
  - section 705 of the Bankruptcy Code in a Chapter 7 case; or
  - section 1102 of the Bankruptcy Code in a Chapter 11 case (see Practice Notes, Chapter 11 Creditors' Committees and Chapter 11 Equity Committees).
- If the case is a Chapter 9 municipality case or a Chapter 11 case in which no committee has been appointed under section 1102, the top 20 unsecured creditors identified on the list filed under Federal Rule of Bankruptcy Procedure 1007(d) (see Standard Document, List of Largest Unsecured Creditors).
- Any other entity that the court may direct.

(Fed. R. Bankr. P. 4001(c)(1)(C).)

A DIP financing motion is a contested matter for which a motion must be made under Federal Rule of Bankruptcy Procedure 9014 (Fed. R. Bankr. P. 4001(c)(1)(A)). Under Bankruptcy Rule 9014, the motion must be served in the manner provided for service of a summons and complaint by Federal Rule of Bankruptcy Procedure 7004.

If the motion is supported by an affidavit, the debtor must serve them together and any written response must be served no later than one day before the hearing, unless otherwise permitted by the court (Fed. R. Bankr. P. 9006(d)). The debtor commonly submits a written declaration of a business person or financial advisor in support of its DIP financing motion (see Section 364(d) of the Bankruptcy Code).

Notice and Hearing on the DIP Financing Motion

The court may hold an interim hearing to authorize the immediate access to financing to the extent necessary to avoid immediate and irreparable harm to the estate, but it cannot hold a final hearing earlier than 14 days from the date the debtor serves the DIP financing motion (Fed. R. Bankr. P. 4001(c)(2)).

The debtor must give notice of the hearing to all parties it must serve with the DIP financing motion and to any other entities as the court may direct (Fed. R. Bankr. P. 4001(c)(3) and see Service of the DIP Financing Motion).

Local Rules

The E.D. Va. does not have local rules that generally supplement the requirements of Bankruptcy Rule 4001(c). However, the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures) include additional provisions regarding the contents of DIP financing motions in complex Chapter 11 cases and mega cases (see Complex Chapter 11 Case Procedures: Local Rules). In complex Chapter 11 cases and mega cases, practitioners should refer to section VI.D.14 of the Complex Case Procedures, which includes relevant provisions for DIP financing motions.

Interim Relief

Section VI.D.14.a of the Complex Case Procedures provides that on motion by the debtor, an interim hearing will routinely be conducted within three business days to consider entry of an interim order approving the DIP financing motions. The interim hearing typically will be conducted as part of the first day hearing.

Section VI.D.14.a of the Complex Case Procedures further provides that at the interim hearing, the debtor must introduce a cash flow projection showing its sources and uses of cash necessary for ongoing operations on a weekly basis for not less than the first three weeks of the case (Interim Budget). The Interim Budget also must be filed with the court and served no later than noon on the first business day after the filing or on the date of the filing if the interim hearing is to occur before the second business day after the petition date. The debtor also must provide a copy of the Interim Budget in native file format on request.

Final Hearing

Section VI.D.14.b of the Complex Case Procedures provides that the court will set a final hearing to consider approval of the DIP financing motion according to section 364 of the Bankruptcy Code and Bankruptcy Rule 4001.

Section VI.D.14.b of the Complex Case Procedures further provides that at the final hearing, the debtors must introduce a cash flow projection for sources and uses of cash for the period of DIP financing that is proposed (Final Financing Budget). The Final Financing Budget must be filed two calendar days before the final hearing, and the debtor must provide a copy in native file format on request. The court will consider whether it is appropriate to order long-term DIP financing according to section 364 of the Bankruptcy Code and Bankruptcy Rule 4001.

Contents of DIP Financing Motion

Section VI.D.14.c of the Complex Case Procedures directs debtors to highlight certain provisions of proposed interim and final orders approving DIP financing, including:

- Sale, plan confirmation, and other milestones (see Practice Note, DIP Financing: Overview: Greater Control).
- Cross-collateralization or cross-default provisions (see Practice Note, DIP Financing: Overview: Increased Collateral Securing Prepetition Debt).
- Roll-ups, including provisions:
  - deeming prepetition debt to be postpetition debt; and
  - requiring the proceeds of postpetition loans to be used to repay prepetition debt.

  (See Practice Note, Roll-Up DIP Financing.)
- The collateral package, including any proposed liens on avoidance actions or proceeds of avoidance actions.
- Default provisions and remedies, including provisions:
  - terminating the automatic stay without further order;
  - waiving rights to challenge lenders' ability to exercise post-default remedies; and
  - limiting required proof or altering the burden of proof at post-default hearings.
- Releases of claim against lenders or others.
- Limitations on the use of cash collateral other than general carve-outs to pay approved fees and expenses of advisors to official committees or future trustees.
- Priming liens.
- Any provision that limits the ability of estate fiduciaries to fulfill the duties under the Bankruptcy Code and applicable law.
- Carve-outs for payment of US Trustee quarterly fees, fees incurred by a trustee under section 726(b) of the Bankruptcy Code, and professional fees.
- Waiver of the right to charge against or recover proceeds of collateral under section 506(c) of the Bankruptcy Code, the equities of the case exception contained in section 552(b) of the Bankruptcy Code, or both (see Practice Notes, The Section 506(c) Surcharge on Collateral and Treatment of Prepetition Liens in Postpetition Property: Equity Exception).
- Fees or other compensation payable to any agent for performing administrative responsibilities or any lenders as compensation for arranging, backstopping, or undertaking similar responsibilities regarding the financing (if nothing in the Complex Case Procedures prevents the debtors or any other party in interest from filing a motion seeking to seal or redact these fees, as provided in Section VI.D.14.f).
- Required make-whole payments or prepayment penalties (see Practice Note, Treatment of Make-Whole and No-Call Provisions in Bankruptcy).
- Stipulations by the debtors concerning any existing agreements, liens, and security interests.
- Provisions providing for the amendment, waiver, consent, or other modification of any provisions of the financing documents without further approval of the court.
- Obligations to indemnify lenders, agents, or other parties for costs and expenses, including the payment of their reasonable and documented professional fees and expenses, without the requirement that these professionals file retention motions or fee applications.
- Provisions providing for credit bid rights in any sale of collateral as provided in section 363(k) of the Bankruptcy Code without the need for further court order (see Practice Note, Credit Bidding in Section 363 Bankruptcy Sales).

Under section VI.C.14.d of the Complex Case Procedures, if a DIP financing motion seeks to include any of the above terms, the motion should list all these provisions in a separate section or chart and provide specific reasons why each provision should be approved.

Section VI.C.14.e of the Complex Case Procedures also provides that if a proposed DIP financing order contains a release by the debtors of claims against lenders and other third parties, the debtor should provide that an official committee of unsecured creditors has at least 60 days from the date of the committee's formation to investigate these claims and challenge the extent and validity of any liens or appropriateness of this release. The challenge period may be extended consensually without court approval, and nothing in the Complex Case Procedures prevents a party from seeking an order providing for a nonconsensual extension of the challenge period.

Section VI.D.14.f of the Complex Case Procedures further provides that, to the extent the debtor or any other party in interest files a motion to seal or redact a fee letter related to financing, this motion should explain the basis for sealing this fee letter under section 107(b) of the Bankruptcy Code. This motion should indicate whether the party affected by disclosure of the fee letter has agreed to make available the fee letter, on a confidential basis, to the court, the US Trustee, counsel for any official committee appointed in the case, and any other party as may be ordered by the court, in each case under appropriate confidentiality agreements that preserve the confidentiality of the fee letter.

Domestic Support Obligations

Background/Federal Requirements

A domestic support obligation, defined in section 101(14A) of the Bankruptcy Code, is a debt that is:

- Owed to or recoverable by:
  - the debtor's spouse (§ 101(14A)(A)(i), Bankruptcy Code);
  - the debtor's former spouse (§ 101(14A)(A)(i), Bankruptcy Code);
  - the debtor's child (§ 101(14A)(A)(i), Bankruptcy Code);
  - the parent, legal guardian, or responsible relative of the debtor's child (§ 101(14A)(A)(i), Bankruptcy Code); or
  - a governmental unit (§ 101(14A)(A)(ii), Bankruptcy Code).
- In the nature of alimony, maintenance, or child support (§ 101(14A)(B), Bankruptcy Code).
- Included in:
  - a separation agreement (§ 101(14A)(C)(i), Bankruptcy Code);
  - a divorce decree (§ 101(14A)(C)(i), Bankruptcy Code);
  - a property settlement agreement (§ 101(14A)(C)(i), Bankruptcy Code);
  - a court order (§ 101(14A)(C)(ii), Bankruptcy Code); or
  - a lawful determination by a governmental unit (§ 101(14A)(C)(iii), Bankruptcy Code).
- Not assigned to any nongovernmental entity except to collect the debt (§ 101(14A)(D), Bankruptcy Code).

A domestic support obligation:

- Can accrue before, on, or after the petition date and can accrue interest under applicable non-bankruptcy law (§ 101(14A), Bankruptcy Code).
- Cannot be discharged under any chapter of the Bankruptcy Code, including Chapters 7, 11, 12, or 13.

(§ 523(a)(5), Bankruptcy Code.)

A Chapter 12 or 13 debtor must remain current on postpetition domestic support obligations to receive a discharge under Chapters 12 and 13 (§§ 1228(a) and 1328(a), Bankruptcy Code). An individual Chapter 11 debtor must remain current on postpetition domestic support obligations as a condition to confirmation of its plan (§ 1129(a)(14), Bankruptcy Code).

Official Bankruptcy Form B2830

Official Bankruptcy Form B2830 is used to certify under section 1328(a) of the Bankruptcy Code that the debtor either:

- Owed no domestic support obligation when the bankruptcy petition was filed and was not required to pay any domestic support obligation since then.
- Was required to pay a domestic support obligation and has paid all amounts:
  - required under the Chapter 13 plan; and
  - that became due between the petition date and the day of the certification.

The debtor must also certify that the debtor has either:

- Not claimed an exemption under section 522(b)(3) of the Bankruptcy Code or state or local law, as specified in section 522(p)(1) and (2) of the Bankruptcy Code:
  - in property that the debtor or a dependent use as a residence, claims as a homestead, or acquired as a burial plot; and
  - that exceeds $170,350 in value.
- Claimed an exemption under section 522(b)(3) or state or local law, as specified in section 522(p)(1) and (2):
  - in property that the debtor or a dependent use as a residence, claims as a homestead, or acquired as a burial plot; and
  - that exceeds $170,350 in value.

The Instructions to Official Bankruptcy Form 2830 provide that:

- In a joint case, each debtor must file the certifications.
- The debtor must make the certifications after it has completed the plan payments.

Local Rules

E.D. Va. Local Bankruptcy Court Rule 4008-2(A) requires Chapter 13 debtors to file the Debtor's Certification of Compliance With 11 U.S.C. 1328 within 45 days of mailing of the Notice to Debtor(s) and Creditors Concerning Issuance of Discharge. This form requires the debtor to certify that it has paid all amounts due under any domestic support obligations as defined by section 101(14A) of the Bankruptcy Code or by statute either:

- Before the bankruptcy case was filed and provided for in the Chapter 13 plan.
- At any time after the filing of the bankruptcy case.

The E.D. Va. has no other local rules or forms concerning domestic support obligations.

Electronic Court Filing and Transmission of Highly Sensitive Documents

Background/Federal Requirements

Cybersecurity is an important issue for bankruptcy professionals and how they counsel debtor, creditor, and other bankruptcy clients. The debtor and estate professionals collect large amounts of personally identifiable information (PII) and other sensitive data that has significant value to hackers and other cyberattackers.

