Local Bankruptcy Rules: New York (EDNY)

EDWARD J. LoBELLO, MEYER, SUOZZI, ENGLISH & KLEIN, P.C., WITH PRACTICAL LAW BANKRUPTCY

Search the Resource ID numbers in blue on Westlaw for more.

A Practice Note summarizing selected local rules of the US Bankruptcy Court for the Eastern District of New York (EDNY).

AUTOMATIC STAY

BACKGROUND/FEDERAL REQUIREMENTS

An automatic stay:

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

For more information about the stay, see Practice Note, Automatic Stay: Overview (9-380-7953).

LOCAL RULES

Relief from Stay

If a motion for relief from the stay is made:

- Returnable more than 30 days after the date filed, the movant is deemed to consent to the continuation of the stay through the hearing date (E.D.N.Y. LBR 4001-1(a)).
- By presentment under EDNY Local Bankruptcy Court Rule 2002-1 and a hearing is scheduled, the 30-day time limit set by section 362(e)(1) of the Bankruptcy Code is waived (E.D.N.Y. LBR 4001-1(b)).

Order Confirming Inapplicability of Stay

A request for an order under section 362(c)(4)(A)(ii) or (j) of the Bankruptcy Code must include evidence of entitlement to the order and be on notice to:

- The debtor.
- The debtor's attorney, if any.
- The trustee.

(E.D.N.Y. LBR 4001-2.)

Order Continuing or Imposing Stay

A motion for an order under section 362(c)(3)(B) of the Bankruptcy Code continuing the automatic stay or an order under section 362(c)(4)(B) of the Bankruptcy Code imposing the automatic stay must be on notice to all parties in interest, including all creditors and the trustee (E.D.N.Y. LBR 4001-3).

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 EDNY Local Civil Rules and Administrative Orders.
- The EDNY Local Bankruptcy Court Rules and Administrative Orders.
- The Rules of the US Court of Appeals for the Second Circuit.
- The preferences of the assigned judge. Select the assigned judge from the list and review their Individual Motion Practices and Rules.
- The USBC-EDNY Appeals Process.

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 Second Circuit, review 28 U.S.C. Section 158, Federal Rule of Bankruptcy Procedure 8006, and Official Bankruptcy Form B424 (see Direct Appeals to Second 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 (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 Direct, Inc.*, 511 U.S. 863, 867 (1994)). The Second Circuit applies this rule less rigidly in bankruptcy proceedings than in ordinary litigation. Orders in bankruptcy cases may be immediately appealed if they conclusively determine a discrete dispute within the larger case (see *In re Johns-Manville Corp.*, 824 F.2d 176, 179 (2d Cir. 1987)).

Notice of Appeal

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

The appellant must also:

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

Appeals Related to Pending Cases

If the appeal is related to another pending case in the district court, the appellant must provide the information required on the civil cover sheet.

The E.D.N.Y. Local Civil Rules require appellants to promptly bring related cases to the court's attention (S.D.N.Y. and E.D.N.Y. L. Civ. R. 1.6).

Docket Fee

The filing fee for a notice of appeal can be found on the bankruptcy court's website (see Bankr. E.D.N.Y.: Fee Schedule). Payments must be made by attorney's check, money order, certified bank check, cash, or credit card (Visa, Mastercard, American Express, or Discover), with all funds payable to Clerk, U.S. Bankruptcy Court. 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 dockets 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:

- 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.
- 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 Second Circuit (see Direct Appeals to Second 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 Second Circuit

The Second Circuit disbanded its Bankruptcy Appellate Panel (BAP), so EDNY bankruptcy appeals are heard in the district court. 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).

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

Once the bankruptcy court has certified the direct appeal, the appellant must request permission to take a direct appeal with the circuit clerk within 30 days of the certification date 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.

Attorneys appearing before the Second Circuit must currently be admitted to practice in the Second Circuit or have an admission application pending. For information on admittance to the Second Circuit bar, see Practice Note, Second Circuit Civil Appeals: Initiating an Appeal: Obtain or Renew Admission to the Second Circuit Bar (6-518-9480). For information on Second Circuit appellate practice, see Second Circuit Civil Appeals Toolkit (2-523-5771).

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.
- Omit items that are not helpful to their argument unless directly relevant to the issues on appeal.

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

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

No paper copies of designated items are required, except as may be provided in the district judge's individual practices posted on the court's website (see E.D.N.Y.: Judges' Info).

Transcripts

The duties of the parties to provide copies of transcripts are set out in Federal Rule of Bankruptcy Procedure 8009(b) (see Bankr. E.D.N.Y.: Transcript Information). Transcript designations filed by counsel must be electronically filed.

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 reargue with the bankruptcy court. Federal Rule of Civil Procedure 59, made applicable to bankruptcy proceedings under Federal Rule of Bankruptcy Procedure 9023, permits a party to make a motion to alter or amend a judgment. The Second 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 *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992).)

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 (including 30 pages for principal brief and 15 pages for reply brief).

In the EDNY, docket item numbers in appellate briefs are commonly cited as "Dkt.," "D.I.," or "D.E." followed by the docket item number of the paper.

