

Local Bankruptcy Rules: California (N.D. Cal.)

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A Practice Note summarizing selected local rules of the US Bankruptcy Court for the Northern District of California (N.D. Cal.).

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 suits 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: Lenders' Perspective ([9-380-7953](#)).

LOCAL RULES

Contents of Motion to Extend or Impose Automatic Stay

The movant must:

- State whether the motion is concerning all creditors or only specific creditors, who must be identified by name.
- Set out facts in support of the motion, established by declarations as appropriate:

- showing that the filing of the case is in good faith about the creditors to be stayed; and
- describing the circumstances that led to the dismissal of all prior cases concerning the debtor that were pending or dismissed in the last eight years.

(Bankr. N.D. Cal. R. 4001-2(b).)

Procedural Requirements

The movant must:

- Schedule the hearing on the judge's regular relief from stay calendar, allowing for 14 days' notice. If there are no available dates that allow for 14 days' notice within 30 days of the petition date, the movant should follow the judge's procedures for scheduling a special setting.
- For hearings on shortened time, comply with Federal Rule of Bankruptcy Procedure 9006 and N.D. Cal. Local Bankruptcy Court Rule 9006-1.

(Bankr. N.D. Cal. R. 4001-2(d)(1).)

Alternatively, the movant may use the Notice and Opportunity for Hearing procedures outlined in N.D. Cal. Local Bankruptcy Court Rule 9014-1(b)(3), modified so that:

- The time to object and request a hearing is 14 days.
- The time for the movant to give written notice of the hearing date is five days.
- The tentative hearing date, if set in the notice, must be at least seven days after the conclusion of the period for objecting parties to request a hearing.
- If there is a timely objection or request for a hearing or if the judge has required that the motion be set for a hearing, the time for the movant to file and serve notice of the hearing is five days.

(Bankr. N.D. Cal. R. 4001-2(d)(2).)

Opposition and Hearing

N.D. Cal. Local Bankruptcy Court Rule 4001-2(e) provides that:

- Any opposition to the motion may be presented:
 - in writing before or at the hearing; or
 - orally at the hearing.

- Any responsive pleadings, points and authorities, and declarations for any hearing must be filed with the objection or request for the hearing.
- A hearing on the motion to continue the automatic stay must be completed no later than 30 days after the petition date.

Guidelines on Residential Loan Modifications on Relief from Stay Motions

The court's Guidelines on Residential Loan Modifications on Relief From Stay Motions and in Chapter 11 and Chapter 13 Plans (Guidelines) that are not binding under N.D. Cal. Local Bankruptcy Court Rule 9029-1 but are generally enforced by the court include certain provisions regarding stay relief concerning a loan secured by the debtor's primary residence. These guidelines provide that:

- The secured creditor must state on the cover sheet accompanying a stay relief motion whether or not the debtor has requested a loan modification before bankruptcy or before the date the motion is filed (Guideline 1). If the debtor has made this request, the creditor must also indicate the status of the request on the cover sheet (for example, request pending, no decision yet; modification in trial period; or denied in writing (attaching copy of denial)) (Guideline 2).
- If the debtor has not made a request for a loan modification before the date of filing a stay relief motion but intends to do so or has done so after that date and the creditor has not so indicated in its motion, then the debtor should advise the court accordingly at the hearing. As one form of adequate protection, the court may set a deadline for the debtor to file and serve on the creditor a declaration stating under penalty of perjury:
 - the date of this request and to whom it was sent (attaching copy of any transmittal letter or cover sheet, without exhibits);
 - if known, the status of the request; and
 - the amount that is 31% of debtor's monthly gross income as shown on Bankruptcy Schedule I.
- (Guideline 3.)
- As additional adequate protection of the creditor's interest in the debtor's principal residence pending the creditor's consideration of the loan modification request, the court will set an appropriate monthly payment amount and, in doing so, may consider as adequate a monthly amount that is 31% of the debtor's monthly gross income, with payments beginning in the month that follows the first hearing on the stay relief motion or at the end of the contractual grace period in the month that follows after the motion was filed (Guideline 4).
- The court's adequate protection order will normally provide that if the creditor in its sole discretion denies the loan modification request in writing provided to the debtor:
 - the adequate protection payments revert to the amount provided in the loan documents in the next calendar month after the denial; or
 - the creditor may restore the matter to calendar on ten days' notice.
- (Guideline 5.)

BANKRUPTCY APPEALS

BACKGROUND/FEDERAL REQUIREMENTS

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 N.D. Cal. Local Civil Rules.
- The N.D. Cal. Local Bankruptcy Court Rules.
- The Rules of the US Court of Appeals for the Ninth Circuit.
- The Rules of the US Bankruptcy Appellate Panel of the Ninth Circuit.
- The standing orders of the assigned judge, which are available on the judges' web pages. Select the assigned judge from the list, then select "Standing Orders" from the left navigation bar.

Consider whether the bankruptcy order is final or interlocutory (see Final Versus Interlocutory Orders). If it is interlocutory, review Federal Rule of Bankruptcy Procedure 8004 on motions for leave to appeal an interlocutory order (see Permission for Interlocutory Appeals).

For:

- Timing on filing the notice of appeal, review Federal Rule of Bankruptcy Procedure 8002 (see 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).
- Disputes relating to the record on appeal, review Federal Rule of Bankruptcy Procedure 8004 (see Correcting or Modifying Record).
- Obtaining a stay of a bankruptcy court order or judgment pending appeal, review Federal Rule of Bankruptcy Procedure 8007 (see Stay Pending Appeal).
- Designating the record on appeal and the statement of the issues on appeal, review Federal Rule of Bankruptcy Procedure 8009 (see Designation of Record and Statement of Issues and Record on Appeal).
- Certifying an appeal directly to the US Court of Appeals for the Ninth Circuit, review 28 U.S.C. Section 158, Federal Rule of Bankruptcy Procedure 8006, and Official Bankruptcy Form B424 (see Direct Appeals to Ninth Circuit).
- 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).
- Page limitations and other rules relating to appellate briefs, review Federal Rules of Bankruptcy Procedure 8014 to 8016 and N.D. Cal. Local Bankruptcy Court Rule 8014-1 and N.D. Cal. Local Bankruptcy Court Rule 8018-1 (see Other Appeal Responsibilities). See also the policies and procedures of the assigned judge regarding page limitations, courtesy copies, and other requirements.

Final Versus Interlocutory Orders

Under 28 U.S.C. Section 158, when an order is final, it is appealable as a matter of right. When an order is interlocutory, it is appealable only with leave of the court (see *Permission for Interlocutory Appeals*).

The US Supreme Court has articulated a general rule in ordinary civil litigation that provides that only an order that “ends the litigation on the merits and leaves nothing more for the court to do but execute judgment” is final (*Digital Equip. Corp. v. Desktop, Inc.*, 511 U.S. 863, 867 (1994)). The Ninth Circuit applies this rule more flexibly in bankruptcy cases to quickly resolve issues that are central to the progress of a bankruptcy case (see *Sahagun v. Landmark Fence Co. (In re Landmark Fence Co.)*, 801 F.3d 1099, 1102-04 (9th Cir. 2015)).

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. N.D. Cal.: Court Fees).
- Complete the civil cover sheet (see N.D. Cal.: Civil Cover Sheet).

Effect of Appeal on Bankruptcy Jurisdiction

The doctrine of exclusive appellate jurisdiction confers exclusive jurisdiction on the appellate court of the aspects of the case involved in the appeal (see *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982)). This rule applies in bankruptcy cases but does not prevent the balance of the bankruptcy case from proceeding. The bankruptcy court retains jurisdiction over all aspects of the bankruptcy case that are not the subject of the appeal.

The rule of exclusive jurisdiction does not prevent a bankruptcy court from issuing an opinion consistent with an order that is pending appeal (Fed. R. Bankr. P. 8007(e)).

The bankruptcy court may also grant relief that enforces an order being appealed unless the appellant has obtained a stay of the order pending appeal.

Timing Issues

The notice of appeal must be filed within 14 days after entry of a bankruptcy order or judgment on the bankruptcy court docket unless the appellant obtains a time extension (Fed. R. Bankr. P. 8002(a), (d); see *Extension of Time to File Notice of Appeal*).

The time for appeal begins to run from the date the bankruptcy court order is entered on the court docket, not from the earlier date when the order is signed (Fed. R. Bankr. P. 8002(a)). Attorneys cannot rely on the date of mailing or service of the order and instead must monitor the docket to determine when the order to be appealed

was entered. This is particularly crucial because the requirements of Bankruptcy Rule 8002 are jurisdictional. The failure to timely file a notice of appeal results in a loss of the right to appeal.

The notice of appeal is effective once it is docketed with the bankruptcy court. This effective date triggers the 14-day period for designating the record and statement of issues on appeal (see *Designation of Record and Statement of Issues*).

A notice of appeal filed after:

- A decision or order is announced but before it is entered on the docket is treated as filed on the day of entry of the decision or order on the docket.
- Entry of judgment, but before the last of the motions listed in Federal Rule of Bankruptcy Procedure 8002(b)(1) is decided, is treated as filed when the order determining the last of the motions is entered.

Extension of Time to File Notice of Appeal

The bankruptcy court may extend the time to file a notice of appeal on request by motion within:

- The 14-day period for filing the notice of appeal.
- 21 days after the 14-day period if the party shows excusable neglect.

(Fed. R. Bankr. P. 8002(d).)

An extension of time to file a notice of appeal for excusable neglect is not granted for orders:

- Granting relief from the automatic stay.
- Approving the sale or lease of property or the use of cash collateral.
- Authorizing DIP financing.
- Authorizing the assumption or assignment of an executory contract or unexpired lease.
- Approving a disclosure statement.
- Confirming a plan.

(Fed. R. Bankr. P. 8002(d)(2).)

Docket Fee

The filing fee for a notice of appeal can be found on the bankruptcy court’s website (see Bankr. N.D. Cal.: Court Fees). The fee may be paid online with an attorney credit card when filing the notice of appeal. These fees are not refunded if the appeal is dismissed or denied.

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*).

Docketing of Appeal in District Court

On receipt of the notice of appeal, civil cover sheet, and docket fee, the clerk of the bankruptcy court transmits the appeal to the district court. The clerk of the district court then docketed the appeal under the title of the bankruptcy case and the title of any adversary proceeding, if applicable. (Fed. R. Bankr. P. 8003(d).)

The appeal is effective once docketed with the district court.

Stay Pending Appeal

Filing a notice of appeal does not affect the enforceability of a bankruptcy court order while the appeal is pending. For example, an approved sale or confirmed plan may be consummated while an appeal is pending, which may render the appeal moot.

Sections 363(m) and 364(e) of the Bankruptcy Code provide additional justification for seeking a stay pending appeal. Under section 363(m), the reversal or modification on appeal of an order authorizing the sale or lease of property does not affect its validity to a good faith purchaser or lessee. Under section 364(e), reversal or modification of an order authorizing DIP financing or the priority of a lien does not affect the validity of that financing, priority, or lien to the entity providing the financing or lien in good faith.

The mechanism to prevent an order pending appeal from taking effect is to seek a stay pending appeal.

A party typically must first move in the bankruptcy court for a stay pending appeal or other intermediate request for relief specified in Federal Rule of Bankruptcy Procedure 8007(a) either before or after the notice of appeal is filed.

Motions for a stay pending appeal or for other intermediate relief may also be made in the court where the appeal is pending if the movant shows or states one of the following:

- That moving first in the bankruptcy court is impracticable.
- If a motion was first made in the bankruptcy court, that the bankruptcy court has not yet ruled on the motion.
- If the bankruptcy court has ruled on the motion, the reasons given for the bankruptcy court's ruling.

The motion must also include:

- The reasons for granting a stay pending appeal and the facts relied on.
- Affidavits or other sworn statements supporting the facts that are subject to dispute.
- Relevant parts of the records.

(Fed. R. Bankr. P. 8007(b).)

A motion for a stay pending appeal cannot be filed in the district court (or court of appeals in the case of a direct appeal) unless a notice of appeal has already been filed with the bankruptcy court.

If a stay is sought from the district court after a notice of appeal has been filed but before the appeal appears on the district court docket, the movant must:

- Obtain from the clerk of the bankruptcy court the district court civil case number and the name of the district judge assigned to the appeal.
- File the motion for relief with the clerk of the district court.