After the disclosure of widespread cybersecurity breaches of both private sector and government computer systems, in 2021 US federal courts began implementing new security procedures to protect highly sensitive confidential documents (HSDs) filed with the courts. Many US bankruptcy courts have entered orders requiring parties to file HSDs outside of the electronic court filing (CM/ECF) system.

Under the new procedures, HSDs filed with federal courts will be accepted for filing in paper form or by a secure electronic device, such as a thumb drive, and stored in a secure stand-alone computer system. These sealed HSDs will not be uploaded to CM/ECF. This new practice will not change current policies regarding public access to court records, since sealed records are confidential and currently are not available to the public.

Federal courts, including bankruptcy courts, will issue standing or general orders regarding the new HSD procedures. While the procedures apply to all HSDs filed with a court, not all sealed filings are considered an HSD. The specific bankruptcy court orders will address the type of filings a court does and does not consider to be HSDs.

For more information, see Practice Note, Cybersecurity in Bankruptcy.

Local Rules

The E.D. Va. entered E.D. Va. Standing Order 24-10, effective May 30, 2024, that adopts the Highly Sensitive Documents Definition and Guidance (HSD Guidance) annexed as Exhibit A to E.D. Va. Standing Order 24-10, which includes a standard definition of HSD, a procedure for filing, serving, and maintaining HSDs, and factors to be considered by judicial officers in determining if a document is an HSD.

E.D. Va. Standing Order 24-10 further provides that HSDs will be filed and served:

- In paper form.
- If the document cannot be filed in paper form, in digital media on a secure electronic device, such as a flash drive, which will be maintained by the

clerk's office in a secure paper filing system or secure stand-alone computer system that is not connected to any network.

E.D. Va. Local Bankruptcy Court Rule 1007-1(H)(1) provides that nothing prevents a debtor from filing a mailing matrix under seal to protect individuals against potential identity theft or for other cause. In practice, instructions and orders are obtained on a case-by-case basis from the judge assigned to the case. For example, a debtor can seek court authority to file a mailing matrix under seal to protect individuals against potential identity theft. Any motion filed in the E.D. Va. to protect PII should indicate whether the party affected by the disclosure has agreed to make available the document containing the PII to:

- The court.
- The US Trustee.
- Counsel for any official committee appointed in the case.
- Any other party as may be ordered by the court in each case under appropriate confidentiality agreements that preserve the confidentiality of the PII.

First Day Declarations

Background/Federal Requirements

The first day declaration is an independent document executed by a key executive or senior officer of the debtor, providing an explanation of the debtor's business, the events leading to the Chapter 11 case, the basis for the relief sought in the first day motions, and often the debtor's future intentions for the Chapter 11 case.

The transition into bankruptcy can be difficult for most companies, as their board of directors and management are forced to accept new limitations on their authority to operate the business and adapt to their new fiduciary duties to the debtor's secured creditors and unsecured creditors. The transition is equally difficult for a debtor's employees, lessors, creditors, and customers.

A first day declaration can help mitigate these concerns by providing an explanation for the events that led to the bankruptcy and a road map for the Chapter 11 case.

For more information on first day declarations, see Practice Note, Chapter 11 First Day Declaration.

Local Rules

The E.D. Va. does not have any local rules that contain special or additional requirements relating to Chapter 11 first day declarations.

First Day Motions

Background/Federal Requirements

A Chapter 11 debtor typically files several motions on or soon after the petition date to seek relief necessary to ease the debtor's transition into bankruptcy. These first day motions address both administrative and operational issues and may seek relief on an interim or final basis.

For more information on first day motions, see Practice Note, First Day Motions: Overview and First Day Relief: Debtor Checklist.

Local Rules

The E.D. Va. does not have any local rules and practices generally governing first day motions. However, the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures) include certain provisions regarding first day motions for complex Chapter 11 cases (see Complex Chapter 11 Case Procedures: Local Rules).

Drafts of first day motions should not be delivered to the clerk's office or chambers unless requested by the clerk's office or chambers (Complex Case Procedures, § I.B).

As soon as reasonably practicable before filing a complex Chapter 11 case or mega case, counsel to the proposed debtors are encouraged to make a good faith effort to provide advance notice of the intended filing and drafts of first day motions to the Assistant US Trustee for the division in which the case is to be filed (Complex Case Procedures, § I.C).

All first day hearings in complex Chapter 11 cases and mega cases must be conducted by video conference on no less than 24 hours' notice and, unless otherwise requested by the debtors, must be held within two business days of the filing of the case (Complex Case Procedures, §§ I.E and F). Section VI.D of the Complex Case Procedures provides a non-inclusive list of 14 categories of first day motions that the court typically hears at a first day hearing as well as guidance regarding acceptable provisions applicable to certain first days motions. However, Section VI.A of the Complex Case Procedures provides that the fact that a motion is listed in Section VI.D does not mean that the court will grant the relief requested in these motions, and the court will decide motions based on applicable law and the evidence, including the particular facts and circumstances of the case. This list of motions includes:

- Motion for an expedited hearing on first day motions. No motion to expedite a hearing on first day motions is necessary if the hearing on this motion is conducted on at least 24 hours' notice and within two business days of the filing. Debtors should otherwise comply with E.D. Va. Local Bankruptcy Court Rule 9013-1(N) (the local rule governing requests for an expedited hearing). (Complex Case Procedures, § VI.D.1.)
- Motion for joint administration (if more than one case is commenced). The motion should seek joint administration for procedural purposes only and should require that the court maintain one file and one docket for all jointly administered cases (Complex Case Procedures, § VI.D.2). The motion may seek authority concerning the manner in which monthly operating reports required by the US Trustee can be filed.
- Case management procedures motion (if a debtor seeks to deviate from the Complex Case Procedures).
- Application to retain a claims, noticing, or balloting agent. If a claims agent is retained, the claims agent must maintain a case-specific website where electronic copies of all pleadings filed in the case must be posted as soon as practicable but not later than three business days after the filing and may be viewed free of charge.

  The order approving the claims agent's retention may provide that the claims agent must maintain the master service list (Complex Case Procedures, § VI.D.4.b). At least once every 30 days, an updated master service list must be posted on the case-specific website.

  The order approving the claims agent's retention may authorize the debtors to compensate the claims agent on the receipt of reasonably detailed invoices without the need for the claims agent to file fee applications or otherwise seek court approval for the compensation of its services and reimbursement of its expenses. However, the order should also provide that:

  - the claims agent will serve monthly invoices on the debtors, the US Trustee, counsel for any official committee appointed in the case, and any party in interest who specifically requests the service of the monthly invoices; and
  - if any dispute arises relating to the monthly invoices, the parties will first meet and confer in an attempt to resolve the dispute and may seek a resolution of the matter from the court if resolution is not achieved.

  (Complex Case Procedures, § VI.D.4.c.)
- Schedules and statements motion. Debtors may file a motion to dispense with the requirement to file any and all schedules and statements if the debtors are not seeking to bar and subsequently discharge all or certain categories of debt. Alternately, debtors may move for an extension of the time to file schedules and statements to a specific date.
- With the schedules and statements motion, the debtors also may include a request to:
  - file a consolidated list of creditors instead of a separate mailing matrix for each of the debtors;
  - file a consolidated list of at least the debtors' 30 largest creditors;
  - authorize the debtors to redact certain personally identifiable information;
  - waive the requirement to file a list of equity security holders, provide notice of commencement to equity security holders, or both; and
  - waive the requirement of filing the mailing matrix where a claims agent is being retained to handle the noticing.

  (Complex Case Procedures, § VI.C.5.a.)

  The motion should demonstrate or explain why the relief requested therein is necessary.
- Cash management motion. A cash management motion should describe the debtors' cash management system and, where money will be transferred between debtors or from a debtor to a non-debtor affiliate, represent why these transfers are desirable, state that the debtors will maintain records of all postpetition intercompany transfers of funds, and describe what repayment terms exist.

- For a request to waive section 345 of the Bankruptcy Code, the motion should disclose the amount of funds that the debtors propose to invest outside the statute's enumerated permitted investments and the proposed types of investments to be made. If the debtors propose to invest or deposit money in or with an entity that has not satisfied the requirement of section 345(b) of the Bankruptcy Code, the motion should explain why this investment or deposit is necessary and, to the extent known, why this non-qualified entity cannot satisfy or has not satisfied the requirements of section 345(b) (Complex Case Procedures, § VI.D.6).
- Wages and benefits motion. Any request to pay prepetition claims should be in an amount not to exceed specified and aggregate amounts, which amounts must be set out in the motion. If the motion requests authority to pay amounts above the amount set out in section 507(a)(4) and (5) of the Bankruptcy Code per employee, a list of the names and position/job titles of all employees to whom those payments will be made must be attached (subject to the debtor's right to seek authority to file this list under seal with unredacted copies furnished to the US Trustee and any committee appointed in the case) (Complex Case Procedures, § VI.D.7).

  The motion also must state the extent to which any claims constitute priority claims under section 507 of the Bankruptcy Code and, if not, why the claims should be paid as requested. The motion also may seek permission to direct banks to honor prepetition checks for these amounts and for the debtor to replace any checks that were dishonored.

  The motion should generally describe the applicable compensation and benefit programs and explain why the relief requested is necessary.
- Customer programs motion. If the debtors file a motion to authorize the debtors to maintain and administer their existing customer programs and honor certain prepetition obligations related thereto, the motion must set maximum payment limits per claimant and in the aggregate (Complex Case Procedures, § VI.D.8). The motion also must state the extent that any claims are priority claims and why any non-priority claims should be paid as requested.

  The motion should generally describe the applicable customer programs and explain why the relief requested is necessary.
- Utility motion. A utility motion should describe the proposed adequate assurance and identify each of the debtors' utility providers (Complex Case Procedures, § VI.D.9). In addition to other service obligations relating to first day motions, both the utility motion and any interim and final orders should be served on each of the debtors' utility providers.
- Motion to pay critical vendors, section 503(b)(9) claimants, and lien claimants. For payment of any prepetition obligations, this relief must not exceed specified aggregate amounts, which amounts must be set out in the motion (Complex Case Procedures, § VI.D.10). The motion also must state whether and the extent to which the claims proposed to be paid constitute priority claims, and if these claims are not priority claims, the motion should explain why those claims should be afforded the treatment requested in the motion.

  The motion should generally describe the applicable vendors or claimants and explain why the relief requested is necessary.
- Motion to maintain insurance policies. The motion should generally describe the insurance policies and surety bond programs, along with the amount of any unpaid prepetition obligations related to these policies and surety bond programs (Complex Case Procedures, § VI.D.11).
- The motion may seek to:
  - continue insurance policies and surety bond programs; and
  - honor insurance policies and surety bond programs in the ordinary course during the administration of the case, including paying related prepetition obligations.
- The motion also may seek to modify the automatic stay solely for the limited purpose of permitting employees with workers' compensation claims to pursue these claims under applicable workers' compensation policies, whether they arose before or after the petition date, in the appropriate judicial or administrative forum to move against the proceeds of these policies only.
- Motion authorizing payment of prepetition and postpetition taxes and fees. For payment of any prepetition taxes and fees, the motion should identify the approximate amount of these taxes and fees the debtors seek to pay and explain why the relief is necessary, such as for the avoidance of penalties the debtors would incur absent timely payment of taxes the debtors intend to pay (Complex Case Procedures, § VI.D.12).

The motion should generally describe the applicable taxes and fees the debtors have incurred or expect to incur.

- DIP financing and cash collateral motions (see DIP Financing: Local Rules and Cash Collateral: Local Rules).