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

USBC-EDNY Appeals Process

The EDNY Bankruptcy Court has issued the USBC-EDNY Appeals Process, as summarized in the following table:

How Commenced; Deadline for Filing	■ An appeal is begun by filing a Notice of Appeal from a final order, or a notice of appeal and motion for leave to appeal from an interlocutory order. Appellants must file the notice of appeal (and motion for leave to appeal, if applicable) electronically in Case Management/Electronic Case Filing (CM/ECF) (attorneys) or by submitting an original copy of the notice of appeal with the clerk of the bankruptcy court within 14 days from entry of the challenged judgment or order. An appellee may file a cross-appeal within 14 days of the filing of the Notice of Appeal. The Notice of Appeal (or cross-appeal) must be accompanied by a Civil Cover Sheet and a copy of the order being appealed. The time for filing may be extended under certain circumstances (for example, a motion to extend the period to appeal may be filed before it expires). ■ The bankruptcy court promptly transmits the Notice of Appeal and Civil Cover Sheet to the district court, at which point the district court assigns the matter to a judge and a case number and promptly notifies the bankruptcy court and all parties to the appeal about the date the appeal was docketed. (USBC-EDNY Appeals Process, ¶ 1.)
Service of Notice	The Notice of Appeal must include all parties to be served and their: ■ Attorneys if they are represented. ■ Addresses. (USBC-EDNY Appeals Process, ¶ 3.)
Leave to Appeal	To appeal from an interlocutory order or decree, a party must file with the bankruptcy clerk: ■ A Notice of Appeal. ■ A motion for leave to appeal. The bankruptcy court promptly transmits the Notice of Appeal and motion for leave to the district court. The response to a motion for leave to appeal from an interlocutory order may be filed with the district court within 14 days after service of the motion. (USBC-EDNY Appeals Process, ¶ 4.)

Appellant's Designation	Appellant's designation of record on appeal and statement of issues to be presented on appeal must be filed with the bankruptcy court and served within 14 days of the latest of: ■ The notice of appeal. ■ Entry of an order granting leave to appeal. A copy of the designation and statement must be served by the appellant on the appellee. (USBC-EDNY Appeals Process, ¶ 5.)
Appellee's Designation	Within 14 days after service of the appellant's designation and statement, the appellee may file with the bankruptcy court and serve on the appellant a designation of additional items to be included in the record on appeal (USBC-EDNY Appeals Process, ¶ 6).
Transcripts	If the record designated by any party includes a transcript of any proceeding, the party must, immediately after filing the designation, request a copy of a transcript. The written request for the transcript must be filed with the bankruptcy court. (USBC-EDNY Appeals Process, ¶ 7.)
Completion and Transmittal of Record	The parties must ensure that the record on appeal is complete, or an incomplete record otherwise may be transmitted to the district court. The court sets a deadline for transmission of the record of 30 days from the earlier of: ■ The filing with the court of the appellant's designation of record. ■ The deadline for the filing. (USBC-EDNY Appeals Process, ¶ 8.)
Remand	If the district court remands an action for further proceedings, a motion for these further proceedings must be made by the appropriate party within 21 days of the remand (E.D.N.Y. LBR 8016-1; USBC-EDNY Appeals Process, ¶ 9).
ECF Registration (Attorneys Only)	All documents must be filed electronically, both in the bankruptcy court and, once the record has been transmitted, in the district court. Registration is required at both courts. (USBC-EDNY Appeals Process, ¶ 10.)

Copies

No later than the day after the filing of a notice of appeal, the appellant must provide the clerk with sufficient copies of the notice of appeal or certification for direct appeal and address labels for all parties to be served to permit the clerk to comply with Federal Rule of Bankruptcy Procedure 8004 (E.D.N.Y. LBR 8004-1).

Record on Appeal

EDNY Local Bankruptcy Court Rule 8006-1 provides that:

- When a party files a designation of items to be included in a record on appeal under Federal Rule of Bankruptcy Procedure 8006 and an item is not docketed in electronic format or only an excerpted version of an item is on the docket, that party must provide the clerk with a full copy of this designated item. The clerk must transmit to the district clerk, as the record on appeal, the full copies of these items. A party must electronically file in the bankruptcy case any item that party has designated that does not already appear on the docket. (E.D.N.Y. LBR 8006-1(a).)
- Exhibits not designated to be included in a record on appeal must remain in the custody of the attorney who has possession of these exhibits, who is responsible for promptly forwarding them to the clerk of the appellate court on that clerk's request (E.D.N.Y. LBR 8006-1(b)).
- On the docketing of the notice of appeal in the district court, all papers relating to the appeal must be filed electronically with the district clerk, except for a request for a stay pending appeal, which must be filed consistent with Federal Rule of Bankruptcy Procedure 8005 (E.D.N.Y. LBR 8006-1(c)).

Order, Judgment, or Remand by Appellate Court

EDNY Local Bankruptcy Court Rule 8016-1 provides that:

- An order or judgment of an appellate court, when filed in the office of the clerk, becomes the order or judgment of the court and must be entered as that by the clerk without further order.
- If the order or judgment of the appellate court remands for further proceedings, a motion for these further proceedings must be made by the appropriate party within 21 days of the remand and referred to the judge who heard the proceeding below, unless the appellate court orders otherwise.

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), (3), Bankruptcy Code). The court may hold an interim cash collateral hearing on the first day of the case to avoid immediate and irreparable harm to the debtor but cannot hold a final hearing earlier than 14 days from the date the cash collateral motion is filed (Fed. R. Bankr. P. 4001(b)(2) and see *In re Dynaco Corp.*, 158 B.R. 552 (Bankr. D. N.H. 1993); *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 Adequate Protection: Overview (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

Contents of the Cash Collateral Motion

EDNY Local Bankruptcy Court Rule 4001-5 supplements the requirements of Bankruptcy Rule 4001(c). The Guidelines for Financing Motions (Guidelines) require the debtor to specifically identify certain material provisions, in addition to those it must identify in a cash collateral motion under Bankruptcy Rule 4001(b) (see Background/Federal Requirements: Contents of the Cash Collateral Motion). Each of these provisions must reference their location within the filed copy of the relevant agreement. This table summarizes the requirements of the Guidelines and EDNY Local Bankruptcy Court Rule 4001-5.