Motions for a stay pending appeal or other relief specified in Federal Rule of Bankruptcy Procedure 8007(a) are not assigned separate miscellaneous case numbers. The movant must give reasonable notice of these motions to all parties affected by the order from which the appeal is being taken.

A stay pending appeal may be conditioned on filing a bond or other security with the bankruptcy court (Fed. R. Bankr. P. 8007(c), (d)). Neither the US nor any of its agencies are required to file a bond.

Permission for Interlocutory Appeals

If a bankruptcy court order is interlocutory (see *Final Versus Interlocutory Orders*), the party seeking to appeal the order must file a district court cover sheet with the notice of appeal and a motion for leave to appeal (28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8004(a), (b)).

A motion for leave to appeal must include:

- The facts necessary to understand the question presented.
- The question itself.
- The relief sought.
- The reasons why leave should be granted.
- A copy of the interlocutory order or decree and any related opinion.

(Fed. R. Bankr. P. 8004(b).)

A party responding to a motion for leave to appeal must file a response in opposition or a cross-motion in the district court within 14 days of service of the motion (Fed. R. Bankr. P. 8004(b)(2)).

An authorization of direct appeal by the Ninth Circuit (see *Direct Appeals to Ninth Circuit*) acts as a grant of leave to appeal if the district court has not already granted leave (Fed. R. Bankr. P. 8004(e)).

Direct Appeals to Ninth Circuit

Appellants cannot generally appeal directly to the Ninth Circuit. In limited circumstances, where the criteria in Section 158(d)(2)(A) of the Judicial Code (28 U.S.C. § 158(d)(2)(A)) are met, a direct appeal to the court of appeals is possible (Fed. R. Bankr. P. 8006). For more information on these criteria, see Practice Note, *Appealing a Bankruptcy Court Order: Overview: Appealing a Bankruptcy Court Order Directly to the Court of Appeals in Limited Circumstances (w-001-3320)*.

A certification of a bankruptcy court order, judgment, or decree for direct review in the court of appeals under Section 158(d)(2)(A) must be filed with the clerk of the court where the matter is pending using Official Bankruptcy Form B424. When filing a certification of direct appeal under Federal Rule of Bankruptcy Procedure 8006(b), a matter remains pending in the bankruptcy court for 30 days after the effective date of the appeal to provide the judge with an opportunity to decide the issue of certification.

Once a direct appeal has been certified by the bankruptcy court, the appellant must request permission to take a direct appeal with the circuit clerk within 30 days under Federal Rule of Appellate Procedure 6(c) (Fed. R. Bankr. P. 8006(g)). The Federal Rules of Appellate Procedure govern any further proceedings in the court of appeals.

Record on Appeal

Under Federal Rules of Bankruptcy Procedure 8003 and 8009, the appellant must establish the record and issues on appeal by designating the documents from the bankruptcy proceeding relevant to the appeal, including:

- Items to be included in the record (see Designation of Record and Statement of Issues).
- A statement of issues to be presented on appeal (see Designation of Record and Statement of Issues).
- Transcripts to be relied on during the appeal (see Transcripts).
- Documents placed under seal by the bankruptcy court to be relied on during the appeal (see Sealed Documents).
- Any changes needed to ensure that the record accurately reflects what occurred in the bankruptcy court (see Correcting or Modifying Record).

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. 8002).

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.
- Not include 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 or BAP the record or notice that the record is available electronically (Fed. R. Bankr. P. 8010(b)(1)). The district court or BAP must notify all parties that the record has been entered on that court's docket.

No paper copies of designated items are required, except as may be required by the district court or the BAP (Fed. R. Bankr. P. 8010(b)(4)).

Transcripts

The duties of the parties to provide copies of transcripts are set out in Federal Rule of Bankruptcy Procedure 8009(b). If a transcript has been docketed in the case, a party may simply add the document number to the designation. Transcript designations filed by counsel must be electronically filed.

The transcript ordering procedures for each division of the N.D. Cal. are:

- Bankr. N.D. Cal.: Tape & Transcript Ordering Procedure (San Jose Division).

- Bankr. N.D. Cal.: CD/Tape and Transcript Ordering Procedure (Santa Rosa Division).
- Bankr. N.D. Cal.: Tape and Transcript Ordering Procedure (Oakland Division).
- Bankr. N.D. Cal.: Transcript and Tape Ordering Procedures (San Francisco Division).

Sealed Documents

A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. A party must identify the sealed document without revealing confidential or secret information. Under Federal Rule of Bankruptcy Procedure 8009(f), the bankruptcy court cannot transmit a sealed document to the district court without permission. A party instead must file a motion with the district court to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling. The bankruptcy court then transmits the sealed document to the district court.

Correcting or Modifying Record

If a party believes that the record contains a discrepancy and does not accurately reflect what occurred in the bankruptcy court, the discrepancy must be submitted to and settled by the bankruptcy court and the record conformed according to Federal Rule of Bankruptcy Procedure 8009(e).

Alternatives to Appeal

There are alternatives that parties may wish to exhaust before filing an appeal, such as filing a motion to reconsider or for a rehearing 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. The Ninth 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 *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001).)

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).

Other Appeal Responsibilities

To avoid missing important deadlines, appellants and appellees must record important appeal-related dates in their calendars, including that:

- The notice of appeal must be filed within 14 days of entry on the docket of the order to be appealed (see Notice of Appeal).
- The filing and service of the designation of the record and statement of issues on appeal must be filed within 14 days after the notice of appeal is entered on the bankruptcy court docket (see Designation of Record and Statement of Issues).

Although the Federal Rules of Bankruptcy Procedure set out the time for filing and serving briefs and appendices by all parties

(Fed. R. Bankr. P. 8018), many courts issue a briefing schedule and consider consensual schedules proposed by the parties to the appeal.

Parties must be aware of any page limitations imposed by their local bankruptcy, civil, or appellate rules or by the particular judge overseeing the appeal, in addition to those imposed by Federal Rule of Bankruptcy Procedure 8015(a) (including 30 pages for principal brief and 15 pages for reply brief).

Appellants and appellees must also carefully review Federal Rules of Bankruptcy Procedure 8014 to 8016 and any applicable rules particular to the judge assigned to the appeal before drafting appellate briefs. Appellate briefs have specific formatting requirements that must be met.

For more information on bankruptcy appeals generally, see Practice Note, *Appealing a Bankruptcy Court Order: Overview* ([w-001-3320](#)).

LOCAL RULES

Manner of Taking Appeal

An appeal is automatically directed to the Bankruptcy Appellate Panel unless one of the parties elects to have an appeal heard by the district court.

On the filing of a notice of appeal and a statement of election to have the appeal heard by the district court, the clerk of the bankruptcy court must forward to the clerk of the district court:

- The notice of appeal.
- The statement of election.
- The docket sheet.

(Bankr. N.D. Cal. R. 8004-1.)

If a statement of election is filed by an appellee, the notice of appeal and the statement of election will be received from the BAP. In either case, the clerk of the district court must immediately docket these documents and give notice to the parties of the name of the assigned district judge and the district court case number (Bankr. N.D. Cal. R. 8004-1).

Procedure in Bankruptcy Appeals

N.D. Cal. Local Bankruptcy Court Rule 8009-1 provides:

- That on receipt of the record on appeal from the clerk of the bankruptcy court, the clerk of the district court must immediately docket it in the case and give notice to all parties to the appeal of the briefing schedule (Bankr. N.D. Cal. R. 8009-1(a)).
- Procedures for dismissal of an appeal that has not been properly perfected under Federal Rule of Bankruptcy Procedure 8009, either by motion of the appellee or on the bankruptcy court's own motion to the district court. Unless the assigned district judge orders otherwise:
 - within 14 days after receiving notice of the assignment to a district judge, the appellant must file in the district court a brief of not more than five pages in opposition to dismissal of the appeal;
 - 14 days thereafter, appellees may file a reply brief of not more than five pages; and
 - no hearing is held.

- (Bankr. N.D. Cal. R. 8009-1(b).)
- That when the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the District Court Civil Rules are silent about a particular matter of practice on an appeal to the district court from the bankruptcy court, the assigned district judge may apply:
 - the Rules of the US Court of Appeals for the Ninth Circuit;
 - the Federal Rules of Appellate Procedure; and
 - the Rules of the US Bankruptcy Appellate Panel of the Ninth Circuit.
- (Bankr. N.D. Cal. R. 8009-1(c).)

Procedure for Challenging Bankruptcy Court's Authority to Enter Final Order or Judgment

In cases where the bankruptcy court has entered a final order or judgment and a party contends that the bankruptcy court lacked constitutional or statutory authority to enter a final order or judgment on that matter, the party must both:

- File a timely notice of appeal of the bankruptcy court's final order or judgment.
- Elect that the appeal be heard by the district court under 28 U.S.C. Section 158(c)(1) and Federal Rule of Bankruptcy Procedure 8005(a).

(Bankr. N.D. Cal. R. 8003-1(a).)

In this event, all parties' briefs to the district court must:

- Contain argument and information addressing whether the bankruptcy court had authority to enter the final order or judgment.
- Contain all argument and information that the brief must contain if it was undisputed that the bankruptcy court had authority to enter the final order or judgment.
- Satisfy all the requirements of N.D. Cal. Local Bankruptcy Court Rule 9033-1, treating the findings of fact and conclusions of law of the bankruptcy court as proposed findings of fact and conclusions of law.

(Bankr. N.D. Cal. R. 8014-1.)

Procedure on Bankruptcy Court's Proposed Findings of Fact and Conclusions of Law

N.D. Cal. Local Bankruptcy Court Rule 9033-1 contains detailed procedures concerning the bankruptcy court's proposed findings of fact and conclusions of law, including concerning:

- Objections.
- Responses to objections.
- Further district court adjudication.

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 4001(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 ([3-618-3450](#)).

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 either obtain:

- 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 ([3-618-3450](#))).

(§ 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)(1), (3) and see *In re Dynaco Corp.*, 158 B.R. 552 (Bankr. D. N.H. 1993); *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 ([3-618-3450](#)) and Protecting the Lender's Interests in Bankruptcy: The Remedy of Adequate Protection ([8-382-8989](#))).

Though not required, a debtor may 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) ([5-507-4700](#))). 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 ([1-508-8252](#)) and Chapter 11 Equity Committees ([6-608-2869](#))).
- 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 ([3-610-4108](#))).
- 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 Bankruptcy Rule 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 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 N.D. Cal. does not have any specific local rules for cash collateral motions, but the court has Guidelines for Cash Collateral and Financing Motions & Stipulations (Guidelines) that are generally enforced, though technically not binding under N.D. Cal. Local Bankruptcy Court Rule 9029-1.

Introductory Statement

A cash collateral motion or stipulation must include an introductory statement, not to exceed three pages, summarizing the material provisions of the motion or stipulation, including:

- The purposes for the use of the cash collateral.
- The terms, including duration, of the use of the cash collateral.
- Any liens, cash payments, or other adequate protection (including any protections afforded by section 364 of the Bankruptcy Code) that will be provided to each entity with an interest in cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.
- The name of each entity with an interest in the cash collateral.

(Guideline B.)

The introductory statement must include a certification signed by counsel for the debtor in possession or trustee (a Certifying Professional) concerning compliance with the Guidelines, stating:

"The undersigned Certifying Professional has read the accompanying motion or stipulation and the Cash Collateral - Post Petition Financing Introductory Statement; to the best of my knowledge, information and belief, formed after reasonable inquiry, the terms of the relief sought in the motion or stipulation are in conformity with the Court's Guidelines For Cash Collateral

And Financing Motions and Stipulations except as set forth above. I understand and have advised the debtor in possession or trustee that the court may grant appropriate relief under [Federal Rule of Bankruptcy Procedure 9024] if the court determines that a material element of the motion or stipulation was not adequately disclosed in the Introductory Statement."

(Guideline G.)

The court may grant appropriate relief under Federal Rule of Bankruptcy Procedure 9024 if it determines that the introductory statement did not adequately disclose a material element of the motion, stipulation, or agreement (Guideline D and see Practice Note, Withdrawal of the Reference: Reconsideration ([w-000-9965](#))).