Section VI.E of the Complex Case Procedures allows debtors to seek entry of a final order rather than an interim order at the first day hearing for certain first day motions, including:

- Wages and benefits motion.
- Motion authorizing payment of prepetition and postpetition taxes and fees.
- Motions to pay mechanic's and material liens that meet the criteria of section 546(b) of the Bankruptcy Code.
- Application to retain a claims, noticing, or balloting agent.
- Motions to limit or modify the notice requirements of Bankruptcy Rule 2002.
- Utility motion.
- Any other motions that are procedural in nature and do not affect the substantive rights of creditors and other parties in interest.
- Section VI.F of the Complex Case Procedures provides that the court does not typically entertain certain matters as first day motions, including:
- Motions for relief from the automatic stay.
- Bid procedures motion.
- Conditional approval of disclosure statements.
- Employment of professionals (with the exception of a claims agent).
- Motions to approve interim compensation procedures for retained professionals.
- Motions to approve retention of professionals used in the ordinary course of business.

However, nothing prevents a debtor from seeking this relief on the first day under appropriate circumstances.

Post-Confirmation Requirements

Background/Federal Requirements

Local bankruptcy court rules may contain post-confirmation requirements for Chapter 11 cases, including liquidating cases. These requirements can include:

- Submission of a post-confirmation timetable and proposed order.
- Filing of periodic post-confirmation reports.
- Filing a closing or final report.
- A motion for a final decree.

(See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Post-Confirmation Reports.)

Local Rules

The E.D. Va. does not have any local rules concerning specific post-confirmation requirements, though quarterly and final post-confirmation reports are required under the US Trustee's guidelines following the effective date of a Chapter 11 plan (see Post-Confirmation Reporting).

Prepacks

Background/Federal Requirements

Prepackaged bankruptcies, typically known as "prepacks," have become more popular since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The BAPCPA has promoted the use of prepacks and has made traditional Chapter 11 bankruptcy cases more difficult and expensive. A prepack is a Chapter 11 bankruptcy in which the debtor negotiates the terms of and solicits votes on a plan before it files its Chapter 11 bankruptcy petition. Prepacks allow a company to emerge more quickly and efficiently from bankruptcy, while reducing the risks and uncertainties involved with negotiating a traditional plan during bankruptcy proceedings.

For more information on prepacks, see Practice Note, The Prepackaged Bankruptcy Strategy and Timeline of a Prepackaged Bankruptcy Case.

Local Rules

The E.D. Va. does not have local rules or specific guidelines governing prepackaged bankruptcies, and the lack of these local rules or guidelines has not caused any known negative effects.

Professional Fee Requests

Background/Federal Requirements

There are three components to getting paid as a professional to a Chapter 11 estate:

- The bankruptcy court must approve the professional's retention on notice to the US Trustee and key creditors. For information on getting retained as a professional to the DIP, see Practice Note, Getting Retained as a Professional to the Debtor-in-Possession.
- Once a retention is approved, professionals have ongoing fiduciary duties and statutory obligations. For information on a DIP professional's ongoing duties and obligations, see Practice Note, Fiduciary Duties and Statutory Obligations of Professionals to the Debtor-in-Possession.
- A DIP professional's fees and expenses must be approved under section 330 of the Bankruptcy Code and, if applicable, section 328 of the Bankruptcy Code (see Practice Note, Getting Paid as a Professional to a Chapter 11 Debtor or Trustee).

The fees and expenses of a professional retained under section 327 of the Bankruptcy Code are subject to court approval under sections 330 and 331 of the Bankruptcy Code. Section 328(a) of the Bankruptcy Code provides a mechanism for seeking preapproval of reasonable terms and conditions for compensation of professionals employed under section 327 (see Practice Note, Getting Retained as a Professional to the Debtor-in-Possession: Preapproval of Fee Arrangements).

Individual judges and local court rules also contain requirements relating to fee requests. The US Trustee has also issued fee guidelines with detailed requirements (see Practice Note, Getting Paid as a Professional to a Chapter 11 Debtor or Trustee: US Trustee Fee Guidelines).

Under section 503(b)(2) of the Bankruptcy Code, compensation awarded under section 330(a) is classified as an administrative claim.

For more information on professional fee requests, see Practice Note, Getting Paid as a Professional to a Chapter 11 Debtor or Trustee.

Local Rules

A party seeking compensation or reimbursement for services under Federal Rule of Bankruptcy Procedure 2016 above the amount specified in the Adjustment of Dollar Amounts Statement, as published and updated periodically by the clerk on the court's website, must set a hearing and give notice as required in Federal Rule of Bankruptcy Procedure 2002(a)(6) and (c)(2) (E.D. Va. LBR 2016-1(A)). The party must file with the court proof of service evidencing proper notice of the scheduled hearing.

Section VI.F.5 of the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures), which apply to both complex Chapter 11 cases and mega cases (see Complex Chapter 11 Case Procedures: Local Rules), also provides that the order establishing procedures for interim compensation for services rendered and reimbursement of expenses incurred by retained professionals may include provisions regarding:

- Monthly fee statements (see Monthly Fee Statements).
- Interim fee applications (see Interim Fee Applications).

Monthly Fee Statements

On or after the 21st day of each calendar month following the month for which compensation is sought, or as soon as is practicable thereafter, each retained professional seeking interim allowance of its fees and expenses must file with the court and serve a monthly fee statement (Monthly Fee Statement), by hand, overnight delivery, or email, on the Fee Notice Parties of:

- The debtors.
- Counsel to the debtors.
- The US Trustee.
- Counsel for any postpetition lender.
- Counsel for any official committee appointed in the case.

Any retained professional that fails to file and serve a Monthly Fee Statement for a particular month may subsequently file and serve a consolidated Monthly Fee Statement that includes a request for compensation earned or expenses incurred during previous months.

The deadline for any Fee Notice Party to object to any Monthly Fee Statement must be the 14th day (or the next business day if this is not a business day) following the date the Monthly Fee Statement is served (the Objection Deadline). However, nothing in the Complex Case Procedures should be construed to prevent the Office of the US Trustee from seeking, by consent or order, an extension of the Objection Deadline to up to 21 days following service of a Monthly Fee Statement.

To object to a retained professional's Monthly Fee Statement, the objecting Fee Notice Party must file with the court a written objection (Objection) setting out, with specificity, the nature of the objection and the amount of fees or expenses at issue on or before the Objection Deadline and serve the Objection on the affected retained professional and each of the Fee Notice Parties so that each Fee Notice Party actually receives the Objection on or before the Objection Deadline.

On the expiration of the Objection Deadline, the debtors will promptly pay the retained professional 80% of the fees and 100% of the expenses requested in the applicable Monthly Fee Statement not subject to an Objection.

If a portion of the fees and expenses requested in a Monthly Fee Statement is subject to an Objection and the parties can resolve the objection, the objecting Fee Notice Party must file with the court and serve on each other Fee Notice Party a statement indicating that the Objection is withdrawn. Thereafter, the debtors must promptly pay the portion of the Monthly Fee Statement no longer subject to an Objection.

If a portion of the fees and expenses requested in a Monthly Fee Statement is subject to an Objection and the parties cannot reach a consensual resolution, the retained professional may either:

- File with the court a response to the Objection, together with a request for payment of any portion of the amounts subject to the Objection.
- Forgo payment of those amounts until the next hearing to consider interim or final fee applications, at which time the court will adjudicate any unresolved Objections.

The filing of an Objection to a Monthly Fee Statement does not prejudice the objecting Fee Notice Party's right to object to any Interim Fee Application (as defined in Interim Fee Applications) on any ground whether raised in the Objection or not. Failure by a Fee Notice Party to object to a Monthly Fee Statement does not constitute a waiver of any kind nor prejudice that Fee Notice Party's right to object to any Interim Fee Application subsequently filed by a retained professional.

Interim Fee Applications

Commencing with applications covering the period from the petition date through the last day of the month that is two months following the end of the month in which the petitions were filed, and at three-month intervals thereafter, retained professionals must file with the court an application (Interim Fee Application) for interim approval and allowance of compensation and reimbursement of expenses sought by that retained professional in its Monthly Fee Statements, including any amounts requested in Monthly Fee Statements but yet unpaid, filed during the preceding interim period (each period, an Interim Fee Period).

Retained professionals must file their applicable Interim Fee Applications on or before the 45th day, or the next business day if that is not a business day, following the end of each Interim Fee Period.

The Interim Fee Application must include a brief description identifying:

- The Monthly Fee Statements that are the subject of the request.
- The amount of fees and expenses requested.
- The amount of fees and expenses paid to date or subject to an Objection.
- The deadline for parties to file Objections to the Interim Fee Application.
- Any other information requested by the court or required by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the E.D. Va. Local Bankruptcy Court Rules.

Objections to any Interim Fee Application must be filed with the court and served on the affected retained professional and each of the Fee Notice Parties so as to be actually received on the 21st day (or the next business day if that day is not a business day) following service of the applicable Interim Fee Application.

The debtors may request that the court schedule a hearing on Interim Fee Applications at least once every three months or at other intervals as the court deems appropriate. If no Objections are pending and timely filed, the court may approve and allow an Interim Fee Application without a hearing. On allowance by the court of a retained professional's Interim Fee Application, the debtors will be authorized to promptly pay that retained professional all requested fees (including any holdback from prior Monthly Statements not subject to a pending Objection) and expenses not previously paid.

Each retained professional that is an attorney must make a reasonable effort to comply with the US Trustee's requests for information and additional disclosures as set out in the Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases, effective as of November 1, 2013, regarding each fee application.

Any retained professional unable to file its own Interim Fee Application with the court must deliver a fully executed copy to the debtors' Virginia counsel for filing on the retained professional's behalf.

Any retained professional that fails to file an Interim Fee Application when due will be ineligible to receive further monthly or interim payments of fees or expenses concerning any subsequent period until the retained professional files an Interim Fee Application covering the prior period. There are no other penalties for failing to file an Interim Fee Application in a timely manner.

A pending Objection to compensation or reimbursement of a retained professional does not disqualify the retained professional from future compensation or reimbursement.

Neither (i) the payment of or the failure to pay, in whole or in part, any interim compensation and reimbursement to a retained professional nor (ii) the service of an Objection or the filing of or failure to file an Objection will bind any party in interest or the court concerning the final allowance of any compensation of fees for services rendered or reimbursement of expenses incurred by a retained professional. All fees and expenses paid to retained professionals under these Compensation Procedures are subject to disgorgement until final allowance by the court.

Any member of a statutorily appointed committee in the Chapter 11 case may submit statements of expenses (excluding the fees and expenses of an individual committee member's third-party counsel) and supporting vouchers for reimbursement by the debtors according to the Compensation Procedures. Payment of these expenses is not authorized if this authorization does not exist under the Bankruptcy Code, applicable law, the Federal Rules of Bankruptcy Procedure, the E.D. Va. Local Bankruptcy Court Rules, or other applicable law.

No retained professional may serve a Monthly Fee Statement or file an Interim Fee Application until the court enters an order approving the retention of that Professional.

No-Look Attorneys' Fees

For information on no-look fees (often called flat fees or presumptively reasonable fees) for attorney services in Chapter 13 cases in the E.D. Va., see Practice Note, Fee Arrangements in Chapter 13 Bankruptcy Cases: Box: Chapter 13 No-Look Attorney Fees by Jurisdiction.

Professional Retention Applications

Background/Federal Requirements

A debtor-in-possession (DIP) must obtain bankruptcy court approval in order to retain professionals. Those professionals must demonstrate disinterestedness and a lack of any interest adverse to the estate. Court approval of the retention of the DIP's professionals is subject to significant disclosure obligations and conflict-of-interest rules.

To ensure the disinterestedness of the DIP's professionals, conflicts of interest are more strictly interpreted in bankruptcy than in other areas of the law. Certain conflicts that a client can waive after full disclosure outside of bankruptcy (such as simultaneous representation of a client and a client's creditor) cannot be waived in bankruptcy. Even potential conflicts must be avoided. The Bankruptcy Code's strict conflict-of-interest requirements help ensure undivided loyalty and promote public confidence in the bankruptcy process.