Provision	EDNY Bankruptcy Court Required Information
Essential terms of cash collateral motion.	■ The amount of cash collateral the party seeks to use, including: • any committed amount or borrowing base formula; and • the estimated availability under the formula. ■ The material conditions to using cash collateral, including budget provisions. ■ Pricing and economic terms and the treatment of costs and expenses of the lender, the lender's agent, and their professionals. (Guidelines, ¶ 1(a), (b), (c).)
Priming liens.	■ The effect on existing liens of granting collateral or adequate protection to the lender. ■ Priority or superpriority provisions. (Guidelines, ¶ 1(d).)
Carve-outs.	Carve-outs from: ■ Liens. ■ Superpriorities. (Guidelines, ¶ 1(e) and see Practice Note, The Section 506(c) Surcharge on Collateral: Carve-Outs (9-565-5645)). Disclose and justify: ■ The absence of any carve-out for professional fees. ■ Provisions that provide disparate treatment for the debtor's professional compared to the creditors' committee's professionals regarding the professional fee carve-out. ■ Provisions that exclude from a carve-out any request for professional fees related to the investigation of whether the secured creditor's lien is valid or properly perfected. (E.D.N.Y. LBR 4001-5(a)(i), (iii).)
Cross-collateralization.	Any provision that: ■ Elevates prepetition debt to administrative expense status. ■ Secures prepetition debt with liens on postpetition assets. (Guidelines, ¶ 1(f) and see Practice Note, Cash Collateral: Overview: Cross-Collateralization (3-618-3450)).
Funding obligations.	Any limitation on the lender's obligation to fund certain activities of: ■ The debtor. ■ The official creditors', equity security holders', or retiree committee. (Guidelines, ¶ 1(h).)

Provision	EDNY Bankruptcy Court Required Information
Termination or default.	Any termination or default provisions, including: ■ Any cross-default provisions. ■ Events of default. ■ Any effect on the automatic stay or the lender's ability to enforce remedies. ■ Any terms that provide that the use of cash collateral stops on: • the filing of a challenge to the lender's prepetition lien or claim based on the lender's prepetition conduct; • entry of an order granting relief from the automatic stay except concerning material assets; • the grant of a change in venue of the case or any adversary proceeding; • management changes or the departure from the debtor of any identified employees; • the expiration of a specified time for filing a plan; or • the making of a financing motion by a party in interest seeking any relief. (Guidelines, ¶ 1(i), (o).)
Change-of-control.	Any change-of-control provisions (Guidelines, ¶ 1(j)).
Required sale of estate property.	Any provision setting a deadline for or otherwise requiring the sale of estate property (Guidelines, ¶ 1(k)).
Joint liability.	In jointly administered cases: ■ Terms that govern the joint liability of debtors. ■ If one or more debtors is liable for the repayment of funds advanced to another debtor, any provisions that can affect the nature and priority of any inter-debtor claims that result if a debtor were to repay debt incurred by another debtor. (Guidelines, ¶ 1(m).)
Non-debtor affiliates.	Any provision for the funding of non-debtor affiliates with use of cash collateral and the approximate amount of this funding (Guidelines, ¶ 1(n)).
Provisions that purport to preclude court.	Any provision that purports to preclude the court from: ■ Authorizing financing that primes the lender. ■ Confirming a plan that impairs the lender without its consent. (Guidelines, ¶ 1(p).)
Secured creditor's expenses and attorneys' fees.	Disclose and justify provisions that require the debtor to pay the secured creditors' attorneys' fees and expenses relating to the proposed use of cash collateral, without any notice or review by the Office of the US Trustee, creditors' committee (if formed), or court (E.D.N.Y. LBR 4001-5(a)(ii)).

A cash collateral motion should also include provisions regarding:

- **Notice after event of default.** If the proposed order contains a provision that terminates the use of cash collateral after an event of default on less than three days' notice to the debtor, the US Trustee, and the creditors' committee (if the use of cash collateral conforms to any budget in effect), the motion should explain why this lesser notice is provided (Guidelines, ¶ 3 and see Contents of Proposed Orders).
- **Carve-outs.** For a carve-out from liens or superpriorities, the motion should include a provision disclosing:
  - when the carve-out takes effect;
  - if the carve-out remains unaltered after payment of interim fees made before an event of default; and
  - any effect on any borrowing base or borrowing availability under a cash collateral agreement.
- The motion should also disclose the reasons for any disparate treatment for committee professionals and exclusions from the carve-out for:
  - the reasonable expenses of committee members;
  - the reasonable post-conversion commissions, fees, and expenses of a Chapter 7 trustee; or
  - the fees payable to either the bankruptcy court or the US Trustee.
- Reasonable allocations in a carve-out provision may be proposed for:
  - expenses of professionals retained by committees appointed in the case;
  - expenses of professionals retained by the debtor;
  - fees payable to the bankruptcy court and to the US Trustee;
  - reasonable expenses of committee members; and
  - reasonable post-conversion commissions, fees, and expenses of a Chapter 7 trustee.
- (Guidelines, ¶ 4 and see Practice Note, The Section 506(c) Surcharge on Collateral: Carve-Outs (9-565-5645)).

- **Investigation periods relating to waivers and concessions about prepetition debt.** The motion should include an explanation if the proposed order fails to include a provision that permits an investigation of the lender's prepetition liens and claims and the filing of a complaint or a motion seeking authority to begin litigation as a representative of the estate:
  - by an official creditors' or equity security holders' committee for at least a 60-day period beginning from the date of the selection of its counsel;
  - by any party in interest (other than the debtor) for at least a 75-day period beginning from the date of entry of the final cash collateral order, if no committee has been appointed; or
  - for a 75-day period from the day a Chapter 7 trustee is appointed, if the case is converted from Chapter 11 to Chapter 7, to the extent that the investigation period has not expired.
- (Guidelines, ¶ 5 and see Practice Note, Cash Collateral: Overview: Validation of Prepetition Liens (3-618-3450)).
- **Interim relief.** If the motion seeks entry of an emergency or interim order before a final hearing under Bankruptcy Rule 4001(b)(2), provide:
  - a description of the amount and purpose of the funds sought to be used on an emergency or interim basis; and
  - the facts supporting a finding that immediate or irreparable harm is likely to be caused to the estate if immediate relief is not granted before the final hearing.
- (Guidelines, ¶ 6 and see Notice and Hearing on the Cash Collateral Motion.) A single motion may be filed seeking entry of an interim order and a final order, which orders the court would normally enter after the preliminary and the final hearing, respectively.
- **Adequacy of budget.** If the debtor is subject to a budget under a proposed cash collateral order, provide a statement by the debtor on whether it has reason to believe that the budget is adequate, considering all available assets, to pay all administrative expenses due or accruing during the period covered by the financing or the budget (Guidelines, ¶ 7 and see Practice Note, Cash Collateral: Overview: Operating Budget (3-618-3450)).