Required Disclosures

The debtor must highlight and add to its list of material provisions certain provisions that it must identify in a cash collateral motion under Bankruptcy Rule 4001(b). The debtor must justify the inclusion of these provisions, and each of these provisions must reference their location within the proposed cash collateral agreement and form of order (see Contents of the Cash Collateral Motion). These provisions are:

- Provisions granting priority or a lien on property of the estate under sections 364(c) or (d) of the Bankruptcy Code (Guideline C.1).
- Provisions providing adequate protection or priority concerning a claim that arose before the commencement of the case, including:
 - the granting of a lien on property of the estate to secure the claim; or
 - the use of property of the estate to make cash payments on account of the claim.
- (Guideline C.2 and see Practice Note, Cash Collateral: Overview: Extraordinary Provisions in a Cash Collateral Order ([3-618-3450](#))).
- The court will not ordinarily approve cross-collateralization or roll-ups (Guideline E.1 and see Provisions Not Ordinarily Approved).
- Determinations concerning the validity, perfection, priority, or amount of a claim that arose before commencement of the case, or of any lien securing these claims (Guideline C.3). The court will not ordinarily approve these provisions (Guidelines E.2 and E.3 and see Provisions Not Ordinarily Approved).
- A waiver or modification of:
 - the provisions of the Bankruptcy Code or applicable rules relating to the automatic stay (Guideline C.4 and see Practice Note, Automatic Stay: Lenders' Perspective ([9-380-7953](#)) and Standard Clause, Waiver of Automatic Stay ([3-385-5433](#)));
 - any entity's authority to file a plan, to seek an extension of the debtor's exclusivity period, to request the use of cash collateral under section 363(c) of the Bankruptcy Code, or to obtain financing under section 364 of the Bankruptcy Code (Guideline C.5); and
 - the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate or on the foreclosure or other enforcement of the lien (Guideline C.6).
- The court will not ordinarily approve these provisions, except for waivers regarding an entity's authority to file a plan or to seek extensions of exclusivity (Guidelines E.8, E.9, and E.10 and see Provisions Not Ordinarily Approved).

- 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 commence an action (Guideline C.7); and
 - of any right under section 506(c) of the Bankruptcy Code (Guideline C.9 and see Practice Note, The Section 506(c) Surcharge on Collateral: Section 506(c) Waivers ([9-565-5645](#))). The court will not ordinarily approve section 506(c) waivers, unless they are effective only during the period in which the debtor is authorized to use cash collateral (Guideline E.4 and see Provisions Not Ordinarily Approved).
- Indemnification of any entity (Guideline C.8).
- 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 that these liens secure claims for actual pecuniary loss).
- (Guideline C.10.) The court will not ordinarily approve these provisions (Guideline E.7 and see Provisions Not Ordinarily Approved).
- Provisions for carve-outs for professional fees and expenses (Guideline C.11 and see Practice Note, The Section 506(c) Surcharge on Collateral: Carve-Outs ([9-565-5645](#))). The court will not ordinarily approve:
 - carve-outs that provide for disparate treatment for creditors' committee professionals compared to the debtor's or trustee's professionals (Guideline E.12); and
 - inadequate carve-outs for a later appointed trustee in the case, whether before or after conversion (Guideline E.13).
- (See Provisions Not Ordinarily Approved.)
- Provisions or findings of fact that bind the estate or all parties in interest concerning:
 - the validity, perfection, or amount of the prepetition secured party's lien or debt (Guideline E.2); and
 - the relative priorities of the secured party's lien and liens held by persons who are not parties to the stipulation (Guideline E.3).
- Waivers of or grants of liens on rights under section 506(c) of the Bankruptcy Code, unless the waiver or grant is effective only during the period in which the debtor is authorized to use cash collateral (Guideline E.4 and see Practice Note, The Section 506(c) Surcharge on Collateral: Section 506(c) Waivers ([3-618-3450](#))).
- Provisions that operate to divest the debtor or the trustee of any discretion to formulate a plan or administer the estate or limit access to the court to seek any relief under other applicable provisions of law (Guideline E.5).
- Releases of or limitations on liability for a creditor's alleged prepetition torts or breaches of contract (Guideline E.6).
- Waivers of or liens on any of the estate's rights arising under sections 544, 545, 547, 548, 549, 553(b) 723(a), or 724(a) of the Bankruptcy Code or the proceeds of any of these rights (Guideline E.7).
- Automatic relief from the automatic stay on:
 - default;
 - conversion to Chapter 7; or
 - appointment of a trustee.
- (Guideline E.8.)
- Waivers and modifications of the procedural requirements for foreclosure required under applicable nonbankruptcy law (Guideline E.9).
- Waivers or limitations, effective on default or expiration, of the debtor or trustee's right to seek a court order under section 363(c) (2)(B) of the Bankruptcy Code authorizing the use of cash collateral without the secured party's consent (Guideline E.10).
- Findings of fact unrelated to the approval process (for example, a finding that a lender acted in good faith in declaring the prepetition loan in default would be unacceptable) (Guideline E.11).
- Provisions providing unreasonable treatment concerning fees or professionals retained by a creditors' committee compared to any carve-outs provided for a professional retained by the debtor or the trustee (Guideline E.12).
- Provisions that provide an inadequate carve-out for a later appointed trustee in the case, whether before or after conversion (Guideline E.13).

Provisions Ordinarily Approved

The court will ordinarily approve:

- Withdrawal of consent to use cash collateral on occurrence of a default or conversion to Chapter 7 (Guideline F.1).
- Provisions securing any postpetition diminution in the value of the secured party's collateral with a lien on postpetition collateral of the same type as the secured party had prepetition, if this lien is subordinated to the compensation and expense reimbursement (excluding professional fees) allowed to any trustee later appointed in the case (Guideline F.2).

- Provisions securing new advances or value diminution with a lien on other assets of the estate, but only if the lien is subordinated to all the expenses of administration (including professional fees) of a superseding Chapter 7 case (Guideline F.3).
- Reservations of rights under section 507(b) of the Bankruptcy Code, unless the stipulation calls for modification of the Bankruptcy Code's priorities in the event of a conversion to Chapter 7 (§ 726(b), Bankruptcy Code) (Guideline F. 4 and see Practice Note, Protecting the Lenders' Interests in Bankruptcy: The Remedy of Adequate Protection: When Adequate Protection Fails ([w-007-4873](#))).
- Reasonable:
 - reporting requirements (Guideline F.5); and
 - budgets and use restrictions (Guideline F.6).
- An expiration date for the stipulation (Guideline F.7).

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 N.D. Cal. does not have any local rules directly addressing Chapter 15 proceedings.

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 ([1-383-4700](#)) and Timeline of DIP Financing Process ([9-383-6738](#)).

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 ([1-383-4700](#)) and Box, Unsecured Postpetition Financing ([1-383-4700](#))); and
 - priming DIPs, the debtor tried to obtain a non-priming DIP but was unsuccessful (see Practice Note, DIP Financing: Overview: Priming DIPs ([1-383-4700](#))).
- 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) ([5-507-4700](#))). 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 ([1-383-4700](#))). The adequate protection provided depends on the circumstances of the case (see Practice Note, Protecting the Lender's Interests in Bankruptcy: The Remedy of Adequate Protection: What Constitutes Adequate Protection? ([8-382-8989](#))).

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 ([1-383-4700](#))); or
 - section 364(d) of the Bankruptcy Code, which addresses priming DIPs (see Practice Note, DIP Financing: Overview: Priming DIPs ([1-383-4700](#))).
- (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, Protecting the Lender's Interests in Bankruptcy: The Remedy of Adequate Protection: Additional or Replacement Lien ([8-382-8989](#)); 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, Protecting the Lender's Interests in Bankruptcy: The Remedy of Adequate Protection: Cash Payment or Periodic Cash Payments ([8-382-8989](#))).
- (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: Lender's Perspective: Relief from the Stay ([9-380-7953](#)) and Waivers of the Stay ([9-380-7953](#))).
- A waiver or modification of any party's authority or right to:
 - file a plan (see Practice Note, Chapter 11 Plan Process: Overview: Who May File a Plan? ([0-502-7396](#)));
 - seek an extension of the debtor's exclusivity period to file a plan (see Practice Note, Chapter 11 Plan Process: Overview: Contesting Exclusivity ([0-502-7396](#)));
 - request the use of cash collateral under section 363(c) of the Bankruptcy Code (see Practice Note, Cash Collateral: Overview ([3-618-3450](#))); or
 - request authority to obtain credit under section 364 of the Bankruptcy Code (see Practice Note, DIP Financing: Overview ([1-383-4700](#))).
- (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 ([0-502-7396](#))).
- 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 ([9-565-5645](#))).
- 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 that 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 ([1-508-8252](#)) and Chapter 11 Equity Committees ([6-608-2869](#))).
- 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 ([3-610-4108](#))).
- 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 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 N.D. Cal. does not have any specific local rules for DIP financing motions, but the court has Guidelines for Cash Collateral and Financing Motions & Stipulations (Guidelines) that are generally enforced, though technically not binding under N.D. Cal. Local Bankruptcy Court Rule 9029-1.

Introductory Statement

A DIP financing motion or stipulation must include:

- A proposed form of order.
- A copy of the credit agreement.
- An introductory statement, not to exceed three pages, summarizing the material provisions of the proposed credit agreement, including:
 - the amount of new money to be advanced;
 - the interest rate;
 - maturity;
 - events of default;
 - liens;
 - borrowing limits; and
 - borrowing conditions.

(Guideline B.)

The introductory statement must include a certification signed by counsel for the debtor in possession or trustee (a Certifying Professional) concerning compliance with the Guidelines, stating:

"The undersigned Certifying Professional has read the accompanying motion or stipulation and the Cash Collateral - Post Petition Financing Introductory Statement; to the best of my knowledge, information and belief, formed after reasonable inquiry, the terms of the relief sought in the motion or stipulation are in conformity with the Court's Guidelines For Cash Collateral And Financing Motions and Stipulations except as set forth above. I understand and have advised the debtor in possession or trustee that the court may grant appropriate relief under [Federal Rule of Bankruptcy Procedure 9024] if the court determines that a material element of the motion or stipulation was not adequately disclosed in the Introductory Statement."

(Guideline G.)

The court may grant appropriate relief under Federal Rule of Bankruptcy Procedure 9024 if it determines that the introductory statement did not adequately disclose a material element of the motion, stipulation, or agreement (Guideline D and see Practice Note, Withdrawal of the Reference: Reconsideration ([w-000-9965](#))).

Required Disclosures

The debtor must highlight and add to its list of material provisions certain provisions that it must identify in a DIP financing motion under Bankruptcy Rule 4001(c). The debtor must justify the inclusion of these provisions, and each of these provisions must reference their location within the proposed credit agreement and form of

order (see DIP Financing Motion Attachments and Contents). These provisions are:

- Provisions granting priority or a lien on property of the estate under sections 364(c) or (d) of the Bankruptcy Code (Guideline C.1).
- Provisions providing adequate protection or priority concerning a claim that arose before the commencement of the case, including:
 - the granting of a lien on property of the estate to secure the claim; or
 - the use of credit obtained under section 364 of the Bankruptcy Code to make cash payments on account of the claim.
- (Guideline C.2 and see Practice Note, DIP Financing: Overview: Increased Collateral Securing Prepetition Debt ([1-383-4700](#))).
- The court will not ordinarily approve cross-collateralization or roll-ups (Guideline E.1 and see Provisions Not Ordinarily Approved).
- Determinations concerning the validity, perfection, priority, or amount of a claim that arose before commencement of the case, or of any lien securing these claims (Guideline C.3). The court will not ordinarily approve these provisions (Guideline E.2 and see Provisions Not Ordinarily Approved).
- A waiver or modification of:
 - the provisions of the Bankruptcy Code or applicable rules relating to the automatic stay (Guideline C.4 and see Practice Note, Automatic Stay: Lenders' Perspective ([9-380-7953](#)) and Standard Clause, Waiver of Automatic Stay ([3-385-5433](#)));
 - any entity's authority to file a plan, to seek an extension of the debtor's exclusivity period, to request the use of cash collateral under section 363 of the Bankruptcy Code, or to request authority to obtain credit under section 364 of the Bankruptcy Code (Guideline C.5); and
 - the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate or on the foreclosure or other enforcement of the lien (Guideline C.6).
- The court will not ordinarily approve these provisions, except for waivers regarding an entity's authority to file a plan or to seek extensions of exclusivity (Guidelines E.8, E.9, and E.10 and see Provisions Not Ordinarily Approved).
- 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 commence an action (Guideline C.7); and
 - of any right under section 506(c) of the Bankruptcy Code (Guideline C.9 and see Practice Note, The Section 506(c) Surcharge on Collateral: Section 506(c) Waivers ([9-565-5645](#))). The court will not ordinarily approve section 506(c) waivers, unless they are effective only during the period in which the debtor is authorized to borrow funds (Guideline E.4 and see Provisions Not Ordinarily Approved).
- Indemnification of any entity (Guideline C.8).
- 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 that these liens secure claims for actual pecuniary loss).
- (Guideline C.10.) The court will not ordinarily approve these provisions (Guideline E.7 and see Provisions Not Ordinarily Approved).
- Provisions for carve-outs for professional fees and expenses (Guideline C.11 and see Practice Note, The Section 506(c) Surcharge on Collateral: Carve-Outs ([9-565-5645](#))). The court will not ordinarily approve:
 - carve-outs that provide for disparate treatment for creditors' committee professionals compared to the debtor's or trustee's professionals (Guideline E.12); and
 - inadequate carve-outs for a later appointed trustee in the case, whether before or after conversion (Guideline E.13).
- (See Provisions Not Ordinarily Approved.)