For more information on the rules and procedures related to the DIP's retention of professionals, see Practice Note, Getting Retained as a Professional to the Debtor-in-Possession.

Local Rules

Any party moving for an order authorizing employment in a proceeding under Chapter 11 of the Bankruptcy Code must in plain language:

- Inform all parties of the filing of the application.
- Disclose in full and complete detail any actual or potential conflicts of interest.
- Specify the method for objecting to the proposed order.

(E.D. Va. LBR 2014-1.)

The application to employ, related declaration, and proposed order also must be served on:

- The US Trustee.
- Any trustee appointed under section 1104 of the Bankruptcy Code.
- Any committee appointed under section 1102 of the Bankruptcy Code or, if no committee is appointed, the creditors included on the list filed under Federal Rule of Bankruptcy Procedure 1007(d) (the 20 largest unsecured creditors).
- All secured creditors.
- Any other entity as directed by the bankruptcy court.

(E.D. Va. LBR 2014-1.)

Each attorney representing a debtor under any chapter of the Bankruptcy Code must file an attorney's disclosure statement under section 329 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016, regardless of the amount of fees received or requested, no later than 14 days after the later of the filing of the petition or the date that counsel is engaged (E.D. Va. LBR 2016-1(B)).

Professional Retention Applications in Complex Chapter 11 Cases and Mega Cases

The Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures) provide that at the first day hearing for both a complex Chapter 11 case and mega case (see Complex Chapter 11 Case Procedures: Local Rules), the court will only consider an application to employ a claims agent (Complex Case Procedures, § VI.F.4.a). The Complex Case Procedures also provide that employment applications for all other professionals in a complex Chapter 11 case should be filed no later than 30 days after the later of the petition date or the date the professional commenced work. A timely application, if approved, will be effective as of the later of:

- The petition date.
- The commencement of work by the professional.

The Complex Case Procedures provide that proposed professionals retained under sections 327 or 1103 of the Bankruptcy Code should not expect the court to authorize hourly rates that have been increased based on the size of the Chapter 11 case (for example, no premium billing) (Complex Case Procedures, § VI.F.4.b).

Proofs of Claim and Objections to Claims

Background/Federal Rules

A proof of claim is a written statement setting out a creditor's claim and asserting its right to receive a distribution from the bankruptcy estate. It must "conform substantially" to Official Bankruptcy Form B 410 (Fed. R. Bankr. P. 3001(a)). The purpose of a proof of claim is to give notice of the claim to the court, the debtor, the trustee, and other creditors.

A properly prepared proof of claim constitutes prima facie evidence of the validity and amount of the claim (Fed. R. Bankr. P. 3001(f)) and is deemed allowed, unless a party in interest (such as the debtor) objects (§ 502(a), Bankruptcy Code). This means any distribution of the debtor's assets made on account of a claim is based on the filed proof of claim if it is not challenged (or survives a challenge).

For more information on proofs of claim, see Practice Notes, Filing a Proof of Claim in a Chapter 11 Bankruptcy Case and Filing a Proof of Claim: Pitfalls and Precautions.

For more information on objections to claims, see Practice Note, Objections to Claims: Overview.

Local Rules

Representations and Appearances; Powers of Attorney

E.D. Va. Local Bankruptcy Court Rule 9010-1 allows a party to file or withdraw a proof of claim on its own behalf without the requirement for counsel.

Filing of Petitions, Pleadings, and Other Parties by Electronic Means

E.D. Va. Local Bankruptcy Court Rule 5005-2(A) requires all documents, including a proof of claim, to be filed electronically according to the court's Electronic Case

Files Policy (the CM/ECF Policy). Under the CM/ECF Policy, an entity may register to become a user with limited privileges for electronically filing or withdrawing a proof of claim. The court may waive the electronic filing requirement if exceptional circumstances prevent a party from filing documents electronically. E.D. Va. Local Bankruptcy Court Rule 5005-2(B) requires the clerk of court to prepare and publish the CM/ECF Policy. E.D. Va. Local Bankruptcy Court Rule 5005-2(B) further provides that these policies and procedures have the same force of the local rules.

Filing of Claims by Debtor or Trustee

A debtor's attorney or a trustee filing a proof of claim on behalf of a creditor under Federal Rule of Bankruptcy Procedure 3004 is responsible for giving notice of this filing to the creditor, debtor, and trustee as required by that rule and must attach to the proof of claim a certification of this notice (E.D. Va. Bankr. R. 3004-1).

Objections to Claims

E.D. Va. Local Bankruptcy Court Rule 3007-1 governs objections to claims. All claim objections must state with particularity the grounds for objection and the relief sought (E.D. Va. Bankr. R. 3007-1(A)). A hearing on an objection to a claim is not required unless the creditor files a timely response or request for a hearing (E.D. Va. Bankr. R. 3007-1(B)). If creditor serves and files a timely response in opposition or request for a hearing, it is the objecting party's responsibility to set a hearing and give notice to the creditor of the hearing date, time, and location (E.D. Va. Bankr. R. 3007-1(B)). The hearing date selected must be after the expiration of the 30-day response period set out in E.D. Va. Local Bankruptcy Court Rule 3007-1(D) and must allow for at least 14 days' notice of the hearing (E.D. Va. Bankr. R. 3007-1(B)).

E.D. Va. Local Bankruptcy Court Rule 3007-1(D):

- Sets out the requirement for a written response to a claim objection, providing that a creditor served with an objection to claim may file and serve on the objecting party a response thereto within 30 days of service if a notice of opportunity to request a hearing is given.
- Provides that if no response in opposition is filed, the court may treat the objection as conceded and may enter an order without holding a hearing disallowing the claim in whole or part as set out in the objection.

E.D. Va. Local Bankruptcy Court Rule 3007-1(E) includes specific notice language that must be included with the claim objection, stating that each claim objection, whether set to request a hearing or accompanied by notice of opportunity for hearing, must contain or be accompanied by notice substantially according to Official Bankruptcy Form B420B (Notice of Objection to Claim). This notice must state, using bold print and capitalized text:

> NOTICE
>
> **UNDER LOCAL BANKRUPTCY RULE 3007-1, UNLESS A WRITTEN RESPONSE IN OPPOSITION AND A REQUEST FOR HEARING ON THIS OBJECTION ARE FILED WITH THE CLERK OF THE COURT AND SERVED ON THE OBJECTING PARTY AND THE TRUSTEE WITHIN 30 DAYS OF THE SERVICE OF THIS OBJECTION, THE COURT MAY DEEM ANY OPPOSITION WAIVED, TREAT THE OBJECTION AS CONCEDED, AND ENTER AN ORDER GRANTING THE REQUESTED RELIEF WITHOUT A HEARING.**

Proofs of Claim and Omnibus Claim Objection Procedures in Complex Chapter 11 Cases and Mega Cases

Regarding proofs of claim and claim objection procedures in complex Chapter 11 cases and mega cases (see Complex Chapter 11 Case Procedures: Local Rules), Section VII of the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures) provides that:

- Unless a different date is ordered by the court, the bar date for the filing of proofs of claim and proofs of interest is:
  - 180 days after the petition date for governmental units; and
  - 90 days after the first date set for the section 341 meeting for all other entities.

  (Complex Case Procedures, § VII.A.) The debtors must provide notice of the bar date to all creditors on or before the first date set for the section 341 meeting.
- Parties may file a motion to approve procedures for handling omnibus claim objections. Section VII.B provides that while these procedures cannot shift the burden of proof, discovery rights or burdens, or pleading requirements, they may include

Claim Objection Procedures and Claim Hearing Procedures.

The Claim Objection Procedures provide that:

- Parties may file a motion seeking authorization to file omnibus claims objections (Omnibus Claim Objections) on grounds other than those set out in Federal Rule of Bankruptcy Procedure 3007(d).
- The movant is authorized to file Omnibus Claims Objections to no more than 500 claims at a time.
- The Omnibus Claims Objections must be alphabetized by claimant name or in electronically searchable form.
- Except as expressly provided herein, the movant must comply with the requirements for Omnibus Claims Objections set out in Federal Rule of Bankruptcy Procedure 3007(e).
- Any order sustaining an Omnibus Claims Objection must be treated as an order for each claim referenced in the Omnibus Claims Objection as if an individual objection had been filed and an individual order had been entered for that claim.
- The movant is authorized to serve a claim objection notice, rather than the entire Omnibus Claim Objection, on each claimant whose claim is the subject of the applicable omnibus claim objection and, if known, its counsel. The claim objection notice must include:
  - an explanation of the claim objection process;
  - a description of the basis of the omnibus claim objection;
  - information regarding the response deadline and hearing date;
  - information on the Claim Hearing Procedures;
  - identification of the claim that is the subject of the Omnibus Claim Objection (with reference to an attached exhibit or otherwise); and
  - information on how the claimant might obtain a complete copy of the Omnibus Claim Objection.

  The estate representative retains the right to serve Omnibus Claim Objections in their entirety in appropriate circumstances as determined in the estate representative's sole discretion.
- The movant must file all omnibus and individual objections with this court to be made publicly available for free on the website of the debtors' approved claims and noticing agent.
- Responses to the individual and omnibus claim objections must be due on or before 30 calendar days after mailing of the objection. However, the movant may reserve the right to request that the court impose an alternative response date or grant expedited consideration concerning certain objections, if the circumstances so require, which may result in shortened notice of both the hearing date and the response deadline.

The Claim Hearing Procedures provide that:

- The movant must schedule the return date for claims objections, omnibus or otherwise, for hearing at periodic omnibus hearings (the Omnibus Hearings).
- Any information submitted concerning a proof of claim is part of the record concerning the relevant claim, and this information need not be resubmitted regarding the Claim Hearing Procedures.
- A written response (Response) to an Omnibus Claims Objection must be received on or before 30 days after service of the Omnibus Claims Objection (the Response Deadline). If the claimant fails to file and serve a Response on or before 30 days after service of the Omnibus Claims Objection in compliance with these procedures, the movant will present to the court an appropriate order granting the relief requested in the Omnibus Claims Objection without further notice to the claimant or hearing.
- The hearing to consider an objection to claims regarding which a Response is properly filed and served (each, a Contested Claim) must be set for a contested hearing (each, a Claim Hearing) to be scheduled by the movant, in its sole discretion.
- The movant may file and serve a reply (a Reply) to a Response no later than 12:00 p.m. Eastern Time on the day that is at least one day before the date of the applicable hearing.
- There is no sur-reply unless the court orders otherwise on the filing of a motion demonstrating good cause.
- The movant is authorized to further adjourn a hearing scheduled in accordance herewith at any time by providing notice to the court and the claimant.

Reaffirmation of Debt

Background/Federal Requirements

A debtor may choose to keep a loan in place rather than discharge the loan in bankruptcy, especially if the debtor wants to retain the property, such as a vehicle or a family home, that is subject to a security interest. To retain property that acts as collateral for a loan, the debtor can enter into a new contract for the loan with the creditor called a reaffirmation agreement. Under a reaffirmation agreement, the debtor:

- Reaffirms personal liability on the debt that would be otherwise discharged under section 524(a)(1) of the Bankruptcy Code.
- Retains the property.
- Continues to make payments on the loan to prevent the creditor from foreclosing on its underlying collateral.

Reaffirmation is governed by section 524 of the Bankruptcy Code. A reaffirmation agreement must strictly comply with the requirements of sections 524(c), (d), and (m) of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 4004(c)(1)(J), (K), and (c)(2) and 4008 to be valid.

For more information on reaffirmation of debt in bankruptcy, see Practice Note, Reaffirmation of Debt in Chapter 7 Bankruptcy.