Contents of Proposed Orders

Proposed cash collateral orders **should** include certain provisions, as summarized in the table below.

Provision	EDNY Bankruptcy Court Recommended Information
Findings of fact.	■ The presentation of findings of facts limited to those essential to entry of the order. ■ A finding in a proposed **interim** order that immediate and irreparable loss or damage is caused to the estate if immediate use of cash collateral is not obtained and, regarding notice, a statement that: • a hearing was held under Bankruptcy Rule 4001(b)(2); • notice was given to certain parties in the manner described; and • notice was, in the debtor's belief, the best available under the circumstances. ■ To the extent that a proposed order incorporates by reference or refers to a specific section of a prepetition loan agreement or other document, a statement of the significance of that section. (Guidelines, ¶ 11(a)(i), (ii), (iv).)
Cross-collateralization.	Language reserving the court's right to unwind or partially unwind (after notice and a hearing) cross-collateralization provisions, if there is either: ■ A successful challenge to the validity, enforceability, extent, perfection, or priority of the prepetition lender's claims or liens. ■ A determination that: • the prepetition debt was undersecured as of the petition date; and • the cross-collateralization gives undue advantage to the lender. (Guidelines, ¶ 11(c) and see Practice Note, Cash Collateral: Overview: Cross-Collateralization (3-618-3450)).
Order to control.	Statement that to the extent that a loan or agreement differs from the order, the order controls (Guidelines, ¶ 11(f)).
Statutory provisions affected.	A specification of those provisions of the Bankruptcy Code, Bankruptcy Rules, and EDNY Local Bankruptcy Court Rules relied on as authority for granting relief (Guidelines, ¶ 11(g)).
Notice after event of default.	If the proposed order contains a provision terminating the use of cash collateral after an event of default, before the use of cash collateral stops (if the use of cash collateral conforms to any budget in effect), the proposed order should require at least three days' notice to: ■ The debtor. ■ The US Trustee. ■ The creditors' committee (or the debtor's 20 largest unsecured creditors as listed on the debtor's schedules if no committee has been appointed). (Guidelines, ¶ 3.) If less notice is provided, the cash collateral motion should explain why (see Local Rules: Contents of the Cash Collateral Motion).

Provision	EDNY Bankruptcy Court Recommended Information
Carve-outs.	For a carve-out from liens or superpriorities, a provision disclosing: ■ When the carve-out takes effect. ■ If it remains unaltered after payment of interim fees made before an event of default. ■ Any effect on any borrowing base under a cash collateral agreement. (Guidelines, ¶ 4 and see Practice Note, The Section 506(c) Surcharge on Collateral: Carve-Outs (9-565-5645)).
Investigation periods relating to waivers and concessions about prepetition debt.	If the proposed order contains language where the debtor stipulates, acknowledges, or otherwise admits to the validity, enforceability, priority, or amount of a prepetition claim or of any lien securing the claim, the proposed order should include a provision that permits an investigation of the lender's liens and claims and the filing of a complaint or a motion seeking authority to begin litigation as a representative of the estate: ■ By an official creditors' or equity security holders' committee for at least a 60-day period beginning from the date of the selection of its counsel. ■ By any party in interest (other than the debtor) for at least a 75-day period beginning from the date of entry of the final cash collateral order, if no committee has been appointed. ■ For a 75-day period from the day a Chapter 7 trustee is appointed, if the case is converted from Chapter 11 to Chapter 7, to the extent that the investigation period has not expired. (Guidelines, ¶ 5.) If the proposed order does not contain this provision, the cash collateral motion should explain why (see Local Rules: Contents of the Cash Collateral Motion).

Cash collateral orders **may** also include other provisions, as summarized in the table below.

Provision	EDNY Bankruptcy Court Optional Information
Findings of fact.	■ Non-essential facts, if included under a heading with a title like "Stipulations Between the Debtor and the Lender" or "Background." ■ Factual findings about notice and the adequacy of notice included in a proposed **final** order. (Guidelines, ¶ 11(a)(i), (iii).)
Optional provisions.	Any appropriate material provisions of the financing agreement (Guidelines, ¶ 11(b)).
Waivers, consents, or amendments.	Waivers or consents regarding the loan agreement or loan agreement amendments without the need for further court approval if both: ■ The modified agreement does not shorten the maturity, alter the claim priority or collateralization, or increase the commitments, the rate of interest, or the fees payable by the estate. ■ Notice of all amendments (other than those that are ministerial or technical or do not adversely affect the debtor) are provided in advance to: • counsel for any official committee; and • the US Trustee. (Guidelines, ¶ 11(d).)
Conclusions of law.	■ A statement in the proposed **interim** order that the debtor is authorized to enter into the cash collateral agreement, but it should **not** state that the court has examined and approved the agreement (Guidelines, ¶ 11(e)).
Conclusions of law regarding notice.	■ Conclusions of law regarding the adequacy of notice under Bankruptcy Rule 4001 in a proposed **final** order (Guidelines, ¶ 11(h)).