Provisions Not Ordinarily Approved

The court will not ordinarily approve:

- Cross-collateralization clauses and roll-ups (see Guideline E.1 and Practice Notes, DIP Financing: Overview: Increased Collateral Securing Prepetition Debt ([1-383-4700](#)) and Roll-Up DIP Financing ([1-386-8691](#))).
- Provisions or findings of fact that bind the estate or all parties in interest concerning:
 - the validity, perfection, or amount of the prepetition secured party's lien or debt (Guideline E.2); and
 - the relative priorities of the secured party's lien and liens held by persons who are not parties to the stipulation (Guideline E.3).
- Waivers of or grants of liens on rights under section 506(c) of the Bankruptcy Code, unless the waiver or grant is effective only during the period in which the debtor is authorized to borrow funds (Guideline E.4 and see Practice Note, The Section 506(c) Surcharge on Collateral: Section 506(c) Waivers ([9-565-5645](#))).
- Provisions that operate to divest the debtor or the trustee of any discretion to formulate a plan or administer the estate or limit access to the court to seek any relief under other applicable provisions of law (Guideline E.5).
- Releases of or limitations on liability for a creditor's alleged prepetition torts or breaches of contract (Guideline E.6).
- Waivers of or liens on any of the estate's rights arising under sections 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a) of

the Bankruptcy Code or the proceeds of any of these rights (Guideline E.7).

- Automatic relief from the automatic stay on:
 - default;
 - conversion to Chapter 7; or
 - appointment of a trustee.
- (Guideline E.8.)
- Waivers and modifications of the procedural requirements for foreclosure required under applicable nonbankruptcy law (Guideline E.9).
- Findings of fact unrelated to the approval process (for example, a finding that a lender acted in good faith in declaring the prepetition loan in default would be unacceptable) (Guideline E.11).
- Provisions providing unreasonable treatment concerning fees or professionals retained by a creditors' committee compared to any carve-outs provided for a professional retained by the debtor or the trustee (Guideline E.12).
- Provisions that provide an inadequate carve-out for a later appointed trustee in the case, whether before or after conversion (Guideline E.13).

Provisions Ordinarily Approved

The court will ordinarily approve:

- Termination of further financing on occurrence of a default or conversion to Chapter 7 (Guideline F.1).
- Provisions securing any postpetition diminution in the value of the secured party's collateral with a lien on postpetition collateral of the same type as the secured party had prepetition, if this lien is subordinated to the compensation and expense reimbursement (excluding professional fees) allowed to any trustee later appointed in the case (Guideline F.2).
- Provisions securing new advances or value diminution with a lien on other assets of the estate, but only if the lien is subordinated to all the expenses of administration (including professional fees) of a superseding Chapter 7 case (Guideline F.3).
- Reservations of rights under section 507(b) of the Bankruptcy Code, unless the stipulation calls for modification of the Bankruptcy Code's priorities in the event of a conversion to Chapter 7 (§ 726(b), Bankruptcy Code) (Guideline F.4 and see Practice Note, Protecting the Lenders' Interests in Bankruptcy: The Remedy of Adequate Protection: When Adequate Protection Fails ([8-382-8989](#))).
- Reasonable:
 - reporting requirements (Guideline F.5); and
 - budgets and use restrictions (Guideline F.6).
- An expiration date for the stipulation (Guideline F.7).

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 ([7-617-7678](#)).

LOCAL RULES

The N.D. Cal. does not have any local rules concerning 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 ([w-000-5994](#)) and First Day Relief: Debtor Checklist ([w-000-6011](#)).

LOCAL RULES

The N.D. Cal. does not have any specific rules relating to first day relief. However, the typical practice is to file a declaration in support of a Chapter 11 filing and first day motions as soon as possible and then contact the judge's chambers to arrange a hearing on the first day motions and related noticing procedures. Some judges also have particular practices and procedures concerning first day motions.

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 ([9-503-4934](#)) and Timeline of a Prepackaged Bankruptcy Case ([9-504-0794](#)).

LOCAL RULES

The N.D. Cal. has adopted Guidelines for Early Disposition of Assets in Chapter 11 Cases, Pre-Packaged Plans, The Sale of Substantially

All Assets Under section 363 (Prepack Guidelines) to deal with the increasing frequency of prepacks to dispose of substantially all assets of a Chapter 11 debtor shortly after the filing of the petition. The Prepack Guidelines are generally enforced, though technically not binding under N.D. Cal. Local Bankruptcy Court Rule 9029-1. Although they were adopted by the San Jose Division, they are widely used throughout the N.D. Cal.

In addition to any other required papers, the Prepack Guidelines require a declaration of counsel for:

- Debtor-in-possession (see Declaration of Counsel for Debtor-in-Possession).
- Creditors' committee (see Declaration of Counsel for Creditors' Committee).

Declaration of Counsel for Debtor-in-Possession

In requesting a special hearing to approve a disclosure statement or a combined hearing to approve a disclosure statement and confirm a plan, counsel for the debtor-in-possession should submit a declaration covering:

- Information regarding the retention of counsel, including:
 - the date counsel were retained by the debtor;
 - the approximate number of hours of professional time expended prepetition; and
 - the compensation paid to counsel prepetition, including the source of payment and approximate amount of accrued but unpaid compensation.
- (Prepack Guidelines ¶1(a).)
- A description of any written communications of the debtor with creditors (Prepack Guidelines ¶1(b)) or with shareholders or partners of a partnership (Prepack Guidelines ¶1(c)) during the prepetition reorganization process. Copies of letters should be attached (unless they contain confidential information, in which case they should be subject to in-camera inspection).
- If a creditors' committee existed prepetition, the date and manner in which the committee was formed (Prepack Guidelines ¶1(d)).
- If the prepetition creditors' committee retained counsel, the date counsel were engaged and the selection process (Prepack Guidelines ¶1(e)).
- The position of the US Trustee regarding the request for a special setting, if known, as it is expected that the US Trustee will be consulted before or simultaneously with the filing (Prepack Guidelines ¶1(f)).

Declaration of Counsel for Creditors' Committee

Where counsel have represented a prepetition creditors' committee and anticipate representing the official creditors' committee when appointed, counsel should submit a declaration covering:

- Information regarding the retention of counsel, including:
 - the date counsel were retained by the committee;
 - the approximate number of hours of professional time expended prepetition; and
 - the compensation paid to counsel prepetition, including the source of payment and approximate amount of accrued but unpaid compensation.

- (Prepack Guidelines ¶2(a).)
- A description of:
 - the scope and results of any investigation into the debtor's affairs conducted by the committee or its counsel (Prepack Guidelines ¶2(b));
 - any written communications of the committee or its counsel with creditors during the prepetition reorganization process. Copies of letters should be attached (unless they contain confidential information, in which case they should be subject to in-camera inspection) (Prepack Guidelines ¶2(c)); and
 - the committee's and counsel's involvement in the formulation of the plan and disclosure statement (Prepack Guidelines ¶2(d)).

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 \(0-616-6522\)](#).
- 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 \(8-616-5137\)](#).
- 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 \(8-616-5137\)](#)).

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 \(8-616-5137\)](#)).

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 \(8-616-5137\)](#)).

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 \(8-616-5137\)](#).

LOCAL RULES

The N.D. Cal. does not have any specific local rules for fee requests, but the court has [Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees \(Compensation](#)

Guidelines) that are generally enforced, though technically not binding under N.D. Cal. Local Bankruptcy Court Rule 9029-1. Compliance with these guidelines satisfies the requirements of the US Trustee (see US Trustee Operating Guidelines and Reporting Requirements).

The Compensation Guidelines include provisions for:

- Attorneys and other professionals, which address:
 - the narrative (see Narrative);
 - time records (see Time Records); and
 - expenses (see Expenses).
- Trustees (see Requirements for Trustees).

Narrative

The narrative should:

- Disclose the date of the order approving applicant's employment and include a statement itemizing:
 - the date of each prior request for compensation;
 - the amount requested;
 - the amount approved; and
 - the amount paid.
- (Compensation Guidelines I.1.)
- Briefly explain the history and present posture of the case. The narrative should describe:
 - the general operations of debtor;
 - whether the business of the debtor is being operated at a profit or loss;
 - the debtor's cash flow;
 - whether a plan has been filed and, if not, what the prospects are for reorganization and when it is anticipated that a plan will be filed and a hearing set on the disclosure statement; and
 - the amount of money on hand in the estate and the estimated amount of accrued expenses of administration. For interim fee applications, the applicant should orally supplement the application at the hearing to inform the court of any changes in the current financial status of the debtor's estate since the filing of the application.
- (Compensation Guidelines I.2.)
- This requirement does not apply to:
 - special counsel seeking compensation from a fund generated directly by their efforts;
 - auctioneers; or
 - real estate brokers or appraisers.
- In applications exceeding \$10,000 or when the professional's anticipated services for the case will exceed \$20,000, require separate discussion of projects by subject matter, with the number of billing categories guided by the total amount of fees and expenses sought in the case. Maximum amount per billing category is generally \$20,000, subject to exceptions where further breakdown is impractical. Miscellaneous items should not represent more than 15% of the fee request. For each billing category, professionals should set out:
 - the number of hours spent;
 - the results obtained;

- the amount of compensation and expenses requested; and
- time records by billing category.
- (Compensation Guidelines I.3.)
- Set out the aggregate hours and total compensation requested, itemized regarding each professional and paraprofessional providing compensable services (Compensation Guidelines I.4).

Fees may be sought for paralegals, professional assistants, and law clerks only if identified by title and if:

- The services for which compensation is sought would have had to be done by the professional if not done by a paraprofessional and would have been compensable under the Compensation Guidelines.
- The person who performed the services is specially trained or is a law school student, and is not primarily a secretary or clerical worker.
- The application includes a resume or summary of the paraprofessional's qualifications.

(Compensation Guidelines I.5.)

Reasonable fees for preparation of a fee application may be requested but cannot exceed 5% of the total amount of fees and costs requested in the application. The application must disclose:

- The aggregate number of hours spent.
- The amount requested.
- The percentage of the total request that the amount represents.

If the actual time spent will be reflected and charged in a future fee application, this fact should be stated but an estimate still provided. (Compensation Guidelines I.6.)

A debtor-in-possession, trustee, or official committee must exercise reasonable business judgment in monitoring fees and expenses of the estate's professionals. Billing statements should be sent to the employing entity on a monthly basis. A fee application must be sent to the employing entity at least 20 days before the scheduled hearing date. The application must be transmitted with a cover letter stating that:

"The court's Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees provide that a debtor in possession, a trustee or an official committee must exercise reasonable business judgment in monitoring the fees and expenses of the estate's professionals. We invite you to discuss any objections, concerns or questions you may have with us. The Office of the United States Trustee will also accept your comments. The court will also consider timely filed objections by any party in interest at the time of the hearing."

(Compensation Guidelines I.7.)

Each application must contain a certification by the professional designated by the applicant with the responsibility in the particular case for compliance with the Compensation Guidelines (a Certifying Professional) that:

- The Certifying Professional has read the application.
- To the best of the Certifying Professional's knowledge, information, and belief, formed after reasonable inquiry, the compensation

and expense reimbursement sought is in conformity with the Compensation Guidelines, except as specifically noted in the certification application.

- The compensation and expense reimbursement requested are billed at rates, according to practices, no less favorable than those customarily employed by the applicant and generally accepted by the applicant's clients.

(Compensation Guidelines I.8.)