Bankruptcy Rule 4004(c)(1)(J)

If a motion to enlarge the time to file a reaffirmation agreement is pending (Fed. R. Bankr. P. 4008(a)), the bankruptcy court will not grant a Chapter 7 discharge, even if the time for filing an objection to discharge has expired (Fed. R. Bankr. P. 4004(c)(1)(J)).

Bankruptcy Rule 4004(c)(1)(K)

If a presumption has arisen that the reaffirmation agreement is an undue hardship on the debtor under section 524(m) of the Bankruptcy Code and the court has not concluded the hearing on this presumption, the bankruptcy court will not grant a Chapter 7 discharge, even if the time for filing an objection to discharge has expired (Fed. R. Bankr. P. 4004(c)(1)(K)).

Bankruptcy Rule 4004(c)(2)

A reaffirmation agreement must be entered into before discharge (§ 524(c)(1), Bankruptcy Code). However, the agreement does not need to be approved by the court before discharge. For this reason, Federal Rule of Bankruptcy Procedure 4004(c)(2) allows a delay in the entry of the discharge order for 30 days on the debtor's motion and for further time on a motion made within the 30-day period.

Bankruptcy Rule 4008(a)

The reaffirmation agreement must be filed with the court no more than 60 days after the first date set for the meeting of creditors (§ 524(c)(3)(A)-(C), Bankruptcy Code; Fed. R. Bankr. P. 4008(a)). The court can, at any time and in its discretion, enlarge the time to file the reaffirmation agreement (Fed. R. Bankr. P. 4008(a)).

When filed, the reaffirmation agreement must be accompanied by:

- The reaffirmation cover sheet (Fed. R. Bankr. P. 4008(a); Official Bankruptcy Form B427).
- If applicable, an attorney declaration.

Bankruptcy Rule 4008(b)

The debtor's signed statement in support of the reaffirmation agreement is accompanied by a statement of the total income and expenses stated on the debtor's Schedules I (Official Bankruptcy Form B106I) and J (Official Bankruptcy Form B106J and Official Bankruptcy Form B106J-2). If there is a difference between the income and expenses stated on the debtor's statement in support of the reaffirmation agreement and schedules I and J, the debtor's statement in support of the reaffirmation agreement should include an explanation of that difference (Fed. R. Bankr. P. 4008(b)).

Local Rules

Within 14 days after a discharge has been granted, the clerk must give written notice to each discharged debtor of the debtor's rights under section 524(d) of the Bankruptcy Code (E.D. Va. LBR 4008-1(A)).

Any debtor or creditor seeking to reaffirm a debt of the kind specified in section 524(c) must file with the clerk a properly completed reaffirmation agreement on Official Bankruptcy Form B2400A/B ALT and Official Bankruptcy Form B427 (E.D. Va. LBR 4008-1(B)).

Removal, Remand, and Abstention in Bankruptcy

Background/Federal Requirements

Removal, remand, and abstention are important tools to be considered during a bankruptcy proceeding for transferring claims to another court or to prevent that court from determining an issue that it should not hear and decide.

A party can unilaterally remove an action pending in state court to either the district court or the bankruptcy court. After removal, on motion of a non-removing party, the court can remand the matter back to state court or the court, on its own motion or a motion of a party, can abstain from hearing a matter because the state court is capable of hearing and deciding the matter. Abstention is either mandatory or permissive.

For more information on removal, remand, and abstention in bankruptcy cases, see Practice Note, Notice of Removal, Remand, and Abstention in Bankruptcy.

Local Rules

The E.D. Va. does not have local rules that require additional information or documents for notice of removal, remand, and abstention in bankruptcy.

Retaining a Claims Agent

Background/Federal Requirements

To relieve administrative pressure on both debtors and the bankruptcy clerk, Congress enacted 28 U.S.C. Section 156(c) to permit outside vendors (claims agents), at the expense of the bankruptcy estate, to assume certain specified administrative functions mandated by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

Section 156(c) limits the function of the claims agent to that of a delegee of the clerk of court to perform the following tasks:

- Managing the claims process.
- Providing noticing services.
- Disseminating information to the public and responding to requests for case information.

Claims agents, however, may also be retained as administrative agents under section 327 of the Bankruptcy Code to provide services beyond the constraints of 28 U.S.C. Section 156(c), including:

- Assisting with the preparation of schedules of assets and liabilities (schedules) and statements of financial affairs (statements) (see Practice Note, Schedules and Statements of Financial Affairs: Overview).
- Aggregating, sorting, and analyzing proofs of claims.
- Assisting with the reconciliation of claims and the analysis of executory contracts and unexpired leases, including issues such as the cure, assumption, and rejection of contracts and leases.
- Soliciting and tabulating votes on plans of reorganization.
- Making distributions according to the terms of the plan.

For more information on the role and responsibilities of a claims agent, see Practice Note, The Retention and Role of a Claims Agent in Bankruptcy.

Local Rules

The E.D. Va. does not have any local rules that generally contain special or additional requirements on retaining a claims agent. However, the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures) provide that in complex Chapter 11 cases and mega cases (see Complex Chapter 11 Case Procedures: Local Rules), debtors may ask to retain a claims agent on a final basis at the first day hearing (Complex Case Procedures, § VI.E.4). Once retained, the Complex Case Procedures also provide that the claims agent must maintain a case-specific website where it must post electronic copies of all pleadings filed in the Chapter 11 case as soon as practicable but not later than three business days after filing and that may be viewed free of charge (Complex Case Procedures, § VI.D.4.a).

The order approving the claims agent's retention may provide that the claims agent must maintain the master service list (Complex Case Procedures, § VI.D.4.b). At least once every 30 days, an updated master service list must be posted on the case-specific website.

The order approving the claims agent's retention may authorize the debtors to compensate the claims agent on the receipt of reasonably detailed invoices without the need for the claims agent to file fee applications or otherwise seek court approval for the compensation of its services and reimbursement of its expenses. However, the order should also provide that:

- The claims agent will serve monthly invoices on the debtors, the US Trustee, counsel for any official committee appointed in the case, and any party in interest who specifically requests the service of the monthly invoices.
- If any dispute arises relating to the monthly invoices, the parties will first meet and confer in an attempt to resolve the dispute and may seek a resolution of the matter from the court if resolution is not achieved.

(Complex Case Procedures, § VI.D.4.c.)

Retention of Local Counsel

Background/Federal Requirements

As a general rule, attorneys not admitted in the jurisdiction where a bankruptcy case is pending must be admitted *pro hac vice* to appear before the bankruptcy court in that case. To be admitted *pro hac vice*, an attorney must often certify or attest to certain facts, including that the attorney is:

- Eligible for admission to the bankruptcy court.
- Admitted and in good standing as a member of the bar in the attorney's state of practice.
- Willing to submit to the disciplinary jurisdiction of the bankruptcy court for any alleged misconduct in the course of the case for which the attorney is admitted.
- Generally familiar with the court's local rules.

Applicable rules also frequently require the attorney seeking *pro hac vice* admission to pay a fee.

Counsel must review rules and practices of the relevant jurisdiction in which a case is filed or will be filed to determine whether to retain local counsel and to understand the requirements for *pro hac vice* admission.

Local Rules

Local counsel is required for foreign attorneys not admitted to practice in Virginia (E.D. Va. LBR 2090-1(E)(3)(a)). Any attorney admitted *pro hac vice* must be accompanied by local counsel in all appearances, and any pleading must be signed by local counsel (E.D. Va. LBR 2090-1(E)(3)(a)(ii), (F)). Foreign attorneys cannot electronically file documents on CM/ECF, but they may apply to become limited participants.

A foreign attorney not admitted to practice in Virginia may appear *pro hac vice* on the filing of a motion by local counsel, which must be accompanied by an application to appear *pro hac vice* (E.D. Va. LBR 2090-1(E)(3)(b)). A foreign attorney must be qualified to practice in the US district court of another state to be eligible to appear *pro hac vice* in the E.D. Va. Bankruptcy Court (E.D. Va. LBR 2090-1(E)(3)). To appear *pro hac vice* in the E.D. Va. Bankruptcy Court, the rules of the federal court of the district in which the foreign attorney maintains an office must extend a similar privilege to members of the Bar of the E.D. Va. Bankruptcy Court (E.D. Va. LBR 2090-1(E)(3)(a)(i)).

The E.D. Va. Local Bankruptcy Court Rules do not require that the attorney admitted to practice in Virginia reside in Virginia, but the attorney must remain a member in good standing of the Virginia bar and the bar of the E.D. Va. district court (E.D. Va. LBR 2090-1(B)).

Section 363 Sales

Background/Federal Requirements

After notice and a hearing, the bankruptcy court may approve a section 363 sale of a debtor's assets, other than in the ordinary course of business (§ 363(b), Bankruptcy Code). A debtor-in-possession or trustee seeking approval of a section 363 sale must comply with:

- Section 363(b) of the Bankruptcy Code (see Section 363(b) Requirements and Section 363(b)(1)(A) and (B): Sale of PII Requirements).
- Federal Rule of Bankruptcy Procedure 2002 (see Bankruptcy Rule 2002 Notice Requirements).
- Federal Rule of Bankruptcy Procedure 6004 (see Bankruptcy Rule 6004 Requirements and Bankruptcy Rule 6004(g): Sale of PII Requirements).
- Section 365 of the Bankruptcy Code, to the extent that the sale involves the assumption, assignment, or rejection of any executory contracts or leases (see Section 365 Requirements).
- Any applicable local bankruptcy court rules (see Section 363 Sales: Local Rules).

Debtors-in-possession and trustees have great discretion over the method of conducting the sale and are not required to use any specific sale or bidding procedures (§ 363(b), Bankruptcy Code). However, they must comply with certain procedural requirements under Bankruptcy Rules 2002 and 6004 regardless of the form of sale.

For more information on section 363 sales, see:

- Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview.
- Timeline of a Section 363 Sale.
- Article, Strategies for Purchasing and Selling Assets in Chapter 11.

Section 363(b) Requirements

After a notice and a hearing, the trustee (including a debtor-in-possession) may use, sell, or lease property of the estate outside of the ordinary course of business. Therefore, the debtor must provide adequate and reasonable notice of a proposed sale (§ 363(b), Bankruptcy Code and see Bankruptcy Rule 2002 Notice Requirements).

Courts have also held that the sale must:

- Be in the best interests of the estate and its creditors. The debtor generally has a fiduciary duty to obtain the highest or best price for the assets (see *Cello Bag Co., Inc. v. Champion Int'l Corp. (In re Atlanta Packaging Prods., Inc.)*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)). To satisfy this requirement, the sale is usually subject to an auction. The highest price is not always the best price, and it is unnecessary to show that the purchase price was the highest possible price obtainable under the circumstances.
- Be proposed in good faith (see *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 (3d Cir. 1986)).
- Have a legitimate business justification (see *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983)).

Section 363(b) sales of all or substantially all of the debtor's assets also require a court to find that the sale is not a *sub rosa* plan (see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview: Sales of All or Substantially All Assets). A *sub rosa* plan is a transaction that has the practical effect of predetermining the essential terms of a plan of reorganization.

For more information on section 363 requirements, see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview: Legal Requirements.

Section 363(b)(1)(A) and (B): Sale of PII Requirements

Because of privacy issues, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) restricted the use, lease, and sale of personally identifiable information (PII). These restrictions do not apply to other forms of estate property.

Specifically, a debtor cannot sell or lease PII outside the ordinary course of business unless either:

- The sale or lease does not violate the debtor's privacy policy. The transfer of PII is allowed if permitted by the debtor's privacy policy and the transfer complies with all the terms of the privacy policy.
- A consumer privacy ombudsman is appointed under section 332 of the Bankruptcy Code and the court approves the sale or lease after:
  - considering the facts, circumstances, and conditions of the sale or lease; and
  - finding that the sale or lease does not violate applicable non-bankruptcy law.