Interim Relief

When cash collateral motions are filed on or shortly before the petition date, the court may grant interim relief on shortened notice. However, the court may grant interim relief only to the extent that it is necessary to "avoid immediate and irreparable harm to the estate pending a final hearing" (E.D.N.Y. LBR 4001-5(b)).

In the absence of "extraordinary circumstances" the court will not approve ex parte interim cash collateral orders that include any of the provisions listed in:

- Federal Rule of Bankruptcy Procedure 4001.
- EDNY Local Bankruptcy Court Rule 4001-5(a)(i)-(iii).

(E.D.N.Y. LBR 4001-5(b).)

An interim order does not ordinarily bind the court concerning the provisions of the final order if both:

- The lender receives all the benefits and protections of the interim order, including a lender's protections under section 363(m) of the Bankruptcy Code concerning funds advanced during the interim period.
- The interim order does not bind the lender to advance funds under a final order that contains provisions contrary to or inconsistent with the interim order.

(Guidelines, ¶ 6.)

Notice Requirements

Notice of a preliminary or final hearing should be given to:

- The US Trustee.
- The debtor's 20 largest unsecured creditors or the creditors' committee if one has been appointed.
- Persons required by Bankruptcy Rule 4001(b)(3) (see Notice and Hearing on the Cash Collateral Motion and Service of the Cash Collateral Motion).
- Any other persons with interests that may be directly affected by the outcome of the motion or any provision of the proposed order.

Emergency and interim relief may be sought after notice but ordinarily is not considered unless the US Trustee and the court have had a reasonable opportunity to review, and the court normally does not approve provisions that directly affect the parties without notice.

The hearing on a final order for the use of cash collateral under section 363(c) of the Bankruptcy Code ordinarily does not begin until there has been a reasonable opportunity for the formation of a committee and for the committee to obtain counsel.

(Guidelines, ¶ 8.)

Early Notice to the Office of the US Trustee

Prospective debtors are encouraged to provide substantially complete drafts of the cash collateral motion, interim order, and related cash collateral documents to the US Trustee before a filing, on a confidential basis (Guidelines, ¶ 9).

Presence at the Hearing

Unless the court directs otherwise, counsel for each entity (or counsel for an agent of the entity) with an interest in the consensual use of cash collateral should be present at all preliminary and final cash collateral hearings (Guidelines, ¶ 10).

While not required, the debtor typically submits a written declaration of a person familiar with the cash collateral terms and negotiations in support of the motion that describes the debtor's need for the use of cash collateral and proffers the declaration at the hearing. The declarant:

- May be a business representative of the debtor or the debtor's financial advisor.
- Must be prepared to be examined by the court and parties in interest concerning the proposed terms for using cash collateral.

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 (7-520-4512).

LOCAL RULES

The EDNY 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 but was unable to obtain a non-priming DIP (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, Adequate Protection: Overview: 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, Adequate Protection: Overview: 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, Adequate Protection: Overview: 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: Overview: 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 to any other entities as the court may direct (Fed. R. Bankr. P. 4001(c)(3) and see Service of the DIP Financing Motion).

LOCAL RULES

Contents of the DIP Financing Motion

EDNY Local Bankruptcy Court Rule 4001-5 supplements the requirements of Bankruptcy Rule 4001(c). The Guidelines for Financing Motions (Guidelines) require the debtor to specifically identify certain material provisions, in addition to those it must identify in a DIP financing motion under Bankruptcy Rule 4001(c) (see DIP Financing Motion Attachments and Contents). Each of these provisions must reference their location within the filed copy of the relevant agreement. This table summarizes the requirements of the Guidelines and EDNY Local Bankruptcy Court Rule 4001-5.

Provision	EDNY Bankruptcy Court Required Information
Essential terms of DIP financing motion.	■ The amount of financing the party seeks to obtain, including: • any committed amount or borrowing base formula; and • the estimated availability under the formula. ■ The material conditions to closing and borrowing, including budget provisions. ■ Pricing and economic terms and the treatment of costs and expenses of the lender, the lender's agent, and their professionals. (Guidelines, ¶ 1(a), (b), (c).)
Priming liens.	■ The effect on existing liens of granting collateral or adequate protection to the lender. ■ Priority or superpriority provisions. (Guidelines, ¶ 1(d).)
Carve-outs.	Carve-outs from: ■ Liens. ■ Superpriorities. (Guidelines, ¶ 1(e) and see Practice Note, The Section 506(c) Surcharge on Collateral: Carve-Outs (9-565-5645)). Disclose and justify: ■ The absence of any carve-out for professional fees. ■ Provisions that provide disparate treatment for the debtor's professional compared to the creditors' committee's professionals regarding the professional fee carve-out. ■ Provisions that exclude from a carve-out any request for professional fees related to the investigation of whether the secured creditor's lien is valid or properly perfected. (E.D.N.Y. LBR 4001-5(a)(i), (iii).)
Cross-collateralization.	Any provision that: ■ Elevates prepetition debt to administrative expense status. ■ Secures prepetition debt with liens on postpetition assets. (Guidelines, ¶ 1(f) and see Practice Note, DIP Financing: Overview: Increased Collateral Securing Prepetition Debt (1-383-4700)).
Roll-ups.	Any provision that either: ■ Applies the proceeds of DIP financing to pay prepetition debt. ■ Has the effect of converting prepetition debt to postpetition debt. (Guidelines, ¶ 1(g) and see Practice Note, Roll-Up DIP Financing (1-386-8691)).
Funding obligations.	Any limitation on the lender's obligation to fund certain activities of: ■ The debtor. ■ The official creditors', equity security holders', or retiree committee. (Guidelines, ¶ 1(h).)
Termination or default.	Any termination or default provisions, including: ■ Any cross-default provisions. ■ Events of default. ■ Any effect on the automatic stay or the lender's ability to enforce remedies. ■ Any terms that provide that the availability of credit stops on: • the filing of a challenge to the lender's prepetition lien or claim based on the lender's prepetition conduct; • entry of an order granting relief from the automatic stay except concerning material assets; • the grant of a change in venue of the case or any adversary proceeding; • management changes or the departure from the debtor of any identified employees; • the expiration of a specified time for filing a plan; or • the making of a financing motion by a party in interest seeking any relief. (Guidelines, ¶ 1(i), (o).)