Time Records

All professionals, except auctioneers, real estate brokers, appraisers, and those employed on a contingency fee basis, must:

- Keep accurate contemporaneous time records (though the court may direct that time records be kept on a contingent fee matter).
- Keep time records in minimum increments no greater than six minutes. Time entries must identify:
 - the person performing services;
 - the date performed;
 - what was done; and
 - the subject involved.
- Disclose the time spent on each task, if several separate tasks are performed on a single day (no grouping or clumping).

(Compensation Guidelines I.10-14.)

Professionals should be prepared to explain:

- Time spent in conferences with other professionals or paraprofessionals in the same firm. Failure to justify this time may result in disallowance of all fees related to these conferences (Compensation Guidelines I.15).
- The need for more than one professional or paraprofessional from the same firm at the same court hearing, deposition, or meeting. Failure to justify this time may result in compensation for only the person with the lowest billing rate. (Compensation Guidelines I.16.)

Airplane travel time is not compensable, but work actually done during a flight is compensable. If significant airplane travel time is expected in a case, specific guidelines should be obtained for that case. (Compensation Guidelines I.17.)

Time spent in addressing, stamping, and stuffing envelopes, filing, photocopying, or supervising any of the foregoing is not compensable, whether performed by a professional, paraprofessional, or secretary (Compensation Guidelines I.18).

Expenses

Policies and practices that apply to expenses under the Compensation Guidelines include that:

- All expenses for which reimbursement is sought must be of the kind and at the least expensive rate the applicant customarily charges nonbankruptcy or insolvency clients (Compensation Guidelines I.19).
- Documentation must be retained and made available on request for all expenditures above \$50.00 (Compensation Guidelines I.21).
- Reimbursement is only allowed for the amount paid to a third-party provider of goods or services without enhancement

for handling or other administrative charge (actual cost) (Compensation Guidelines I.20). Expenses that are reimbursable at actual cost include:

- computerized research (Compensation Guidelines I.24);
- outside photocopies (Compensation Guidelines I.28);
- postage (Compensation Guidelines I.29);
- overnight delivery, where shown to be necessary (Compensation Guidelines I.30);
- messenger service, where shown to be necessary (in-house messenger service is reimbursable, but the cost cannot exceed comparable services available from outside service) (Compensation Guidelines I.31);
- fax transmissions, on a per page basis. If the per page cost exceeds 20 cents, professionals must demonstrate to the satisfaction of the court that the per page cost represents a good faith estimate of the actual cost of copies, based on the purchase or lease cost of the fax machine and supplies, including space occupied by the machine but not including time spent in operating the machine (Compensation Guidelines I.32);
- long-distance telephone calls (Compensation Guidelines I.33);
- parking, but parking for professionals, paraprofessionals, or other staff members at the principal place of business is not reimbursable (Compensation Guidelines I.35);
- filing fees (Compensation Guidelines I.41);
- court reporter fees (Compensation Guidelines I.42);
- witness fees (Compensation Guidelines I.43);
- process service (Compensation Guidelines I.44); and
- UCC searches (Compensation Guidelines I.45).
- Expenses that are not reimbursable include:
 - office overhead, which includes secretarial time, secretarial overtime, word processing time, charges for after-hour and weekend air conditioning and other utilities, and cost of meals or transportation provided to professionals and staff who work late or on weekends (Compensation Guidelines I.22);
 - word processing (Compensation Guidelines I.23);
 - automotive transportation of one hour or less round-trip. Travel expenses for trips over one hour round-trip is reimbursable according to the amount allowed by the Internal Revenue Service (Compensation Guidelines I.34);
 - the cost of lunch while a party is away from the Bay Area or in the Bay Area from another city. Reimbursement may be sought for the reasonable cost of breakfast and dinner while traveling (Compensation Guidelines I.38);
 - working meals at restaurants or private clubs. Reimbursement may be sought for working meals only where food is catered to the professional's office during a meeting with clients for allowing the meeting to continue through a normal meal period (Compensation Guidelines I.39); and
 - charges for entertainment, alcoholic beverages, newspapers, dry cleaning, shoe shines, and similar expenses (Compensation Guidelines I.40).
- Paraprofessional services may be compensated as a paraprofessional under section 330 of the Bankruptcy Code

but not charged or reimbursed as an expense (Compensation Guidelines I.25).

- A professional employed under section 327 of the Bankruptcy Code may not employ and charge as an expense another professional (for example, counsel employing an expert witness) unless the court approves the employment of the second professional before the rendering of services (Compensation Guidelines I.26).
- Internal photocopy charges must be disclosed on an aggregate and per page basis. If per page cost exceeds 20 cents, the professional must demonstrate to the satisfaction of the court that the per page cost represents a good faith estimate of the actual cost of copies, based on the purchase or lease cost of the copy machine and supplies, including the space occupied by the machine but not including the time spent in operating the machine (Compensation Guidelines I.27).
- Air travel is expected to be at regular coach fare for all flights (Compensation Guidelines I.36).
- All persons must exercise discretion and prudence regarding hotel expenditures (Compensation Guidelines I.37).

Requirements for Trustees

Trustees must maintain contemporaneous time records in every case. Time records must be maintained by project categories. At a minimum, project categories should include:

- Assets Recap (asset analysis and recovery/asset disposition).
- Investigation of Financial Affairs of the Debtor.
- Claims Administration and Objections.
- Fee Applications.

Trustees may add additional categories at their discretion.

Trustees are also subject to Compensation Guidelines 4, 5 (subject to section 326 of the Bankruptcy Code), 10, 12, 13, and 19 to 45 (dealing with expenses) (Compensation Guidelines II).

If a trustee's compensation request is anticipated to be \$25,000 or less, a trustee may submit:

- A brief narrative description of the services performed.
- A statement of the amount of time spent.

In cases in which the final compensation exceeds \$25,000 or where an interim request is made and it is anticipated that the total compensation requested will exceed \$25,000, the trustee's application must:

- Include:
 - time records; and
 - a brief narrative description of the services performed.
- Comply with Compensation Guidelines 4, 5 (subject to section 326 of the Bankruptcy Code), 10, 12, 13, and 19 to 45 (dealing with expenses).

(Compensation Guidelines II.)

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* ([0-616-6522](#)).

LOCAL RULES

The N.D. Cal. does not have any local rules that directly relate to professional retention applications.

REMOVAL, REMAND, 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 a district court having jurisdiction, where it can then be transferred to the bankruptcy court, if appropriate (28 U.S.C. §§ 1441, 1446, 1452(a)). After removal, on motion of a non-removing party, the court can remand the matter back to state court or the court (28 U.S.C. §§ 1447, 1452(b)), 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 (28 U.S.C. § 1334).

For more information on removal, remand, and abstention in bankruptcy cases, see Practice Note, *Notice of Removal, Remand, and Abstention in Bankruptcy* ([w-000-7148](#)).

LOCAL RULES

N.D. Cal. Local Bankruptcy Court Rule 9027-1 requires that:

- A notice of removal contain a statement that on removal of the claim or cause of action, the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy court.
- Any other party file a statement indicating whether they do or do not consent to entry of final orders or judgment by the bankruptcy court as required by Federal Rule of Bankruptcy Procedure 9027(e)(3).

N.D. Cal. Local Bankruptcy Court Rule 9015-2(f) provides that nothing in N.D. Cal. Local Bankruptcy Court Rule 9015-2 (concerning jury trials and personal injury and wrongful death claims) should be construed to preclude entry of any order of remand or abstention.

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 ([w-000-9982](#))).
- Aggregating, sorting, and analyzing proofs of claims.
- Assisting with the reconciliation of claims and the analysis of executory contracts and unexpired leases, including such issues 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 ([w-001-1117](#)).

LOCAL RULES

The N.D. Cal. does not have any special rules relating to claims agents.

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 of *pro hac vice* admission.

LOCAL RULES

Counsel not admitted to practice in California may be admitted to practice in N.D. Cal. by submitting a hard copy *pro hac vice* application to the district court clerk, including:

- The admission fee.
- A proposed order.
- An oath.
- A certificate of good standing issued by the authority governing attorney admissions for the applicant's relevant bar and dated within one year before the date of application.

(N.D. Cal. L. Civ. R. 11-3(a).)

The court's website contains further instructions for *pro hac vice* admission.

Counsel admitted *pro hac vice* to practice in N.D. Cal. must:

- Obtain local counsel (N.D. Cal. L. Civ. R. 11-3(a)(3)).
- Indicate appearance *pro hac vice* in all papers filed (N.D. Cal. L. Civ. R. 11-3(e)).

Pro hac vice admission is prohibited for an attorney who resides in or regularly practices law in California (N.D. Cal. L. Civ. R. 11-3(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 unexpired 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 and any applicable local bankruptcy court rules.

For more information on section 363 sales, see Practice Note, *Buying Assets in a Section 363 Bankruptcy Sale: Overview* ([1-385-0115](#)), *Timeline of a Section 363 Sale* ([3-385-0751](#)), and Article, *Strategies for Purchasing and Selling Assets in Chapter 11* ([w-001-4106](#)).

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).

Additionally, courts have 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 *Committee 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* ([1-385-0115](#))). 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* ([1-385-0115](#)).

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* ([3-616-3701](#)).

Bankruptcy Rule 2002 Notice Requirements

Bankruptcy Rule 2002 sets out notice requirements for a section 363 sale 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); and
- 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).

Bankruptcy Rule 6004 Requirements

Bankruptcy Rule 6004 sets out requirements for:

- **Notice.** Notice of a proposed sale of estate property outside the ordinary course of business, other than cash collateral, 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 (3-610-4108)); 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 (3-616-3701).

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), (b)(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 ([8-381-2672](#)).

LOCAL RULES

N.D. Cal. Local Bankruptcy Court Rule 6004-1 contains provisions governing a motion to sell free and clear of liens under section 363(f) of the Bankruptcy Code, including:

- Requiring that the motion identify by name, immediately below the caption, the lienholders and other interest holders whose property rights are affected by the motion who must be served with a complete set of moving papers (Bankr. N.D. Cal. R. 6004-1(a)).
- Requiring that the motion identify the applicable subsections of section 363(f), supported by a competent declaration setting out the factual basis (Bankr. N.D. Cal. R. 6004-1(b)).
- Providing that a motion to sell property under section 363(b) may be combined with a motion to sell free and clear of liens (Bankr. N.D. Cal. R. 6004-1(c)).
- Requiring that the order granting a motion to sell free and clear of liens specify each lienholder whose interest is to be affected by the order (Bankr. N.D. Cal. R. 6004-1(d)).

The court also has:

- Guidelines for the Sale of Substantially All Assets Under § 363 Within 60 Days of the Filing of the Petition (Sale Guidelines), which were adopted by the San Jose Division but are widely used throughout the N.D. Cal.
- Guidelines re: Sale Orders (Sale Order Guidelines).

These guidelines are not binding under N.D. Cal. Local Bankruptcy Court Rule 9029-1 but are generally enforced by courts.

The Sale Guidelines require a declaration of:

- Counsel for debtor-in-possession (see Declaration of Counsel for Debtor-in-Possession).
- Responsible individual for debtor-in-possession (see Declaration of Responsible Individual for Debtor-in-Possession).
- Counsel for creditors' committee (see Declaration of Counsel for Creditors' Committee).

Declaration of Counsel for Debtor-in-Possession

Regarding any hearing to approve the sale of substantially all assets within 60 days of the petition date, a declaration by counsel for the debtor-in-possession should support the request for the

special setting of hearing or the sale motion itself, when regularly noticed, covering:

- Information regarding the retention of counsel, including:
 - the date counsel were retained by the debtor;
 - the approximate number of hours of professional time expended prepetition; and
 - the compensation paid to counsel prepetition, including the source of payment and approximate amount of accrued but unpaid compensation.
- (Sale Guidelines ¶3(a).)
- A description of any written communications of the debtor with creditors (Sale Guidelines ¶3(b)) or with shareholders or partners of a partnership (Sale Guidelines ¶3(c)) during the prepetition reorganization process. Copies of letters should be attached (unless they contain confidential information, in which case they should be subject to in-camera inspection).
- If a creditors' committee existed prepetition, the date and manner in which the committee was formed (Sale Guidelines ¶3(d)).
- If the prepetition creditors' committee retained counsel, the date counsel was engaged and the selection process (Sale Guidelines ¶3(e)).
- All contingencies to the sale agreement, with a copy of the agreement (Sale Guidelines ¶3(f)).
- If no creditors' committee has been formed yet, a list of contact persons together with fax and phone numbers for each of the largest 20 unsecured creditors (Sale Guidelines ¶3(g)).
- Assuming the sale is approved, an estimate of administrative debts to be incurred before closing and the source of payment for these debts (Sale Guidelines ¶3(h)).
- An estimate of the gross sale proceeds and net sale proceeds, along with an explanation of items making up the difference (Sale Guidelines ¶3(i)).
- A brief description of the debtor's debt structure, including the amount of secured debt, priority claims, and general unsecured claims (Sale Guidelines ¶3(j)).
- A statement of likely distribution of sale proceeds to each of:
 - the secured claimants;
 - the administrative claimants;
 - the priority claimants; and
 - the general unsecured creditors.
- (Sale Guidelines ¶3(k).)