(§ 363(b)(1), Bankruptcy Code.)

For additional requirements for the sale of PII, see Bankruptcy Rule 6004(g): Sale of PII Requirements.

For more information on the sale of PII, see Practice Note, Property of the Estate: Special Intangible Property Interests: Customer Data.

Bankruptcy Rule 2002 Notice Requirements

Bankruptcy Rule 2002 sets out notice requirements for section 363 sales regarding:

- **Length and method of notice.** The clerk of the bankruptcy court or another person directed by the court must give parties at least 21 days' notice of the sale by mail, unless the court limits or shortens the time or directs another method of giving notice (Fed. R. Bankr. P. 2002(a)(2)).
- **Content of notice.** The notice must include:
  - the time and place of any public sale;
  - the terms and conditions of any private sale;

- the time fixed for filing objections; and
- a general description of the property to be sold. The notice of a proposed sale of PII must state whether the sale is consistent with the debtor's privacy policy (see Section 363(b)(1)(A) and (B): Sale of PII Requirements).

(Fed. R. Bankr. P. 2002(c)(1).)

- **Parties served.** The notice of the sale must be served on:
  - the debtor;
  - the trustee, if any;
  - all creditors;
  - any indenture trustees;
  - any official creditors' committees and equity committees, or their authorized agents;
  - the Securities and Exchange Commission (SEC), if appropriate;
  - the Commodity Futures Trading Commission, in a commodity broker case;
  - the Internal Revenue Service (IRS);
  - the US attorney for the district where the case is pending, if a debt is owed to the US other than for taxes, and on the department, agency, or instrumentality of the US through which the debtor became indebted;
  - the Secretary of the Treasury, if the US has a stock interest;
  - the US Trustee;
  - equity security holders, in sales of all or substantially all assets, unless the court orders otherwise; and
  - entities who have requested notice under Federal Rule of Bankruptcy Procedure 2002.

  (Fed. R. Bankr. P. 2002(a)(2), (d), (g), (i), (j), (k).)
- **Additional parties served.** Notice must also be served on:
  - the consumer privacy ombudsman, if applicable (§ 332(a), Bankruptcy Code and see Section 363(b)(1)(A) and (B): Sale of PII Requirements and Bankruptcy Rule 6004(g): Sale of PII Requirements);
  - all parties to executory contracts or unexpired leases to be assumed and assigned, or rejected as part of the sale (see Section 365 Requirements) (Fed. R. Bankr. P. 6006(c));
  - all parties known or reasonably believed to have asserted a lien, encumbrance, claim, or other interest in the assets to be sold (Fed. R. Bankr. P. 6004(c) and see Bankruptcy Rule 6004 Requirements);
  - the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, if the sale implicates the antitrust laws of the US (§ 363(b)(2), Bankruptcy Code); and
  - the Committee on Foreign Investment in the US if the sale implicates the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (for more information on FIRRMA, see Legal Update, FIRRMA Signed into Law, Expanding Scope of CFIUS Review).

Bankruptcy Rule 6004 Requirements

Bankruptcy Rule 6004 sets out requirements for:

- **Notice.** Notice of a proposed sale of estate property outside of the ordinary course of business must be given consistent with Bankruptcy Rule 2002 (Fed. R. Bankr. P. 6004(a) and see Bankruptcy Rule 2002 Notice Requirements).
- **Objections.** Objections to the proposed sale must be filed and served at least seven days before the date of the sale or within the time fixed by the court (Fed. R. Bankr. P. 6004(b)). An objection gives rise to a contested matter governed by Federal Rule of Bankruptcy Procedure 9014 (Bankruptcy Rule 9014).
- **Sale free and clear of liens.** A sale free and clear of liens or other interests under section 363(f) of the Bankruptcy Code is a contested matter for which a motion must be made under Bankruptcy Rule 9014 and served on the parties who have liens or other interests in the property to be sold (Fed. R. Bankr. P. 6004(c)). The notice must include the date of the sale hearing and the deadline to file and serve objections on the debtor or the trustee. Under Bankruptcy Rule 9014, the motion must be served in the manner provided for service of a summons and complaint by Federal Rule of Bankruptcy Procedure 7004.
- **Hearing.** If a timely objection is made, the hearing date may be set out in the original notice of the sale (Fed. R. Bankr. P. 6004(e)). No hearing is required if there are no objections. If the original sale notice does not contain a hearing date, the objecting party commonly obtains a hearing

date and time from the court and states it on the objection.

- **Public or private sale.** The sale may be by private sale or public auction. On the completion of the sale, unless it is impracticable, the trustee or the debtor must file and transmit to the US Trustee an itemized statement of:
  - the property sold;
  - the name of each purchaser; and
  - the price received for each item or lot or for the property as a whole if sold in bulk.

  (Fed. R. Bankr. P. 6004(f)(1).)

  If an auctioneer sells the property, then the auctioneer must file the statement and provide a copy to the US Trustee and the debtor or the trustee.
- **Execution of instruments.** The debtor or the trustee must execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser (Fed. R. Bankr. P. 6004(f)(2)).
- **Stay of sale order.** Sale orders are stayed for 14 days, unless the court orders otherwise (Fed. R. Bankr. P. 6004(h)). This gives any objecting parties time to seek a further stay while they appeal the sale order. Courts can waive or reduce the 14-day appeal period, on request of the parties, if there is a reason to close the sale early.

Bankruptcy Rule 6004(g): Sale of PII Requirements

A motion to sell PII outside of the terms of the debtor's privacy policy:

- Must include a request for an order directing the US Trustee to appoint a consumer privacy ombudsman under section 332 of the Bankruptcy Code, whom it must appoint at least seven days before the sale hearing.
- Is a contested matter governed by Bankruptcy Rule 9014 and must be transmitted to the US Trustee and served on:
  - any official creditors' and equity committees;
  - the creditors included on the list of the 20 largest creditors filed under Federal Rule of Bankruptcy Procedure 1007(d), if no creditors' committee has been appointed (see Standard Document, List of Largest Unsecured Creditors); and
  - any other entity that the court may direct.

(Fed. R. Bankr. P. 6004(g)(1).)

If a consumer privacy ombudsman is appointed, then at least seven days before the sale hearing, the US Trustee must file a notice of the appointment, including:

- The name and address of the person appointed.
- A verified statement of that person setting out their connections with:
  - the debtor;
  - creditors;
  - any other party in interest;
  - the respective attorneys and accountants of the above entities;
  - the US Trustee; and
  - any person employed in the office of the US Trustee.

(Fed. R. Bankr. P. 6004(g)(2).)

Section 363(b)(1)(A) and (B) of the Bankruptcy Code contains additional requirements for the sale of PII (see Section 363(b)(1)(A) and (B): Sale of PII Requirements).

For more information on the sale of PII, see Practice Note, Property of the Estate: Special Intangible Property Interests: Customer Data.

Section 365 Requirements

Executory contracts and unexpired leases may be assumed by the debtor and assigned to buyers either as a stand-alone section 363 sale of just contracts and leases or as part of a larger section 363 sale of other assets.

To assume and assign an unexpired lease or executory contract:

- The debtor must cure all defaults, including all non-monetary defaults, or provide adequate assurance that the default will be cured promptly, except for incurable non-monetary breaches of unexpired real property leases and defaults based on breaches of *ipso facto* provisions (§ 365(b)(1)(A), (2), Bankruptcy Code).
- The debtor must compensate or provide adequate assurance that it will promptly compensate the non-debtor for any actual monetary loss caused by the default (§ 365(b)(1)(B), Bankruptcy Code).
- The purchaser must provide adequate assurance of future performance, even if there are no defaults (§ 365(b)(1)(C), (f)(2)(B), Bankruptcy Code).

Federal Rule of Bankruptcy Procedure 6006(c) and Bankruptcy Rule 9014 govern the timing and procedure for giving notice of the proposed assumption, assignment, or rejection of a lease or executory contract, including providing notice to the other parties to the lease or contract, as well as to the US Trustee.

For more information on the assignment of executory contracts and unexpired leases, see Practice Note, Executory Contracts and Leases: Overview: Assignment.

Local Rules

E.D. Va. Local Bankruptcy Court Rule 6004-1 and E.D. Va. Local Bankruptcy Court Rule 6004-2 supplement the requirements of Bankruptcy Rule 6004 for sales in the E.D. Va. (see Bankruptcy Rule 6004 Requirements).

E.D. Va. Local Bankruptcy Court Rule 6004-1 requires that:

- Any motion to sell real property or any interest therein must contain a legal description of real property sufficient to effect a proper conveyance.
- Orders approving the sale of property of the estate or any interest must comply with E.D. Va. Local Bankruptcy Court Rule 9022-1(E) (for example, the order must be sufficient in description to stand alone).

E.D. Va. Local Bankruptcy Court Rule 6004-2:

- Provides that notice of sale of estate property outside the ordinary course must comply with Federal Rule of Bankruptcy Procedure 2002(a)(2) and (c)(1) (E.D. Va. LBR 6004-2(A)).
- Provides that an objection to a sale outside the ordinary course must be filed within the time period permitted under E.D. Va. Local Bankruptcy Court Rule 9013-1(G)(3) (E.D. Va. LBR 6004-2(B)).
- Provides special requirements for the sale of property when the nonexempt value of the estate is less than $2,500 (E.D. Va. LBR 6004-2(C)).
- Requires the debtor to file with the court a report of any sale of estate property outside the ordinary course of business within 30 days after the sale (E.D. Va. LBR 6004-2(D)).

Guidelines for Bid Procedures Motions in Complex Chapter 11 Cases and Mega Cases

The Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures) state that in complex Chapter 11 cases and mega cases (see Complex Chapter 11 Case Procedures: Local Rules), bid procedures motions should "provide for input from or consultation with any official committees and secured lenders with liens on the property being sold" (Complex Case Procedures, § VI.E.2). However, the Complex Case Procedures prohibit secured lenders or committee members who are not potential bidders from participating in the adoption or implementation of bidding procedures and receiving any information that may affect the sale that is not generally available to all potential bidders.

Setting Bar Dates in Chapter 11 Cases

Background/Federal Requirements

A bankruptcy court presiding over a Chapter 11 case must issue an order setting a deadline by which all creditors must file proofs of claim to evidence and preserve a claim against the debtor (Fed. R. Bankr. P. 3003). This deadline is known as a bar date. Both unsecured creditors and secured creditors holding claims against the bankruptcy estate must either be scheduled as creditors by the debtor (with no designation of being disputed, contingent, or unliquidated) or file a proof of claim by the bar date to receive a distribution under a plan of reorganization or a plan of liquidation.

By fixing a bar date, a debtor can begin the process of analyzing creditors' claims and determine how to expeditiously administer and conclude its Chapter 11 case.

The Federal Rules of Bankruptcy Procedure, together with the local rules of the bankruptcy court where the bankruptcy case is filed, dictate the requirements for setting bar dates and providing notice to creditors. Many bankruptcy courts across the country have adopted their own local procedural guidelines for debtors seeking entry of an order setting a bar date. Debtors and their counsel must check the local rules of the bankruptcy court when preparing to request that the court set a bar date. Some local rules permit bar date motions to be decided without a hearing provided notice is given and parties in interest do not request a hearing.

For more information on the purpose of bar dates and the various bar dates in Chapter 11 cases, see Practice Note, Bar Dates in a Chapter 11 Bankruptcy Case.

Local Rules

E.D. Va. Local Bankruptcy Court Rule 3003-1(A) provides that:

- The last date for filing claims in Chapter 11 cases, other than governmental claims, is 90 days after the first section 341 meeting date.
- The last date for governmental units to file claims is 180 days after the petition in a voluntary case or after the order for relief is entered in an involuntary case.
- The clerk must give notice of the bar date in a separate notice of bar date mailed with the notice for the meeting of creditors.

