



UNITED STATES TRUSTEES: AN OVERVIEW

Dr. Binoy J. Kattadiyil and Adv. Ankita Agarwal

ICSI IIP, an IPA of IBBI, New Delhi

WHO ARE U.S. TRUSTEES?

In the USA, there are Chapter 7, 11 and 13 Trustees who are the equivalent to Insolvency Professionals and liquidators under Insolvency and Bankruptcy Code in India. Chapter 7 trustees oversee the liquidation/bankruptcy and Chapter 11 trustees overlook the reorganisation plan. The U.S. has a very debtor centric insolvency regime and thus in the cases of Chapter 11 there is complete control of 'debtor in possession' and trustees are only appointed by court in special circumstances (where fraud, abuse of power or mismanagement is detected).

A trustee is an officer of the Department of Justice who is appointed by the official U.S. Trustee to oversee the assets of the bankrupt debtor. Trustees play the role of a debtor in possession. A trustee is appointed in usually Chapter 7 and 13 bankruptcy cases and very rarely in cases of restructuring under Chapter 11 of the U.S. Bankruptcy Code. The administrative functions of these Trustees are overseen by the U.S. Trustee Program.

DUTIES OF A TRUSTEE¹

The duties of the trustee appointed in a Chapter 7 or Chapter 11 proceedings, are enumerated in the provisions 704 and 1106. Some of the duties are enumerated below. A Trustee has to:

- be accountable for all property received;
- if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
- unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
- if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and

¹11 U.S. Code § 1106; 11 U.S. Code § 704



disbursements, and such other information as the United States trustee or the court requires; and

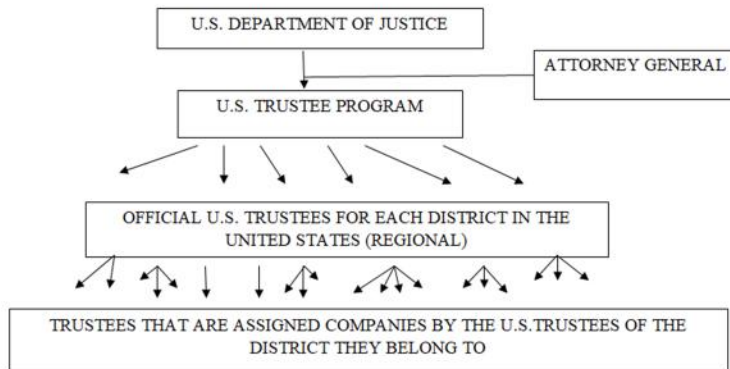
- make a final report and file a final account of the administration of the estate with the court and the United States trustee.
- if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title 9
- except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
- As soon as practicable –
 - i) file a statement of any investigation conducted under paragraph (3) of this subsection, including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate;
 - ii) and transmit a copy or a summary of any such statement to any creditors' committee or equity security holders' committee, to any indenture trustee, and to such other entity as the court designates;
- as soon as practicable, file plan under section 1121 of title 11, file a report of why the trustee will not file a plan, or recommend conversion of the case to a case under chapter 7, 12 or 13 of this title or dismissal of the case;
- for any year for which the debtor has not filed a tax return required by law, furnish, without personal liability, such information as may be required by the governmental unit with which such tax return was to be filed, in light of the condition of the debtor's books and records and the availability of such information; and
- after confirmation of a plan, file such reports as are necessary or as the court orders.
- Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury

ADMINISTRATION

Unlike the Indian Insolvency scenario, there are no agencies that U.S. Trustees are registered with or have to be registered with. Trustees fall under the Department of Justice in the U.S. government. The administrative systems functions within the bankruptcy system were given to U.S. Trustee Program. The U.S. Trustee Program is under the control of Attorney General.

The Attorney General is charged with the appointment of United States Trustees and Assistant United States Trustees. The Executive Office for U.S. Trustees (EOUST) in Washington, D.C., provides general policy and legal guidance, oversees the Program's substantive operations, and handles administrative functions. The Director of the Executive Office, whose authority derives from the Attorney General, oversees a staff comprised of the Offices of the Director, General Counsel, Criminal Enforcement, Administration, Oversight, Planning & Evaluation, and Information Technology. The Executive Office also provides administrative and management support to individual U.S. Trustee Offices in their implementation of Federal bankruptcy laws.

The basic structure:



U.S. Trustee Program²

The mission of the United States Trustee Program is to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public.³

The primary role of the U.S. Trustee Program is to serve as the "watchdog over the bankruptcy process."