Declaration of Responsible Individual for Debtor-in-Possession

The declaration of responsible individual for debtor-in-possession should accompany the declaration of counsel for debtor-in-possession (see Declaration of Counsel for Debtor-in-Possession). The declaration of responsible individual:

- Describes the efforts, if any, to pursue other alternatives, such as financing or capital infusion, including the period of time involved and the results achieved (Sale Guidelines ¶4(a)).
- Describes the manner in which the assets were marketed for sale, including the period of time involved and results achieved (Sale Guidelines ¶4(b)).

- States the date on which the debtor accepted the offer to purchase its assets (Sale Guidelines ¶4(c)).
- Discloses the debtor's prior valuations within the last year of assets to be sold, if any (for example, book value, appraisals, and financial statements) (Sale Guidelines ¶4(d)).
- Identifies the buyer and sets out all of the buyer's (including its officers, directors, and shareholders) 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.
- (Sale Guidelines ¶4(e).)
- Describes any relationship or connection the debtor (including its officers, directors, and shareholders) will have with the buyer after the consummation of the sale, assuming it is approved (Sale Guidelines ¶4(f)).
- Discloses all connections between the debtor's officers, directors, employees, or other insiders and each secured creditor involved (for example, release of insider's guarantee), if the sale involves the payment of all or a portion of secured debt (Sale Guidelines ¶4(g)).
- Discloses current compensation received by officers, directors, key employees, or other insiders pending approval of the sale (Sale Guidelines ¶4(h)).

Declaration of Counsel for Creditors' Committee

Where counsel have represented a prepetition creditors' committee and anticipate representing the official creditors' committee when appointed, counsel should submit a declaration covering:

- Information regarding the retention of counsel, including:
 - the date counsel were retained by the committee;
 - the approximate number of hours of professional time expended prepetition; and
 - the compensation paid to counsel prepetition, including the source of payment and approximate amount of accrued but unpaid compensation.
- (Sale Guidelines ¶5(a).)
- A description of:
 - the scope and results of any investigation into the debtor's affairs conducted by the committee or its counsel (Sale Guidelines ¶5(b));
 - any written communications of the committee or its counsel with creditors during the prepetition reorganization process. Copies of letters should be attached (unless they contain confidential information, in which case they should be subject to in-camera inspection) (Sale Guidelines ¶5(c)); and
 - the committee's and counsel's involvement in the negotiation of the sale (Sale Guidelines ¶5(d)).

Other Sale Guidelines

In addition to requiring the various declarations, the Sale Guidelines also provide that:

- Unless the court orders otherwise:
 - all sales governed by the Sale Guidelines, including auctions or the presentation of competing bids, will occur at the hearing before the court (Sale Guidelines ¶6);
 - any competing bidder must be prepared to demonstrate to the court's satisfaction its ability to consummate the transaction if it is the successful bidder (Sale Guidelines ¶10); and
 - each overbid must be at least 5% more than the amount of the original offer, which is determined without regard to any commission or payment to a broker or agent (Sale Guidelines ¶11).
- A proposed order approving the sale should be provided to chambers 24 hours before the hearing (Sale Guidelines ¶7).
- There must be an evidentiary basis for a finding of good faith under section 363(m) of the Bankruptcy Code, which can be presented in the form of a declaration from the prospective purchaser (Sale Guidelines ¶8).
- Competing bids can be presented at the time of the hearing, unless the court orders otherwise (Sale Guidelines ¶9).
- Whether labeled as liquidated damages, break-up fees, topping fees, or other designations, no damages of any kind are payable to a prospective purchaser or its agents, absent court approval, and:
 - if the parties intend to seek separate court approval of a damages provision contained in the original purchase agreement, the provision should provide that it can be approved separately from the agreement itself; and
 - a request for the approval of a damages provision must be supported by, in addition to any other required papers, a declaration from the debtor's counsel setting out the precise conditions under which damages would be payable and the factual basis on which the seller determined the provision was reasonable. Counsel for the proposed buyer may but is not required to submit a similar declaration.
- (Sale Guidelines ¶12.)

Notice Regarding Sale

Sale Guidelines Paragraph 6 provides that, in addition to any other matters normally set out in a notice of sale, the notice to creditors and interested parties of the sale motion should include:

- Assuming the sale is approved, an estimate of administrative debts to be incurred before closing and the source of payment for these debts.
- An estimate of the gross sale proceeds and net sale proceeds, along with an explanation of items making up the difference.
- A brief description of the debtor's debt structure, including the amount of secured debt, priority claims, and general unsecured claims.
- A statement of likely distribution of sale proceeds to each of:
 - the secured claimants;
 - the administrative claimants;
 - the priority claimants; and
 - the general unsecured creditors.
- All of the information provided in the declaration of responsible individual for debtor-in-possession (see Declaration of

Responsible Individual for Debtor-in-Possession), except for insider compensation.

Sale Order Guidelines

The court's Sale Order Guidelines include provisions (along with a link to a model sale order) stating that:

- The order should be simple and needs identify only:
 - the property to be sold;
 - the purchaser; and
 - the general terms of sale.
- (Sale Order Guideline B.1.)
- The order should not include findings of fact or conclusions of law (other than as allowed by the Sale Order Guidelines), which should instead either be stated orally on the record (typical practice) or in a separate statement of findings of fact and conclusions of law, memorandum, or opinion (unusual) (Sale Order Guideline B.2).
- The purchaser's right to approve the form of sale order cannot be exercised to require a form of order inconsistent with the Sale Order Guidelines (Sale Order Guideline B.3).
- The court will generally approve in the sale order:
 - a finding that notice of the motion was proper and adequate given the circumstances;
 - a finding that a purchaser is in good faith and entitled to the protections of section 363(m) of the Bankruptcy Code, where this request is supported by competent evidence, where creditors have been given notice that this finding will be requested, and where there are no objections to the request or all objections have been overruled;
 - a provision approving the sale as the highest and best offer;
 - a provision addressing any back-up bids, as necessary or appropriate;
 - a provision granting the motion and authorizing the debtor or trustee to enter into the purchase and sale agreement on behalf of the estate;
 - a provision authorizing the debtor or trustee to execute the purchase and sale agreement and to undertake other actions as may be reasonably necessary to complete the sale;
 - a provision authorizing the debtor or trustee to pay any closing costs, broker's fees, or commissions as requested in the motion;
 - a provision authorizing the debtor or trustee to pay the amounts secured by any liens that are not in dispute and authorizing the debtor or trustee to file or record termination statements, instruments of satisfaction, releases of liens, and any other documents necessary for documenting the release of specified liens;
 - a provision that the sale is on an "as is, where is" and "with all faults" basis;
 - a provision that the purchase and sale agreement and related documents or instruments may be modified, amended, or supplemented by the parties without further order of the court, if the modification, amendment, or supplement does not have a material adverse effect on the estate;
 - a provision waiving any applicable stay under Federal Rule of Bankruptcy Procedure 6004(h) on a proper showing of cause; and
- a provision reserving bankruptcy court jurisdiction to implement the sale, enforce the sale order, or resolve any disputes arising regarding or related to the sale.
- (Sale Order Guideline B.4.)
- Any bidder that intends to request that the court make a finding under section 363(m) of the Bankruptcy Code that the bidder's purchase of assets or assignment to it of an executory contract or unexpired lease is in good faith must, by a date set by the court, file with the court and serve as required by the court a written declaration of a competent witness demonstrating the bidder's good faith and the absence of fraud or collusion between the bidder and any other bidder or between the bidder and the debtor's or the estate's agents or employees. The declaration must also disclose any facts material to the good faith determination, including:
 - the bidder's pre- and postpetition relationships with any other bidder, the debtor or the debtor's current or former officers, directors, agents, or employees, and any of the debtor's major creditors or equity security holders;
 - the bidder's anticipated relationship after the sale with any of the debtor's current or former officers, directors, agents, or employees;
 - whether any offers of employment or compensation have been or will be made to any of the debtor's current or former officers, directors, agents, or employees; and
 - whether the bidder has paid or contemplates paying consideration regarding the sale to any person other than the debtor.
- (Sale Order Guideline B.5.)
- The court generally will not approve in a sale order any provision that:
 - incorporates the terms of any written or oral agreement into the order or directs the debtor or trustee to perform any act, other than executing the sale agreement and as may be reasonably necessary to complete the sale;
 - purports to exempt the transaction from transfer taxes under section 1146(c) of the Bankruptcy Code;
 - purports to grant a purchaser an administrative claim concerning a breach of the purchase and sale agreement by the debtor or trustee (while recognizing that a purchaser may be entitled to an administrative claim for any damages resulting from this breach);
 - purports to grant declarative or injunctive relief, except as expressly permitted by the Sale Order Guidelines; or
 - purports to excuse any party from complying with applicable state or federal law.
- (Sale Order Guideline B.6.)
- A motion to sell free and clear under section 363(f) of the Bankruptcy Code may be added to a motion for authority to sell assets under section 363(b) (Sale Order Guideline C.1).
- A motion to sell free and clear must:
 - identify each lienholder or other party claiming a property right in the assets to be sold;
 - be served on each lienholder or party that is to be affected;

- expressly state the grounds for relief under section 363(f) concerning each lien, claim, or interest to be affected; and
 - comply with N.D. Cal. Local Bankruptcy Court Rule 6004-1.
- (Sale Order Guideline C.2.)
- The court will grant a motion to sell free and clear only where there is a genuine case or controversy (that is, evidence that the party to be affected actually asserts a lien, claim, or other interest that would follow the property into the hands of the purchaser absent an order from the court). This requirement is generally satisfied by any written instrument purporting to be a security interest, whether recorded or not. Other types of liens, claims, and interests may require more detailed proof. (Sale Order Guideline C.3.)
- An order for sale free and clear of liens and interests must:
- identify with particularity the parties to be affected and the liens, claims, and interests to be affected; and
 - provide that any affected property interest, such as a lien or other interest, is transferred to the proceeds of the sale with the same force, effect, validity, and priority that this property interest had against the assets sold.
- (Sale Order Guideline C.4.)
- The court will generally not approve a blanket order that purports to provide for a sale free and clear of all liens, claims, and interests, or free and clear of all liens, claims, and interests of all parties that were served with the motion (Sale Order Guideline C.5).
- An order authorizing a sale free and clear of liens may contain language providing that, under the order and section 363(f) of the Bankruptcy Code, completion of the sale will vest the property in the purchaser free and clear of the liens, claims, and interests of the affected parties and providing that the affected parties are barred from asserting their affected liens, claims, and interests against the purchaser or the property (Sale Order Guideline C.6).
- The court will generally not approve in an order for sale free and clear any provision:
- that purports to disallow a lien, claim, or interest (as opposed to ordering sale free and clear with the lien, claim, or interest to attach to the proceeds);
 - that purports to bar successor liability claims without a showing of a specific threat of this claim by an identified party; or
 - for injunctive relief.
- (Sale Order Guideline C.7.)

The Sale Order Guidelines also address motions to value secured claims (Sale Order Guidelines D.1-3).

The Sale Order Guidelines also include Guidelines for Motions to Assume and Assign Executory Contracts or Unexpired Leases, which provide that:

- The hearing on a motion to assume and assign executory contracts or unexpired leases under section 365 of the Bankruptcy Code may be combined with a separate motion for authority to sell under section 363(b) and must comply with N.D. Cal. Local Bankruptcy Court Rule 6006-1 (Sale Order Guideline E.1).
- The motion must be served on each affected party to the contract, unexpired lease, or other agreement to be assumed or assigned (Sale Order Guideline E.2).

- The court will generally approve provisions:
 - identifying the contracts, leases, or other agreements that are the subject of the motion;
 - determining the cure amount for each contract, lease, or other agreement or establishing a procedure for the determination of cure amounts, if proper notice has been given and the other requirements of section 365 are satisfied;
 - that relieve the estate from any liability for any breach of an assigned contract, lease, or other agreement that occurs after the assignment according to section 365(k) of the Bankruptcy Code; and
 - waiving any applicable stay under Federal Rule of Bankruptcy Procedure 6006(d) on a proper showing of cause.
- (Sale Order Guideline E.3.)