E.D. Va. Local Bankruptcy Court Rule 3003-1(B) requires the debtor in a Chapter 11 case to:

- Serve creditors whose claims are listed on the schedules as disputed, contingent, or unliquidated with notice of that fact within 14 days after the later of:
  - the conversion of a case to Chapter 11;
  - the filing of the schedules of liabilities; or
  - the filing of an amendment to the schedules adding this creditor.
- File certification that service was made on the affected creditors within seven days of this service.

Counsel should seek a waiver of E.D. Va. Local Bankruptcy Court Rule 3003-1(A) and (B) based on the fact the debtors plan to file a motion setting bar dates for filing proofs of claim and approving the form and manner of notice. The appropriate first day motion to seek this waiver typically is in the motion approving the form and manner of notice of the commencement of the Chapter 11 cases.

The E.D. Va. does not have local rules regarding bar date notices to mass tort claimants.

Bar Dates in Complex Chapter 11 Cases and Mega Cases

In complex Chapter 11 cases (see Complex Chapter 11 Case Procedures: Local Rules), unless the court orders otherwise, Section VII.A of the Procedures for Complex Chapter 11 Cases in the Eastern District of Virginia (Complex Case Procedures) establishes a bar date of:

- 180 days after the petition date for governmental units.
- 90 days after the section 341 meeting for all other entities.

The Complex Case Procedures also provide that the debtors must provide notice of the bar date to all creditors on or before the first date set for the section 341 meeting.

Subchapter V of Chapter 11

Background/Federal Requirements

Congress enacted the Small Business Reorganization Act (SBRA), which added a new Subchapter V to Chapter 11 of the Bankruptcy Code (Subchapter V), effective February 19, 2020. Subchapter V provides small businesses with aggregate liabilities of up to $3,424,000 with an opportunity to resolve outstanding liabilities in a streamlined cost-effective Chapter 11 bankruptcy proceeding.

The SBRA amends the definition of small business debtor in section 101(51D) of the Bankruptcy Code, changing the requirements for an individual or entity to qualify as a small business debtor. The amendments to the definition apply to both Subchapter V and small business cases as defined under section 101(51C) of the Bankruptcy Code.

An individual or entity that qualifies as a small business debtor as defined in section 101(51D) may now:

- Elect to proceed under new Subchapter V of Chapter 11 under new section 103(i) of the Bankruptcy Code.
- Elect to proceed as a small business case under the existing small business case provisions and requirements under section 101(51C) of the Bankruptcy Code, which was amended to specifically exclude a Subchapter V case from the definition of small business case.
- File a traditional (non-small business debtor) Chapter 11 case.

In a voluntary Chapter 11 case, the small business debtor must make its election on the bankruptcy petition. (Fed. R. Bankr. P. 1020(a).) In an involuntary Chapter 11 case, the debtor must file a statement with the bankruptcy court within 14 days of entry of the order for relief that it qualifies as a small business debtor and whether it elects to have Subchapter V apply (Fed. R. Bankr. P. 1020(a)). A debtor's Chapter 11 case becomes a small business case or a case under Subchapter V by virtue of the debtor's election unless and until the bankruptcy court enters a finding that the debtor's designation is not correct (Fed. R. Bankr. P. 1020(a)). Federal Rule of Bankruptcy Procedure 1009 provides that any voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor must give notice of the amendment to the trustee and to any affected entity.

All parties in interest**,** including the US Trustee, may object to the debtor's small business debtor or Subchapter V designation. However, the objection must be filed no later than 30 days after:

- The conclusion of the section 341 meeting.
- Any amendment to the debtor's designation.

(Fed. R. Bankr. P. 1020(b).)

The local rules of the bankruptcy court where the bankruptcy case is filed may provide specific guidance for Subchapter V cases. For more information on small business bankruptcy, see Practice Note, Small Business Bankruptcy Under Subchapter V: Overview.

Local Rules

The E.D. Va. does not have any local rules regarding Subchapter V cases.

Unclaimed Funds

Background/Federal Requirements

The treatment of unclaimed property in a bankruptcy case is addressed by section 347 of the Bankruptcy Code. Unclaimed funds arise in bankruptcy cases when distributions to creditors are returned and remain unclaimed. Most unclaimed funds arise when checks to creditors are not cashed. Ownership of unclaimed funds depends on the nature of the bankruptcy proceeding.

In a Chapter 7, 12, or 13 case, the trustee must stop payment on any check that remains unpaid 90 days after final distributions (§ 347(a), Bankruptcy Code). These unclaimed funds are turned over to the court to hold for the creditor's benefit for five years, after which time they escheat to the US Treasury (28 U.S.C. §§ 2041 to 2044).

In a Chapter 9 or 11 case, unclaimed property is typically addressed by the terms of the confirmed plan. Section 347(b) of the Bankruptcy Code provides a backstop for property that is not addressed by the plan and remains unclaimed at the expiration of the time allowed for distributions. This unclaimed property is either:

- Returned to the debtor or the entity that acquired the debtor's assets under the plan after five years (§ 347(b), Bankruptcy Code).
- In certain circumstances, deposited with the court.

When unclaimed funds are deposited with the bankruptcy court, they can only be released by court order. Motions for the release of unclaimed funds must comply with 28 U.S.C. Section 2042.

For more information on unclaimed funds in bankruptcy cases, see Practice Note, Unclaimed Property in Bankruptcy.

Local Rules

E.D. Va. Local Bankruptcy Court Rule 3011-1(A) generally provides that all unclaimed funds are deposited with the US Treasury and are not held by the court. E.D. Va. Local Bankruptcy Court Rule 3011-1(D) provides that, to claim unclaimed funds, claimants must use Local Form 1340 edva, the Application for Payment of Unclaimed Funds. Instructions for filing the Application can be found here.

E.D. Va. Local Bankruptcy Court Rule 3011-1(H) and (J) governs the treatment of unclaimed funds in specific situations, such as when a creditor is *pro se* or when the claimant is deceased and documentation must be submitted to claim the funds.

The E.D. Va. does not have local rules regarding unclaimed funds that are specific to Chapter 11, and unclaimed property typically is addressed by the terms of the Chapter 11 plan in the E.D. Va.

Withdrawal of the Reference

Background/Federal Requirements

General orders of reference issued by a district court enable the district court to automatically refer cases under 28 U.S.C. Section 1334(b) to the bankruptcy court for that district (28 U.S.C. § 157(a)). If there are issues in a case that has been automatically referred to the bankruptcy court that are beyond the scope of the bankruptcy court's expertise, the district court can, on its own motion or the motion of a party in interest, withdraw the reference and bring the case back to the district court (28 U.S.C. § 157(d)).

Withdrawal of the reference is either mandatory or discretionary. A party seeking discretionary withdrawal must show cause for that withdrawal. A party seeking mandatory withdrawal must show that the case requires consideration of bankruptcy laws and other federal laws regulating organizations or activities affecting interstate commerce.

For more information on withdrawal of the reference, see Practice Note, Withdrawal of the Reference.

Local Rules

E.D. Va. Local Bankruptcy Court Rule 5011-1 provides that:

- A request for withdrawal of the reference must be made by motion in the bankruptcy court conforming in all respects to E.D. Va. Local Bankruptcy Court Rule 9013-1 (the local rule regarding motions practice) and must be accompanied by the filing fee. A motion to withdraw the reference must clearly and conspicuously state that "RELIEF IS SOUGHT FROM A UNITED STATES DISTRICT COURT JUDGE." (E.D. Va. LBR 5011-1(A).)
- Filing a motion to withdraw the reference does not stay the bankruptcy court action (E.D. Va. LBR 5011-1(B)).
- Together with filing the motion to withdraw the reference, the moving party must file with the bankruptcy court and serve a designation of the portions of the bankruptcy court record that the movant believes necessary for the district court's consideration of the motion. Within 14 days after service of the designation of the record, any other party may file with the bankruptcy court and serve a designation of additional portions of the record. (E.D. Va. LBR 5011-1(C).)
- Any opposition to the motion to withdraw the reference must be filed with the bankruptcy court and served on all parties to the matter for which the withdrawal has been requested within 14 days of service of the motion to withdraw. The moving party may then file with the bankruptcy court a reply within 14 days after service of the opposition. (E.D. Va. LBR 5011-1(D).)
- Once the record is complete, the clerk of the bankruptcy court must promptly transmit the record to the district court. After the opening of a docket in the district court, all documents pertaining to the matter pending before the district court must be filed with the district court, while all other unrelated matters in the bankruptcy case must be filed with the bankruptcy court. (E.D. Va. LBR 5011-1(E).)

While not a local rule, there is recent local precedent finding waiver of the right to seek withdrawal of the reference because of delay in seeking this relief (see *Corliss Moore & Assoc., LLC v. Credit Control Servs., Inc.*, 497 B.R. 219 (E.D. Va. 2013)).

Other Topics

List of Creditors

The debtor must file with the petition a list containing the name and address of each creditor. However, nothing prevents debtors from seeking court authority to file this list under seal to protect individuals against potential identity theft or for other cause. (E.D. Va. LBR 1007-1(H)(1).) If not submitted by Case Management/Electronic Case Filing (CM/ECF), the debtor must submit the list of creditors to the clerk in the format the clerk specifies (E.D. Va. LBR 1007-1(H)(1)).

Counsel should seek a waiver in a first day motion of the requirement to submit a list of creditors. With the retention of a claims agent, the clerk does not need the information in the list of creditors (see Retaining a Claims Agent). Debtors typically seek this waiver along with a request to file a consolidated list of creditors.

Discovery

An objection to an interrogatory, a deposition, a request, or an application under Federal Rules of Bankruptcy Procedure 7026 to 7037 must be served within 14 days of service of the discovery request, unless otherwise ordered by the court. Any objection must not extend the time within which the objecting party must otherwise answer or respond to any discovery matter not specifically objected to. (E.D. Va. LBR 7026-1(B).)

US Trustee Operating Guidelines and Reporting Requirements

The US Trustee, a representative of the US Department of Justice, oversees the administration of bankruptcy cases and supervises a panel of private bankruptcy trustees for Chapter 11 and Chapter 7 cases (28 U.S.C. § 586(a)). In particular, the US Trustee must extensively monitor a debtor-in-possession's Chapter 11 estate (see Practice Note, Property of the Estate: Overview).

The Executive Office for US Trustees in Washington, D.C. supervises the US Trustee Program and provides general policy and legal guidance to US Trustees, as well as substantive and administrative support. There are 21 regional US Trustee offices throughout the US, and each has instituted its own guidelines derived from the policies of the Executive Office for US Trustees as well as the US Trustee's duties listed in the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the US Code. While the guidelines are similar in each region, they differ in various ways, including the timing for a debtor's compliance and the amount of detailed information required from each debtor.

The US Trustee's office for Region 4 serves the federal bankruptcy courts located in:

- Maryland.
- South Carolina.
- Virginia.
- West Virginia.
- District of Columbia.

This Note discusses the general operating guidelines and procedural requirements enacted by the US Trustee for Region 4 (Region 4 Guidelines) as they apply to Chapter 11 cases filed in the E.D. Va.

The US Trustee's operating guidelines for cases filed in the E.D. Va. are publicly available and can be obtained from the website for the US Trustee's office for Region 4 (see US Trustee Operating Guidelines, Region 4). The US Trustee also typically emails the guidelines to counsel to the debtor following commencement of the case.

For more information on the US Trustee's role in Chapter 11 cases and the general US Trustee requirements for Chapter 11 debtors, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors.

First Day Requirements

Once the debtor files its Chapter 11 petition, it immediately owes certain fiduciary duties to the estate. For this reason, US Trustees in nearly all districts across the country have implemented guidelines requiring a Chapter 11 debtor-in-possession to monitor its postpetition activities and preserve the enterprise value for the benefit of the estate.