Provision	EDNY Bankruptcy Court Required Information
Change-of-control.	Any change-of-control provisions (Guidelines, ¶ 1(j)).
Required sale of estate property.	Any provision setting a deadline for or otherwise requiring the sale of estate property (Guidelines, ¶ 1(k)).
Right or ability to repay.	Any prepayment penalty or other provision that affects the debtor's right or ability to repay the financing in full during the course of the case (Guidelines, ¶ 1(l) and see Practice Note, Treatment of Make-Whole and No-Call Provisions in Bankruptcy (5-506-1316)).
Joint liability.	In jointly administered cases: ■ Terms that govern the joint liability of debtors. ■ If one or more debtors is liable for the repayment of funds advanced to another debtor, any provisions that can affect the nature and priority of any inter-debtor claims that result if a debtor were to repay debt incurred by another debtor. (Guidelines, ¶ 1(m).)
Non-debtor affiliates.	Any provision for the funding of non-debtor affiliates with proceeds of the DIP loan and the approximate amount of this funding (Guidelines, ¶ 1(n)).
Provisions that purport to preclude court.	Any provision that purports to preclude the court from: ■ Authorizing financing that primes the lender. ■ Confirming a plan that impairs the lender without its consent. (Guidelines, ¶ 1(p).)
Secured creditor's expenses and attorneys' fees.	Disclose and justify provisions that require the debtor to pay the secured creditors' attorneys' fees and expenses relating to the proposed financing, without any notice or review by the Office of the US Trustee, creditors' committee (if formed), or court (E.D.N.Y. LBR 4001-5(a)(ii)).

A DIP financing motion should also include provisions regarding:

- **Efforts to obtain financing and good faith.** The motion should describe the efforts of the debtor to obtain financing, including:
  - the basis on which the debtor determined that the proposed financing is on the best terms available; and
  - material facts bearing on the issue of whether the extension of credit is being extended in good faith.
- (Guidelines, ¶ 2.) This is also required under section 364(d) of the Bankruptcy Code (see Section 364(d) of the Bankruptcy Code).
- **Notice after event of default.** If the proposed order contains a provision that modifies or terminates the automatic stay or permits the lender to enforce remedies after an event of default on less than seven days' notice to the debtor, the US Trustee, and the creditors' committee, the motion should explain why this lesser notice is provided (Guidelines, ¶ 3 and see Contents of Proposed Orders).
- **Carve-outs.** For a carve-out from liens or superpriorities, a provision disclosing:
  - when the carve-out takes effect;
  - if the carve-out remains unaltered after payment of interim fees made before an event of default; and
  - any effect on any borrowing base or borrowing availability under the DIP loan.
- The motion should also disclose the reasons for any disparate treatment for committee professionals and for exclusions from the carve-out for:
  - the reasonable expenses of committee members;
  - the reasonable post-conversion commissions, fees, and expenses of a Chapter 7 trustee; or
  - the fees payable to either the bankruptcy court or the US Trustee.
- Reasonable allocations in a carve-out provision may be proposed for:
  - expenses of professionals retained by committees appointed in the case;
  - expenses of professionals retained by the debtor;
  - fees payable to the bankruptcy court and to the US Trustee;
  - reasonable expenses of committee members; and
  - reasonable post-conversion commissions, fees, and expenses of a Chapter 7 trustee.
- (Guidelines, ¶ 4 and see Practice Note, The Section 506(c) Surcharge on Collateral: Carve-Outs (9-565-5645)).
- **Investigation periods relating to waivers and concessions about prepetition debt.** The motion should include an explanation if the proposed order fails to include a provision that permits an investigation of the lender's prepetition liens and claims and the filing of a complaint or a motion seeking authority to begin litigation as a representative of the estate:
  - by an official creditors' or equity security holders' committee for at least a 60-day period beginning from the date of the selection of its counsel;
  - by any party in interest (other than the debtor) for at least a 75-day period beginning from the date of entry of the final cash collateral order, if no committee has been appointed; or
  - for a 75-day period from the day a Chapter 7 trustee is appointed, if the case is converted from Chapter 11 to Chapter 7, to the extent that the investigation period has not expired.

- (Guidelines, ¶ 5 and see Practice Note, DIP Financing: Overview: Validation of Prepetition Liens and Releases (1-383-4700)).
- **Interim relief.** If the motion seeks entry of an emergency or interim order before a final hearing under Bankruptcy Rule 4001(c)(2) provide:
  - a description of the amount and purpose of the funds sought to be used on an emergency or interim basis; and
  - the facts supporting a finding that immediate or irreparable harm is likely to be caused to the estate if immediate relief is not granted before the final hearing.
- (Guidelines, ¶ 6 and see Notice and Hearing on the DIP Financing Motion.) A single motion may be filed seeking entry of an interim order and a final order, which orders the court would normally enter after the preliminary and the final hearing, respectively.
- **Adequacy of budget.** If the debtor is subject to a budget under a proposed financing order, provide a statement by the debtor on whether it has reason to believe that the budget is adequate, considering all available assets, to pay all administrative expenses due or accruing during the period covered by the financing or the budget (Guidelines, ¶ 7).

Contents of Proposed Orders

Proposed DIP financing orders **should** include certain provisions, as summarized in the table below.