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 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 ([0-617-4008](#)).

LOCAL RULES

Proofs of claim or interest must be filed within 90 days after the first date set for the meeting of the creditors unless otherwise ordered by the court and except as provided in Federal Rule of Bankruptcy Procedure 3003(c)(3) (Bankr. N.D. Cal. R. 3003-1). If the claimant is a government unit, the proof of claim or interest must be filed before 180 days after the date of the order for relief or at a later time as the Federal Rules of Bankruptcy Procedure may provide.

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

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 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 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* ([w-000-9965](#)).

LOCAL RULES

A motion to withdraw the reference is filed with the bankruptcy court clerk, who then transmits the motion to the district court, with a copy to the assigned bankruptcy judge (Bankr. N.D. Cal. R. 5011-2(a)).

A bankruptcy judge may, on its own motion, recommend to the district court whether the case or proceeding should be withdrawn under 28 U.S.C. Section 157(d) (Bankr. N.D. Cal. R. 5011-2(b)).

N.D. Cal. Local Bankruptcy Court Rule 5011-2(c) provides procedures for a motion for withdrawal of the reference to be assigned to a particular district judge, with notification to the parties.

Unless the assigned district judge orders otherwise:

- Within 14 days after receiving notice of assignment to a district judge, any party objecting to withdrawal of the reference must file in the district court its opposition brief of not more than ten pages.
- Within 14 days thereafter, any party supporting withdrawal of the reference may file a reply brief of not more than ten pages.
- No hearing will be held.

(Bankr. N.D. Cal. R. 5011-2(d).)

A withdrawn case or proceeding is assigned to the district judge who ordered the withdrawal of the reference (Bankr. N.D. Cal. R. 5011-2(e)).

In an adversary proceeding, the bankruptcy court will, on its own motion or a party's timely motion, determine whether the proceeding is one in which the bankruptcy court may enter a final order or judgment (Bankr. N.D. Cal. R. 7016-2).

Jury Trials and Personal Injury and Wrongful Death Claims

If the bankruptcy judge determines that a party makes a timely demand for a jury trial and has a right to a jury trial, and if all parties have not filed written consent to a jury trial before the bankruptcy judge, then the bankruptcy judge must, after having resolved all pretrial matters, including dispositive motions:

- Certify to the district court that:
 - the proceeding is to be tried by a jury; and

- the parties have not consented to a jury trial in the bankruptcy court.
- Provide a report of the status of the proceeding and a recommendation on when the matter would be suitable for withdrawal from the bankruptcy court.

(Bankr. N.D. Cal. R. 9015-2(b).)

After certification, the party who has demanded a jury trial must promptly file a motion for withdrawal of the reference of the proceeding to be tried to a jury according to N.D. Cal. Local Bankruptcy Court Rule 5011-2(a). The motion and certification are then handled in the district court according to N.D. Cal. Local Bankruptcy Court Rule 5011-2(c), (d), and (e).

If the bankruptcy judge determines (on timely motion of a party or its own motion) that a claim is a personal injury or tort or wrongful death claim requiring trial by a district court, then the bankruptcy judge must, after having resolved all pretrial matters, including dispositive motions:

- Certify to the district court that the claim requires trial in the district court under 28 U.S.C. Section 157(b)(5).
- Provide a report of the status of the proceeding and a recommendation on when the matter would be suitable for withdrawal from the bankruptcy court.

(Bankr. N.D. Cal. R. 9015-2(d).)

After certification, the claimant must promptly file a motion for withdrawal of the reference of the proceeding according to N.D. Cal. Local Bankruptcy Court Rule 5011-2(a). The motion and certification are then handled in the district court according to N.D. Cal. Local Bankruptcy Court Rule 5011-2(c), (d), and (e).

OTHER TOPICS

APPEARANCES OF CORPORATION OR PARTNERSHIP THROUGH COUNSEL

Entities that cannot appear as a party in an adversary proceeding, in a contested matter, or as debtor in a bankruptcy case except through counsel admitted to practice in N.D. Cal. include:

- A corporation.
- A partnership.
- Any other entity other than a natural person.

(Bankr. N.D. Cal. R. 9010-1(a).)

Petitions and pleadings from parties who are not individuals must bear the signature of an attorney (Bankr. N.D. Cal. R. 9010-1(a)).

BANKRUPTCY DISPUTE RESOLUTION PROGRAM

N.D. Cal. Local Bankruptcy Court Rule 9040-1 to N.D. Cal. Local Bankruptcy Court Rule 9050-1 contain detailed procedures regarding the bankruptcy court's Bankruptcy Dispute Resolution Program.

GUIDELINES FOR VALUING AND AVOIDING LIENS IN INDIVIDUAL CHAPTER 11 AND CHAPTER 13 CASES

The court has Guidelines for Valuing and Avoiding Liens in Individual Chapter 11 Cases and Chapter 13 Cases, which are generally enforced, though technically not binding under N.D. Cal. Local Bankruptcy Court Rule 9029-1.

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 17 serves the federal bankruptcy courts located in the states of:

- California (Northern and Eastern Districts).
- Nevada.

This Note discusses the general operating guidelines and procedural requirements enacted by the US Trustee for Region 17 (Region 17 Guidelines) as they apply to Chapter 11 cases filed in the N.D. Cal.

The US Trustee's operating guidelines covering cases filed in the N.D. Cal. are publicly available and can be obtained from the website for the US Trustee's office for Region 17 (see US Trustee Operating Guidelines, Region 17).

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 ([w-000-5977](#)).

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 N.D. Cal. 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 ([w-000-5977](#))). These guidelines may be waived on request to the US Trustee.

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
Books and Records	<p>The debtor must:</p> <ul style="list-style-type: none"> ■ Close books and records the day immediately before the commencement of the case and open a new set of books and records. ■ Provide a copy of the closing balance sheet and income statement to the US Trustee with the first monthly operating report. <p>(See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Postpetition Books and Records (w-000-5977)).</p>
Bank Accounts	<p>The debtor must:</p> <ul style="list-style-type: none"> ■ Close all prepetition financial accounts and open new debtor-in-possession accounts to be used for all transactions during the pendency of the case. ■ Provide to the US Trustee proof of the establishment of the debtor-in-possession accounts within 15 days of the commencement of the case and immediately after the opening of additional accounts. Acceptable proof of establishment of a debtor-in-possession account includes: <ul style="list-style-type: none"> • a copy of the signature card; • a check imprinted with the "debtor in possession" designation; or • a current bank statement imprinted with the "debtor in possession" designation. ■ Maintain all accounts in depositories that are on the US Trustee List of Cooperating Depositories unless the debtor obtains prior written approval from the US Trustee to use a non-cooperating bank. A list of the qualifying depositories may be obtained from the US Trustee. ■ Establish one or more general accounts and other accounts as necessary (for example, payroll) for continued operations. Any debtor required to pay taxes must maintain a separate tax account to segregate all withholding, social security (both employees' and employer's portions), excise, and agricultural taxes or other monies collected, received, or withheld for or on behalf of the US or other taxing authorities.

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
	<ul style="list-style-type: none"> ■ Within 15 days of the commencement of the case, provide to the US Trustee a copy of all check registers covering the 90-day period before the commencement of the case for each account. The debtor must, on request of the US Trustee, provide for inspection original check registers, bank statements, and canceled checks. ■ Within 45 days after the commencement of the case, provide to the US Trustee a copy of the first postpetition bank statement for each financial account that existed before case commencement showing the account was closed or transferred to a debtor-in-possession account. <p>All bank signature cards must state that the debtor is a “Debtor in Possession.”</p> <p>(See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Bank Accounts (w-000-5977.)</p>
Insurance	<p>The debtor must:</p> <ul style="list-style-type: none"> ■ Obtain or maintain sufficient insurance coverage to protect assets of the estate. “Sufficient insurance” means insurance that is sufficient to cover the full value of assets, not just the amount of any secured interest. ■ Obtain or maintain certain insurance coverage, as appropriate, including: <ul style="list-style-type: none"> • general liability; • casualty; • vehicle; • worker’s compensation (see Practice Note, Workers’ Compensation: Common Questions (0-504-9497)); • unemployment; • employee health; • malpractice; • products liability; • liquor or dram shop; and • homeowner’s insurance. ■ Within 15 days of case commencement, provide to the US Trustee copies of the declaration pages of all applicable insurance policies or binders, and the expiration date for each, showing debtor as named insured of a current policy. ■ Provide to the US Trustee updated proof of insurance as policies expire by attaching copies of the new declaration page to the Monthly Operating Report. ■ Immediately notify the US Trustee in writing of any changes in insurance coverage. <p>(See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Insurance (w-000-5977.)</p>
Taxes	<p>The debtor must:</p> <ul style="list-style-type: none"> ■ Within 15 days of case commencement, provide the US Trustee with copies of its federal income tax returns (including all schedules and attachments) for the prior two years. The debtor must timely file all applicable tax returns during pendency of the case and contemporaneously provide the US Trustee with a copy of each return. ■ File with the monthly operating report a verified statement for the preceding calendar month showing: <ul style="list-style-type: none"> • the amounts collected, received, or deducted for each taxing agency; • the total amount expended for gross payroll; • the amount received from gross sales; and • the amount paid to each taxing agency and dates of payments. <p>Under the standing bankruptcy court order for payment of state and federal taxes that is routinely issued in Chapter 11 cases, the debtor must:</p> <ul style="list-style-type: none"> ■ Segregate and hold separate and apart from all other funds all: <ul style="list-style-type: none"> • withholding; • social security (both employees’, and employer’s portions); and • excise and agricultural taxes or other monies collected, received, or withheld for or on behalf of the US or the State of California.

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
	<ul style="list-style-type: none"> ■ Submit proof of timely payment of the amounts owing under the preceding paragraph to the Internal Revenue Service. The debtor must pay: <ul style="list-style-type: none"> • taxes arising out of payment of wages or salaries within seven days after the debtor has paid such salaries or wages; and • all other taxes within seven days after the last day of each calendar month or within a shorter period as the court may order on ex parte application of the US. ■ Proof of payment must be made to: Internal Revenue Service, Attention: Insolvency-1400S, 1301 Clay Street, Oakland, California 94612.5217, Fax no. 510.637.2896. ■ Make timely payments to State of California, Department of Benefit Payments, of all unemployment insurance, disability insurance, and withheld State of California personal income taxes within seven days after the debtor has paid wages or salaries creating the tax obligations. Payment of the taxes must be made to Chief, Tax Collection Section, Employment Development Department, P.O. Box 82603, Sacramento, California 94230. ■ Make timely payment to State of California, Board of Equalization, of all sales and use taxes which are due to it, at the time required by law, and make timely payment to State of California, Franchise Tax Board, of all income taxes that are due to it, at the time required by law. ■ File all federal and state tax returns on a timely basis. Federal returns must be filed with the Internal Revenue Service, Attention: Insolvency - 1400S, 1301 Clay Street, Oakland, California 94612.5217, fax no. 510.637.2896. Returns to be filed with the State of California, California Department of Benefit Payments, must be filed at the address shown above. Returns to be filed with the California Board of Equalization and Franchise Tax Board must be filed where required by law. ■ File with the court on or before the 20th day of each month a verified statement for the preceding calendar month showing: <ul style="list-style-type: none"> • the amounts collected, received, or deducted for each taxing agency; • the total amount expended for gross payroll; • the amount received from gross sales; and • the amount paid to each taxing agency and dates of payments. On filing, a copy of each monthly statement must be transmitted to the Internal Revenue Service and California Department of Benefit Payments at the addresses shown above.
	<p>(See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Taxes (w-000-5977)).</p>

FIRST MONTH REQUIREMENTS

The following table summarizes the US Trustee guidelines for Chapter 11 cases filed in the N.D. Cal. concerning a debtor's Chapter 11 obligations and reporting requirements during the first month of a case.