The following table summarizes the US Trustee guidelines for Chapter 11 cases filed in the E.D. Va. concerning a debtor's initial Chapter 11 obligations and reporting requirements during the first few days of a case (see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: First Day Duties of the Debtor). These guidelines may be waived on request to the US Trustee.

US Trustee Operating Requirements	E.D. Va. Bankruptcy Court Requirements
Duty to Keep Records and File Reports	The debtor's accounting records must establish a clear cut-off between financial transactions that occur before the Chapter 11 filing and those that occur on and after the date of the filing.
Bank Accounts	The debtor must: • Immediately close existing bank accounts and open new debtor-in-possession bank accounts. • Open accounts in a financial institution approved by the US Trustee. The Alexandria, Richmond, and Norfolk and Newport News Divisions may have different authorized depositories.

US Trustee Operating Requirements	E.D. Va. Bankruptcy Court Requirements
	• Inform the US Trustee of each financial institution in which estate funds are maintained and execute an authorization for the release of information pertaining to estate accounts. A Statement of Depository and Authorization for Release of Information Form is due within 15 days after: – the date of the petition in a voluntary case; – the order for relief in an involuntary case; or – the appointment of a trustee. • This document should be sent only to the Office of the US Trustee. It should not be filed with the court. • Deposit all receipts into the debtor-in-possession accounts. The debtor cannot use any bank accounts other than its disclosed debtor-in-possession accounts without an order of the court approving the debtor's use of this bank account. • Ensure that the debtor's bank statements report activity on a full-calendar-month basis. • Notify the US Trustee within five business days of any change of bank accounts and provide proof of compliance with section 345(b) for each new account.
Insurance	The debtor must: • Maintain adequate insurance coverage customary in the debtor's business, including a combination of: – commercial, liquor, automobile, or product liability insurance; – property insurance; – worker's compensation (see Practice Note, Workers' Compensation: Common Questions); – malpractice insurance; or – contractor or employee fidelity bonds. • All documents provided as evidence of insurance must clearly indicate: – the policy expiration date; – the types and amounts of coverage; – the locations covered; – the deductible; – the named insured; – the insurer; and – the name, address, and telephone number of the local agent. • Provide a certificate of insurance to the Office of the US Trustee within 15 days, which must indicate that the US Trustee is to be notified in the event of any change, cancellation, or expiration of the policy.

US Trustee Operating Requirements	E.D. Va. Bankruptcy Court Requirements
	The certificate of insurance should provide the following notification information: • Alexandria: – Department of Justice Office of the United States Trustee 1725 Duke St., Suite 650 Alexandria, Virginia 22314 – Fax: (703) 557-7279 • Newport News/Norfolk: – Department of Justice Office of the United States Trustee 200 Granby Street, Room 625 Norfolk, Virginia 23510 – Fax: (757) 441-3266 • Richmond: – Department of Justice Office of the United States Trustee 701 East Broad Street, Suite 4304 Richmond, Virginia 23219 – Fax: (804) 771-2330
Taxes	The debtor must remain current on all postpetition federal, state, and local taxes and file all tax returns on a timely basis.

Additional US Trustee Procedural Requirements

In addition to the first day requirements (see First Day Requirements), the US Trustee Operating Guidelines for the E.D. Va. require that a debtor submit as part of the initial reporting requirements to the US Trustee at least 24 hours before the initial debtor interview (see Initial Debtor Interview) in electronic format:

- Last two filed federal tax returns and a copy of an extension request (if applicable).
- Previous three months of bank statements for all accounts held by debtor.
- Check register for 90 days prepetition.
- Copies of the declaration page for all insurance policies.
- Certificate of insurance listing Office of US Trustee as a notice holder (to include all asset and liability coverages of the debtor).
- Copies of last year's financial statements.
- Copies of last month and year-to-date income statement and balance sheet.
- Copies of all business licenses.
- Payroll register for businesses.
- Recent paystub and most recent W-2 for individuals.
- Bank accounts (Exhibit 1 to the US Trustee Operating Guidelines).
- If debtor has at least a 20% ownership interest in any entity, copies of prior year and year-to-date financial statements for that entity.

Initial Debtor Interview

The US Trustee Program's general guidelines require that an employee of the US Trustee conduct a personal interview with the debtor and the debtor's counsel, commonly referred to as the initial debtor interview. The initial debtor interview is held within 14 days of the filing of the petition. This initial debtor interview:

- Provides the US Trustee with crucial information so that the US Trustee can assess the accuracy of the debtor's schedules and statements and the debtor's financial ability to confirm a plan.

- Informs the debtor of its new fiduciary obligations and of the US Trustee's role in the administration of Chapter 11 cases.

(See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Initial Debtor Interview.)

The US Trustee for the Richmond, Alexandria, and Norfolk and Newport News Divisions each require this initial conference between representatives of the debtor and the US Trustee's office to occur shortly after commencement of the bankruptcy case. The initial debtor interview will occur at the debtor's place of business, the office of the US Trustee, or virtually.

A person knowledgeable about the debtor's accounting operations should attend the initial debtor interview. During the initial debtor interview, the US Trustee's representative will ask questions about the debtor's accounting records, bank accounts, insurance, and other administrative matters. The US Trustee's representative will explain the monthly operating report requirements, payment of statutory fees, and the debtor's other obligations.

Meeting of Creditors

Federal Rule of Bankruptcy Procedure 2003 and sections 341 and 343 of the Bankruptcy Code govern the date, place, and order of section 341 meetings in all districts that have a US Trustee.

For more information on section 341 meetings, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Section 341 Meeting.

The US Trustee for the Richmond, Alexandria, and Norfolk and Newport News Divisions will convene and preside over a meeting of creditors according to the timeline set out in Federal Rule of Bankruptcy Procedure 2003(a), usually between 20 to 40 days after the petition was filed. Small business Subchapter V cases will be held by the 21st day.

Unless otherwise noticed, all Chapter 11 meetings are held at:

ALEXANDRIA DIVISION: Office of the US Trustee 1725 Duke St., Suite 650 Alexandria, VA 22314	RICHMOND DIVISION: Office of the US Trustee 701 East Broad Street, Suite 4300 Richmond, VA 23219
NORFOLK DIVISION: Office of the U.S. Trustee 200 Granby Street, Room 625 Norfolk, VA 23510	NEWPORT NEWS DIVISION: US Trustee's Hearing Room 11751 Rock Landing Drive Newport News, VA 23606

Monthly Operating Reports

The debtor-in-possession must file operating reports each month throughout the pendency of the Chapter 11 case. The timely filing of reports of operations is crucial to the efficient administration of Chapter 11 cases. These reports are designed to provide the US Trustee, the court, creditors, and other parties in interest with reliable information concerning the debtor's current financial performance. US Trustees use the information contained in the reports to identify cases lacking a realistic prospect of reorganization and to evaluate the feasibility of a proposed plan of reorganization (see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Monthly Operating Reports).

Effective June 21, 2021, the US Trustee's office requires all debtors except those who are small businesses or who under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) elect relief under Subchapter V of Chapter 11 to use streamlined, data-embedded, uniform forms for filing monthly operating reports and also requires that monthly operating reports be filed no later than the 21st day of the month immediately following the reporting period covered by the monthly operating report. These forms have been updated, effective November 30, 2021.

Debtors typically seek and receive authority in the joint administration first day motion to file monthly operating reports on a consolidated basis, but orders granting this relief typically require debtors to track and break out disbursements on a debtor-by-debtor basis in each monthly operating report.

The Region 4 Guidelines require that these reports be filed from the petition date to the earlier of:

- The effective date of a confirmed plan.
- The conversion date of the case.
- The dismissal of the case.

For more information on monthly operating reports, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Monthly Operating Reports.

Post-Confirmation Reporting

After confirmation of the plan of reorganization, the reorganized debtor no longer must submit monthly operating reports to the US Trustee but must instead file a post-confirmation operating report on a fiscal quarterly basis until the court enters an order closing, dismissing, or converting the case (see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Post-Confirmation Reports).

Effective June 21, 2021, the US Trustee's office requires all debtors except Subchapter V debtors to use streamlined, data-embedded, uniform forms for filing quarterly post-confirmation reports and also requires that quarterly post-confirmation reports be filed no later than the 21st day of the month immediately following the reporting period covered by the post-confirmation report. These forms have been updated, effective November 30, 2021.

The Region 4 Guidelines require that the first post-confirmation report is due after the effective date of the confirmed plan.

Small Business and Subchapter V Debtors

Under the Region 4 Guidelines, small business debtors must:

- At the start of the case, file with the court their most recent balance sheet, statement of operations, cash flow statement, and federal income tax return or a statement made under penalty of perjury that the financial statements have not been prepared or the tax return has not been filed no later than seven days after filing.
- Provide the US Trustee with a six-month projection of receipts and disbursements.
- Use Official Bankruptcy Form B425C to report its monthly position until the case is confirmed and, after the effective date, use UST Form 11-PCR to report their quarterly information, which is the same form as a regular business case.

In the case of small business debtors electing Subchapter V status, the Region 4 Guidelines note that the debtors have a duty to cooperate with the trustee appointed to the case. Subchapter V debtors do not have to provide the US Trustee a six-month projection of receipts and disbursements. Subchapter V debtors must:

- Use Official Bankruptcy Form B425C to report their monthly position until the case is confirmed. No post-confirmation reports are required unless the approved plan requires that a report be filed.
- Comply with deadlines not imposed in other Chapter 11 cases, such as:
  - that the initial debtor interview is to be held within ten days of the filing of the petition;
  - that the meeting of creditors is to be held as close to but no sooner than 21 days from the order for relief;
  - that the court will hold a status conference within no later than 60 days after the case is filed;
  - that no later than 14 days before the status conference, "the debtor shall 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 of reorganization" (§ 1188(c), Bankruptcy Code); and
  - to file a plan no later than 90 days after the petition date, except that the court may extend the period.

Other Reporting Requirements

The debtor must file reports on Chapter 11 cases subsequently converted to Chapter 7, as required by Federal Rule of Bankruptcy Procedure 1019(5).

If the estate holds a substantial or controlling interest in another entity, the debtor must file periodic reports (Official Bankruptcy Form B426) of the value, operations, and profitability of each entity no later than five days before the first date set for the meeting of creditors. Subsequent reports should be filed semiannually not less than every six months thereafter until the effective date of the plan or the case is dismissed or converted.

US Trustee Quarterly Fees

Each Chapter 11 debtor is responsible for paying a quarterly fee to the US Trustee Program (28 U.S.C. § 1930(a)(6)). Quarterly fees accrue throughout the course of the Chapter 11 case until the case is:

- Closed.
- Dismissed.
- Converted to another chapter.

The fees are payable on a fiscal quarterly schedule and are due on the last day of the month following the end of each calendar quarter. For example, fees for the first fiscal quarter ending March 31 are due on April 30. Failure to pay quarterly fees may result in the court converting or dismissing the Chapter 11 case (§ 1112(b)(4)(K), Bankruptcy Code). A court cannot confirm a Chapter 11 plan unless the plan provides for payment of all unpaid quarterly fees accrued by the effective date (§ 1129(a)(12), Bankruptcy Code). The amount of the quarterly fee depends on the dollar amount of the debtor's disbursements during each calendar quarter. The US Trustee Program amends the quarterly fee schedule from time to time (see DOJ: US Trustee Quarterly Fee Guideline Schedule). A minimum fee of $250 is due each quarter even if no disbursements are made during that quarter. For more information on the fees required, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: US Trustee Fee Guidelines.

Because Subchapter V debtors do not pay any quarterly fees under 28 U.S.C. Section 1930(a)(6)(A), the Region 4 Guidelines governing quarterly fees do not apply to Subchapter V debtors.