Provision	EDNY Bankruptcy Court Recommended Information
Findings of fact.	■ The presentation of findings of facts limited to those essential to entry of the order. ■ A finding in a proposed **interim** order that immediate and irreparable loss or damage is caused to the estate if immediate financing is not obtained and, regarding notice, a statement that: • a hearing was held under Bankruptcy Rule 4001(c)(2); • notice was given to certain parties in the manner described; and • notice was, in the debtor's belief, the best available under the circumstances. ■ To the extent that a proposed order incorporates by reference or refers to a specific section of a prepetition loan agreement or other document, a statement of the significance of that section. (Guidelines, ¶ 11(a)(i), (ii), (iv).)
Cross-collateralization and roll-ups.	Language reserving the court's right to unwind or partially unwind (after notice and a hearing) cross-collateralization provisions and roll-ups, if there is either: ■ A successful challenge to the validity, enforceability, extent, perfection, or priority of the prepetition lender's claims or liens. ■ A determination that: • the prepetition debt was undersecured as of the petition date; and • the cross-collateralization or roll-up gives undue advantage to the lender. (Guidelines, ¶ 11(c) and see Practice Notes, DIP Financing: Overview: Increased Collateral Securing Prepetition Debt (1-383-4700) and Roll-Up DIP Financing (1-386-8691)).
Order to control.	Statement that to the extent that a loan or agreement differs from the order, the order controls (Guidelines, ¶ 11(f)).
Statutory provisions affected.	A specification of those provisions of the Bankruptcy Code, the Bankruptcy Rules, and the EDNY Local Bankruptcy Court Rules relied on as authority for granting relief (Guidelines, ¶ 11(g)).
Notice after event of default.	If the proposed order contains a provision that modifies or terminates the automatic stay or permits the lender to enforce remedies after an event of default, the proposed order should require at least seven days' notice to: ■ The debtor. ■ The US Trustee. ■ The creditors' committee (or the debtor's 20 largest unsecured creditors as listed on the debtor's schedules if no committee has been appointed). (Guidelines, ¶ 3.) If less notice is provided, the DIP financing motion should explain why (see Local Rules: Contents of the Cash Collateral Motion).
Carve-outs.	For a carve-out from liens or superpriorities, a provision disclosing: ■ When the carve-out takes effect. ■ If it remains unaltered after payment of interim fees made before an event of default. ■ Any effect on any borrowing base or borrowing availability under the DIP loan. (Guidelines, ¶ 4 and see Practice Note, The Section 506(c) Surcharge on Collateral: Carve-Outs (9-565-5645)).

Provision	EDNY Bankruptcy Court Recommended Information
Investigation periods relating to waivers and concessions about prepetition debt.	If the proposed order contains language where the debtor stipulates, acknowledges, or otherwise admits to the validity, enforceability, priority, or amount of a prepetition claim or of any lien securing the claim, the proposed order should include a provision that permits an investigation of the lender's liens and claims and the filing of a complaint or a motion seeking authority to begin litigation as a representative of the estate: ■ By an official creditors' or equity security holders' committee for at least a 60-day period beginning from the date of the selection of its counsel. ■ By any party in interest (other than the debtor) for at least a 75-day period beginning from the date of entry of the final cash collateral order, if no committee has been appointed. ■ For a 75-day period from the day a Chapter 7 trustee is appointed, if the case is converted from Chapter 11 to Chapter 7, to the extent that the investigation period has not expired. (Guidelines, ¶ 5.) If the proposed order does not contain this provision, the DIP financing motion should explain why (see Local Rules: Contents of the DIP Financing Motion).

DIP financing orders **may** also include other provisions, as summarized in the table below.

Provision	EDNY Bankruptcy Court Optional Information
Findings of fact.	■ Non-essential facts, if included under a heading with a title like "Stipulations Between the Debtor and the Lender" or "Background." ■ Factual findings about notice and the adequacy of notice included in a proposed **final** order. (Guidelines, ¶ 11(a)(i), (iii).)
Optional provisions.	Any appropriate material provisions of the financing agreement (Guidelines, ¶ 11(b)).
Waivers, consents, or amendments.	Waivers or consents regarding the loan agreement or loan agreement amendments without the need for further court approval if both: ■ The modified agreement does not shorten the maturity, alter the claim priority or collateralization, or increase the commitments, the rate of interest, or the fees payable by the estate. ■ Notice of all amendments (other than those that are ministerial or technical or do not adversely affect the debtor) are provided in advance to: • counsel for any official committee; and • the US Trustee. (Guidelines, ¶ 11(d).)
Conclusions of law.	A statement in the proposed **interim** order that the debtor is authorized to enter into the loan agreement, but it should **not** state that the court has examined and approved the agreement (Guidelines, ¶ 11(e)).
Conclusions of law regarding notice.	Conclusions of law regarding the adequacy of notice under Bankruptcy Rule 4001 in a proposed **final** order (Guidelines, ¶ 11(h)).

Interim Relief

When DIP financing motions are filed on or shortly before the petition date, the court may grant interim relief on shortened notice. However, the court may grant interim relief only to the extent that it is necessary to "avoid immediate and irreparable harm to the estate pending a final hearing" (E.D.N.Y. LBR 4001-5(b)).

In the absence of "extraordinary circumstances" the court will not approve ex parte interim DIP financing orders that include any of the provisions listed in:

- Federal Rule of Bankruptcy Procedure 4001.
- EDNY Local Bankruptcy Court Rule 4001-5(a)(i)-(iii).

(E.D.N.Y. LBR 4001-5(b).)

An interim order does not ordinarily bind the court concerning the provisions of the final order if both:

- The lender receives all the benefits and protections of the interim order, including a lender's protections under section 364(e) of the Bankruptcy Code concerning funds advanced during the interim period.
- The interim order does not bind the lender to advance funds under a final order that contains provisions contrary to or inconsistent with the interim order.

(Guidelines, ¶ 6.)