28 U.S.C. 3 586 provide, in pertinent part, that each United States Trustee shall:

²<https://www.justice.gov/ust>

³USTP Mission Statement available at <https://www.justice.gov/ust/strategic-plan-mission>



- Establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7 of title 11;
 - Serve as and perform the duties of a trustee in a case under title 11 when required under title 11 to serve as trustee in such a case;
 - Supervise the administration of cases and trustees in cases under chapter 7,11,12, or 13 of title 11 by, whenever the United States trustee considers it to be appropriate –
 - (A) (i) reviewing, in accordance with procedural guidelines adopted by the Executive Office of the United States Trustee (which guidelines shall be applied uniformly by the United States trustee except when circumstances warrant different treatment), applications filed for compensation and reimbursement under section 330 of title 11; and (ii) filing with the court comments with respect to such application and, if the United States Trustee considers it to be appropriate, objections to such application.
 - (B) monitoring plans and disclosure statements filed in cases under chapter 11 of title 11 and filing with the court, in connection with hearings under sections 1125 and 1128 of such title, comments with respect to such plans and disclosure statements;
 - (C) monitoring plans filed under chapters 12 and 13 of title 11 and filing with the court, in connection with hearings under sections 1224, 1229, 1324, and 1329 of such title, comments with respect to such plans;
 - (D) taking such action as the United States trustee deems to be appropriate to ensure that all reports, schedules, and fees required to be filed under title 11 and this title by the debtor are properly and timely filed;
 - (E) monitoring creditors' committees appointed under title 11;
 - (F) notifying the appropriate United States attorney of matters which relate to the Occurrence of any action which may constitute a crime under the laws of the United States and, on the request of the United States attorney, assisting the United States attorney in carrying out prosecutions based on such action;
 - (G) monitoring the progress of cases under title 11 and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress;
 - (H) and monitoring applications filed under section 327 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to the approval of such applications;
 - deposit or invest under section 345 of title 11 money received as trustee in cases under title 11;
 - perform the duties prescribed for the United States trustee under title 11 and this title, and such duties consistent with title 11 and this title as the Attorney General may prescribe; and
-



- make such reports as the Attorney General directs.

The Program was established by the Bankruptcy Reform Act of 1978 as an effort encompassing 18 districts. It was expanded to 21 Regions nationwide, covering all Federal judicial districts except Alabama and North Carolina, by enactment of the Bankruptcy Judges, U.S. Trustees, & Family Farmer Bankruptcy Act of 1986⁴. The Program is funded by the United States Trustee System Fund, which consists primarily of fees paid by parties and businesses invoking Federal bankruptcy protection.

A quarterly fee shall be paid to the United States Trustee System Fund at Treasury in each case under chapter 11 (except small business cases) for each calendar quarter, or portion thereof, between the date a bankruptcy petition is filed and the date the court enters a final decree closing the case, dismisses the case, or converts the case to another chapter in bankruptcy.⁵

The USTP is entirely self-funded through user fees paid by bankruptcy debtors. All revenues are deposited into the United States Trustee System Fund. The Program may expend funds as appropriated by Congress. In FY 2007, approximately 50 percent of the funding was derived from quarterly fees in chapter 11 reorganization cases. The balance of the funds was derived from filing fees paid in chapters 7, 11, 12, and 13, as well as interest earnings and miscellaneous revenues.

The balance in the Fund as of September 30, 2019, was less than \$135 million. Funding for the USTP is approved by the Congress on request made by the Attorney General in form of an Appropriations Request.

Checks and Balances

Similar to the concept of ‘related party’ in India, **a chapter 11 trustee or examiner must be a “disinterested person,” successfully complete a background investigation, and, in the case of a trustee, post a bond.** The trustee must be competent to perform the statutory duties set out in Section 1106 of the Bankruptcy Code as is determined by a questionnaire to be filled out by Trustee. Additional considerations for the selection will be based on the unique circumstances of the specific case. The unique circumstances of the case frequently dictate the terms of the court order directing the appointment.

When the United States Trustee files an application for court approval of the appointment of a trustee or examiner to a particular case, the application must be accompanied by an affidavit of the person being appointed. The application and affidavit must describe all of the connections of the proposed trustee or examiner to other persons involved in the case. This allows the bankruptcy

⁴Pub. L. 99-554, 100 Stat. 3088, reprinted in part at 28 U.S.C. § 581, note

⁵ 28 U.S.C. § 1930(a)(6)



judge to ensure that the person appointed satisfies all the requirements for appointment, particularly the requirement of disinterestedness.

The determination of “disinterestedness” does not end with the appointment. Any new connections that the trustee or examiner, or any professional employed by the trustee or examiner, establishes or discovers after appointment should be brought to the attention of the court and the United States Trustee through the filing of a supplemental verified statement.

Background Investigation

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

Bonds

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

Reporting Requirements of Trustees

The United States Trustee is responsible for supervising the administration of cases and trustees in cases under chapters 7, 11, 12, and 13 of the Bankruptcy Code⁶. In order to comply with this supervisory requirement, each region has established Operating Guidelines and Reporting Requirements for Chapter 11

⁶28 U.S.C. § 586(a)(3)



Debtors and Trustees. The guidelines are established to assist a debtor in possession or a chapter 11 trustee in complying with section 1106 and 1107. The guidelines provide useful general information regarding noticing requirements; closing old bank accounts and opening new debtor in possession bank accounts; maintaining adequate insurance; filing monthly operating reports; paying taxes; employing professionals; and remitting quarterly fees. Regardless of when a chapter 11 trustee is appointed in a case, the guidelines apply. Failure to comply may be cause for the dismissal or conversion of the case to one under chapter 7. Therefore, a chapter 11 trustee should obtain a copy of the Operating Guidelines and Reporting Requirements established in the region in which the trustee has been appointed.⁷