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
Real Property Questionnaire	Within 15 days of case commencement, the debtor must provide to the US Trustee a completed Real Property Questionnaire for each property in which debtor has an interest. If it is rental property, rent roll must be included.
Accounts Receivable	Within 15 days of case commencement, the debtor must provide the US Trustee with an aging report regarding debtor's accounts receivable.
Inventory	Within 15 days of case commencement, the debtor must provide the US Trustee with a complete inventory.
Employees	<p>The debtor must provide to the US Trustee with its first Chapter 11 monthly operating report a list of all employees at the time of case commencement, including each employee's:</p> <ul style="list-style-type: none"> ■ Name. ■ Position. ■ Salary. <p>Waiver of this requirement may be discussed at the initial debtor interview (see Initial Debtor Interview).</p>

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
Disclosure of Insider Transactions	<p>The debtor must promptly disclose in writing to the US Trustee any present or proposed material transactions in which insiders have any interest during the pendency of the case. The disclosure must identify:</p> <ul style="list-style-type: none"> ■ The insider. ■ The insider's affiliation with the debtor. ■ The proposed transaction. ■ The nature of the insider's interest in the transaction.
Designation of Responsible Individual	<p>If the debtor is not an individual, it must:</p> <ul style="list-style-type: none"> ■ Designate a natural person to be responsible for the duties and obligations of the debtor. ■ Provide to the US Trustee the name, address, telephone number, and position of this person within 15 days of case commencement or immediately after any change in the designation. <p>There are comparable requirements in N.D. Cal. Local Bankruptcy Court Rule 4002-1, which requires the debtor to file an application and proposed order appointing a responsible individual.</p>

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. 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 ([w-000-5977](#))).

In the N.D. Cal., the debtor must attend all conferences scheduled by the US Trustee. Shortly after commencement of the case and before the meeting of creditors, the US Trustee will schedule an initial debtor interview to review:

- The reasons for the debtor's financial difficulties.
- The responsibilities and duties of a debtor-in-possession.
- The prospects for a plan.
- The debtor's financial information.

APPLICATION AND EMPLOYMENT OF PROFESSIONALS

The Region 17 Guidelines contain requirements for the application and employment of professionals regarding:

- The scope of employment, including stating:
 - the necessity for employment;
 - the name and address of the professional;
 - the reason for selecting the professional;
 - the professional's qualifications; and
 - the scope of the services to be rendered.
- The terms of employment, including stating:
 - the dates and amounts of all payments related to the case;
 - the source of these payments if other than the debtor;

- the current hourly rates for the professionals and paraprofessionals expected to render services; and
- other charges that may be considered in an application for compensation and reimbursement of expenses.
- A copy of any employment agreement should be attached to the application.
- Prepetition employment, including stating:
 - whether the professional was retained for prepetition services other than bankruptcy-related services;
 - the date these services were commenced;
 - a general description of the services rendered;
 - the amount of fees or costs previously paid;
 - the amount, if any, of fees or costs currently billed; and
 - whether there is a retainer balance.
- Professional disclosures, including a verified statement by the professional in compliance with sections 101(14) and 327 to 329 of the Bankruptcy Code, as well as Federal Rules of Bankruptcy Procedure 2014, 2016, and 5002.
- The timing for filing of the application, requiring filing with the court within 15 days after:
 - commencement of the bankruptcy case; or
 - the agreement is entered to employ the professional.

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 ([w-000-5977](#))).

The following table summarizes the requirements for filing monthly operating reports in the N.D. Cal.:

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
Due Date	On or before the 20th of the month immediately following the month described in the report, for every month while the case is pending, until the date of entry of an order confirming a plan or dismissing or converting the case.
Contents	Format determined at the initial debtor interview (see Initial Debtor Interview). A diskette with the available forms is available from the US Trustee.
Eligibility for Exemption or Waiver	Debtor must use the form prescribed by the US Trustee unless excused by court order or directive or expressly consented to in writing by the attorney for the US Trustee assigned to the case.
Attestation	The cover page must be executed under penalty of perjury by the debtor or its designated responsible individual stating: "I declare under penalty of perjury under the laws of the United States that this report and the documents attached hereto are true and correct. Executed on (date) (Signature) (City), (State) (Print Name)"
Inter-Company Transactions	Where the debtor and its insiders were previously treated on a consolidated basis, the monthly operating report must show the separate treatment of the debtor from the date of case commencement.
Operation of Debtor's Business/Profitability	The debtor is expected to operate its business at a level sufficient to pay expenses of administration without an operating loss and at a level of profitability sufficient to demonstrate that reorganization is feasible.
Review by US Trustee	Failure to file monthly operating reports or monthly operating reports that show a downward financial trend and an unlikelihood of reorganization can be cause for conversion or dismissal under section 1112(b) of the Bankruptcy Code.

CHAPTER 11 OPERATIONS

The following table summarizes the Region 17 Guidelines on Chapter 11 operations:

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
Risk to Public/Compliance with Law	The debtor must manage and operate its business without risk to the public and in compliance with federal, state, and local law.
Cash Collateral	The debtor must not use cash collateral without court approval unless otherwise permitted by the Bankruptcy Code (see Cash Collateral).
Use, Sale, or Lease of Property Outside the Ordinary Course	In addition to information required by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, a notice regarding the use, sale, or lease of estate property outside of the ordinary course of business must provide full disclosure of the proposed disposition of the property, including: <ul style="list-style-type: none"> ■ The identity of the parties to the transaction and their connections, if any, to debtor. ■ The consideration to be received by the estate or any other party to the transaction. ■ Whether any contingent or concurrent transactions are tied to the proposed disposition of property. If the proposed disposition is a sale of property, the notice must disclose the scheduled value and sale price and state whether the sale is subject to or free and clear of liens.
No Lending/Guaranty Honoring	The debtor cannot: <ul style="list-style-type: none"> ■ Make any loan without court approval unless otherwise permitted by the Bankruptcy Code. ■ Honor a past guaranty or give a postpetition guaranty without court approval.
Borrowing	The debtor cannot borrow funds without court approval unless otherwise permitted by the Bankruptcy Code.
Payment of Prepetition Debts	The debtor cannot make any payment of prepetition debt without court approval unless otherwise permitted by the Bankruptcy Code.
Payment of Postpetition Debts	The debtor must remain current on all postpetition debts, including administrative priority: <ul style="list-style-type: none"> ■ Taxes. ■ Wages and employee benefits.
Compromises or Settlements	The debtor cannot compromise or settle any controversy without court approval unless permitted by the Bankruptcy Code.

DISCLOSURE STATEMENTS

The Region 17 Guidelines provide that disclosure statements should be concise and easy to read and comply with section 1125 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 3016. The following table summarizes the items the Region 17 Guidelines recommend for inclusion in disclosure statements:

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
Purpose/Source of Information	The statement should state that its purpose is to provide adequate information to enable a hypothetical investor to make an informed judgment about the proposed plan. The source of information should be disclosed and a determination of reliability of the information should be made.
Description of Business	The statement should describe the debtor's business, including factors that may be unusual or peculiar to the business, such as seasonal cycles and unique product lines.
Reasons for Financial Difficulties and Corrections Made	The statement should contain a brief narrative description of the reasons for the debtor's financial difficulties leading to Chapter 11 bankruptcy and actions taken to alleviate the situation since case commencement.
Historical and Current Financial Information	<p>The statement should include:</p> <ul style="list-style-type: none"> ■ The debtor's historical financial data. ■ Postpetition financial data, including updated monthly operating report information and pro forma balance sheet as of the date of confirmation. <p>Copies of monthly operating reports or excerpts should be attached. Where possible, financial information should be provided on both a cash and accrual basis.</p>
Material Postpetition Events	<p>The statement should describe significant postpetition events, for example:</p> <ul style="list-style-type: none"> ■ Appointment of a creditor's committee and position of the committee concerning the plan. ■ Appointment of a trustee or examiner. ■ Postpetition financing or sale of assets. ■ Any modification or termination of the automatic stay.
Legal Proceedings	<p>The statement should briefly describe all material legal proceedings to which the debtor is or may become a party. The description should include:</p> <ul style="list-style-type: none"> ■ The court in which the litigation is pending. ■ Present status. ■ Relief sought. ■ The effect, if any, on the plan.
Assets	<p>The statement should provide:</p> <ul style="list-style-type: none"> ■ A review of scheduled assets and their values. ■ An estimate of the current value of all debtor's assets and the basis thereof (for example, cost or appraisals). ■ An explanation of any deviation from the scheduled value.
Liabilities	<p>The statement should:</p> <ul style="list-style-type: none"> ■ Provide a review of the scheduled claims and their amounts and an estimate of current amounts of all debtor's liabilities, including proofs of claim filed in the case. ■ Indicate whether any claims are disputed and what action will be taken to resolve the dispute.
Description of the Plan	<p>The statement should describe the major provisions of the plan, including, where practicable:</p> <ul style="list-style-type: none"> ■ The estimated date creditors can expect to receive payment. ■ The expected percentage return on claims. ■ A description and approximate size of each class of creditors. ■ An estimated aggregate dollar amount of the claims in each class and summary of treatment of each class. <p>The description need not be detailed and may refer to the plan for more information.</p>
Means of Effectuating the Plan	The statement should include how the goals of the plan are to be accomplished (for example, infusion of cash by investors, sale of property, continued business operations, or issuance of stock). If an investor is to provide funds, include financial information about the investor.

US Trustee Operating Requirements	N.D. Cal. Bankruptcy Court Requirements
Cash Requirements and Administrative Expenses	<p>The statement should describe:</p> <ul style="list-style-type: none"> ■ The amount and source of cash to be paid on confirmation of the plan or its effective date. ■ The administrative expenses, including: <ul style="list-style-type: none"> • an estimate of the amount of professional fees and costs that must be paid; • the parties to whom the expenses are owed; and • whether any parties consent to an alternative treatment.
Liquidation Analysis	<p>The statement should:</p> <ul style="list-style-type: none"> ■ Estimate the recovery on potential avoidance actions, if any. ■ Where debtor is a partnership, describe the rights of a Chapter 7 trustee under section 723 of the Bankruptcy Code, including an estimate of any recovery and relevant financial information about the general partners. <p>Assumptions regarding liquidation values should be disclosed.</p> <p>See Practice Note, Liquidation Analysis: Best Interests of Creditors Test (6-616-6331).</p>
Projections	<p>The statement should include projections coinciding with the period of any deferred payments under the plan, including assumptions used in formulating projections, such as:</p> <ul style="list-style-type: none"> ■ Expected sales levels. ■ Gross income and net profit/loss levels. ■ Inventory acquisition. ■ An explanation of why the projections are realistic.
Management Compensation	<p>For a plan implemented over time, the statement should disclose:</p> <ul style="list-style-type: none"> ■ The persons that will control the debtor following confirmation and describe the nature and extent of control to be exercised. ■ The business of the controlling person. ■ The identity and experience of management of the controlling person. ■ The identity of affiliates of the controlling person. ■ The transaction whereby control is to be acquired. ■ The business plans, if known, of the controlling person for debtor. ■ Pertinent financial information about the controlling person, if available. ■ Bonding information, if applicable.
Insider Claims	<p>The statement should disclose:</p> <ul style="list-style-type: none"> ■ The identity of each insider claimant. ■ The claimant's affiliation to debtor. ■ The circumstances giving rise to the claim. ■ The amount and treatment of the claim. ■ Any material consideration provided or to be provided to an insider regarding the case, regardless of the source of payment or whether the consideration is payable under the plan.
Stock Issued for Debt	<p>If the plan provides for the issuance of stock for all or part of the debt, the statement should:</p> <ul style="list-style-type: none"> ■ State whether the stock is exempt from securities laws under section 1145 of the Bankruptcy Code. ■ Describe the nature of the stock or securities, including: <ul style="list-style-type: none"> • voting rights; • accumulation of dividends; • liquidation preference; • the existence of other classes of stock; and • registration rights.
Voting	<p>The statement should describe in detail the vote required to constitute acceptance of the plan as set out in section 1126 of the Bankruptcy Code (see Practice Note, Chapter 11 Plan Process: Overview: Required Votes (0-502-7396)).</p>
Signature	<p>The statement must be signed by the debtor.</p>

For more information on disclosure statements, see Practice Note, Chapter 11 Disclosure Statements: Overview ([w-001-4564](#)).

POST-CONFIRMATION REPORTS

At the hearing on the confirmation of the plan, the debtor should advise when all post-confirmation matters will be completed and when a motion for final decree will be filed. After confirmation of a plan, the debtor must file a quarterly report in the form prescribed by the US Trustee until entry of a final decree. After the estate is fully administered, the debtor must file a final account and move for a final decree.

For more information on post-confirmation reports, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Post-Confirmation Reports ([w-000-5977](#)).

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