Monthly operating reports

These periodic reports are generally known as the Monthly Operating Reports. Form operating reports are generally included in the Operating Guidelines and Reporting Requirements and can be obtained from each office of the United States Trustee. These reports vary from region to region. The reports have been created to provide the court, the United States Trustee, and creditors with reliable, accurate information regarding the operations of the estate. **Monthly Operating Reports are required to be filed with the court, with a copy served on the United States Trustee on a calendar month basis on a specified date in the month following the reporting period. This date may vary from region to region. The report must also be served on any taxing authority.**⁸

The trustee is also required to file a report in lieu of a plan if a plan is not finalised and the company is going to liquidation under Chapter 7, a post confirmation report and a final report.⁹

INSURANCE

The protection available to Trustees is to be taken individually by them by way of professional liability insurance.

A trustee does not qualify for appointment to a case until the trustee has filed with the court a bond in favor of the United States of America conditioned on the trustee's faithful performance of his or her official duties.¹⁰ The United

⁷ Operating Guidelines and Reporting Requirements for Chapter 11 Debtors and Trustees, available at https://www.justice.gov/ust-regions-r04/file/ch11_guidelines.pdf/download

⁸ Operating and Reporting Requirements of Chapter 11 Trustees available at https://www.justice.gov/ust-regions-r15/file/sdca_chapter_11_orr.pdf/download

⁹ 11 U.S.C. § 704(9)

¹⁰ 11 U.S.C. § 322(a).



States Trustee may authorize a blanket bond to cover multiple cases for one or more trustees.

The trustee is a principal on the bond, and all bonds are written in favor of the United States of America.¹¹ The bonding company will generally require indemnification from the trustee for any payments the bonding company is required to make to third parties. **Since the bond protects the estate beneficiaries and not the trustee, the trustee may wish to consider obtaining professional liability insurance and employee fidelity coverage.**

The trustee may recover appropriate portions of the bond premium as an administrative expense in the estates with assets subject to its protection. For blanket bonds, the trustee must allocate the blanket bond premium to all of the estates with assets covered by the bond. This includes all chapter 7 asset cases and any chapter 11 cases covered by the bond. The allocation methodology is approved by the United States Trustee, but the allocations are normally based on the funds on hand as of a particular date.

A blanket bond might not cover the trustee in a case that involves operating a business in chapter 7. In such instances, the trustee must consult the United States Trustee and bonding company for further information, including whether an individual case bond is appropriate.¹²

A claim on the trustee's bond is made via an adversary proceeding and may be commenced up to two years after the date on which the trustee is discharged. As soon as the trustee becomes aware of an incident which may give rise to a bond claim, the trustee must notify the United States Trustee and the bonding company.¹³

Conclusion

Since the US Insolvency regime is a very debtor centric system, the safeguards and administrative guidelines available to the Trustees is minimal as compared to insolvency in regimes like India and United Kingdom. The appointment of trustees in Chapter 11 cases is only when the court feels there is a 'cause' which means extraordinary circumstances. Chapter 11 and 7 trustees work under the U.S. official trustee overseen by the Trustee Program. The ultimate authority is the Attorney General under the jurisdiction of the U.S. Department of justice.

For the purpose of monitoring these Trustees self declarations by way of filing of annual questionnaires and affidavits, are to be given. There are no provisions

¹¹ Bond Policies for Chapter 11 Trustees available at https://www.justice.gov/ust-regions-r06/file/01_ch7_bond_policies_0.pdf/download

¹²28 U.S.C. § 586.

¹³Ibid



for inspection, either routine or event based. The court of the Attorney General has the authority to remove any trustee from any assignment at any given time. As is clear, the cost of all investigations and background checks against such trustees are borne by USTP Fund wherein the debtor or assigned party in each case has to submit quarterly fees. If there is paucity of funds, the Attorney General makes a request for funds to the U.S. Government. The Trustees are all qualified individuals sharing their expertise whenever called on. There are various safeguards in place for both the debtor and the Trustee to build a symbiotic relationship between the two.

References

1. U.S. Bankruptcy Code available at <https://www.law.cornell.edu/uscode/text/11>
2. Chapter 11 Trustee Handbook by Department of Justice available at <https://www.justice.gov/ust/file/ch11handbook-200405.pdf/download>
3. Chapter 7 Trustee Handbook by Department of Justice available at <https://www.justice.gov/ust/handbook-chapter-7-trustees>
4. <https://www.thebalance.com/who-is-a-bankruptcy-trustee-316199>
5. https://www.justice.gov/sites/default/files/ust/legacy/2014/05/01/abi_201405.pdf
6. Operating Reporting Requirements for Chapter 11 Trustees, available at https://www.justice.gov/ust-regions-r04/file/ch11_guidelines.pdf/download
7. Bond Policies for Chapter 11 Trustees available at https://www.justice.gov/ust-regions-r06/file/01_ch7_bond_policies_0.pdf/download