Notice Requirements

Notice of a preliminary or final hearing should be given to:

- The US Trustee.
- The debtor's 20 largest unsecured creditors or the creditors' committee if one has been appointed.
- Persons required by Bankruptcy Rule 4001(c)(3) (see Notice and Hearing on the DIP Financing Motion and Service of the DIP Financing Motion).
- Any other persons with interests that may be directly affected by the outcome of the motion or any provision of the proposed order.

Emergency and interim relief may be sought after notice but ordinarily is not considered unless the US Trustee and the court have had a reasonable opportunity to review, and the court normally does not approve provisions that directly affect the parties without notice.

The hearing on a final order for authority to obtain credit under section 364 of the Bankruptcy Code ordinarily does not begin until there has been a reasonable opportunity for the formation of a committee and for the committee to obtain counsel.

(Guidelines, ¶ 8.)

Early Notice to the Office of the US Trustee

Prospective debtors are encouraged to provide substantially complete drafts of the DIP financing motion, interim order, and related financing documents to the US Trustee before a filing, on a confidential basis (Guidelines, ¶ 9).

Presence at the Hearing

Unless the court directs otherwise:

- Counsel for each proposed lender (or counsel for an agent representing the proposed lender) should be present at all preliminary and final hearings.
- A business representative of the debtor, the proposed lender, or an agent representing the proposed lender, and any party objecting to the DIP financing motion, each with appropriate authority, should be present or available by telephone for all preliminary and final hearings.

(Guidelines, ¶ 10.)

While not required, the debtor typically submits a written declaration of a person familiar with the DIP financing terms and negotiations in support of the motion that describes the debtor's efforts to obtain financing and proffers the declaration at the hearing. The declarant:

- May be a business representative of the debtor or the debtor's financial advisor.
- Must be prepared to be examined by the court and parties in interest concerning the proposed financing.

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

A debtor must file an affidavit containing specific information on or within 14 days of the petition date (E.D.N.Y. LBR 1007-4(b)). While the EDNY Local Bankruptcy Court Rules use the term "affidavit" to describe the document a debtor must submit, debtors often submit a declaration instead of an affidavit because the US Code permits use of declarations in federal cases and a declaration does not have to be sworn before a notary public (28 U.S.C. § 1746 and see Practice Note, Chapter 11 First Day Declaration: Declaration Versus Affidavit (7-617-7678)).

A debtor typically describes the relevant background information and prepetition events in the body of the first day declaration (see Practice Note, Chapter 11 First Day Declaration: Declaration Structure (7-617-7678)). A debtor completing a first day declaration in a case presiding in the EDNY addresses some of the local rule information requirements in the body of the document and should consider addressing the remaining information requirements at the end of the declaration in separate schedules attached as exhibits. By providing certain of the information responses on separate schedules, it is clear to the court and the parties in the case which piece of information corresponds with each section of EDNY Local Bankruptcy Court Rule 1007-4.

To comply with EDNY Local Bankruptcy Court Rule 1007-4(a), all Chapter 11 debtors must provide:

- Whether the debtor is a small business debtor within the meaning of section 101(51D) of the Bankruptcy Code (E.D.N.Y. LBR 1007-4(a)(i)).
- The nature of the debtor's business and a statement of the circumstances leading to the debtor's filing under Chapter 11 (E.D.N.Y. LBR 1007-4(a)(ii)).
- In a converted case, the name and address of any trustee appointed in the case and, in a case originally filed under Chapter 7, the names and addresses of the members of any creditors' committee (E.D.N.Y. LBR 1007-4(a)(iii)).
- The names and addresses of the members of, and professionals employed by, any committee organized before the petition date and a description of the circumstances surrounding the formation of the committee, including the date formed (E.D.N.Y. LBR 1007-4(a)(iv)).

- The debtor's 20 largest general unsecured claims, excluding insiders, including for each unsecured creditor:
  - a name;
  - an address;
  - a telephone number;
  - the name of the person familiar with the debtor's account;
  - the claim amount; and
  - whether the claim is contingent, unliquidated, disputed, or partially secured.
- (E.D.N.Y. LBR 1007-4(a)(v) and see Standard Document, List of Largest Unsecured Creditors (3-610-4108))
- The debtor's five largest secured claims, including for each secured creditor:
  - a name;
  - an address;
  - the claim amount;
  - a description and estimate of value of the collateral securing the claim; and
  - whether the claim or lien is disputed.
- (E.D.N.Y. LBR 1007-4(a)(vi).)
- A summary of the debtor's assets and liabilities (E.D.N.Y. LBR 1007-4(a)(vii)).
- All of the debtor's classes of securities publicly held, such as common stock, including the number of shares issued, the number of holders, and whether any shares are held by the debtor's officers and directors, including the amounts (E.D.N.Y. LBR 1007-4(a)(viii)).
- The debtor's business property held in the possession of any third parties, including custodians, public officers, assignees of rents, mortgagees, or secured creditors, and for each third party:
  - a name;
  - an address;
  - a telephone number;
  - the title of any related proceeding; and
  - the court where the proceeding is pending.
- (E.D.N.Y. LBR 1007-4(a)(ix).)
- A list of all premises owned, leased, or held under any other arrangement where the debtor operates its business (E.D.N.Y. LBR 1007-4(a)(x)).
- The location of the debtor's significant assets and books and records and the value of any assets held outside the territorial limits of the US (E.D.N.Y. LBR 1007-4(a)(xi)).
- All actions or proceedings pending or threatened against the debtor or its property if a judgment or seizure may be imminent (E.D.N.Y. LBR 1007-4(a)(xii)).
- The names of the debtor's existing senior management, including their:
  - tenure; and
  - relevant responsibilities and experience.
- (E.D.N.Y. LBR 1007-4(a)(xiii).)
- Amounts paid or proposed to be paid for services for the 30-day period following the petition date to any officers or directors and to any financial or business consultants retained by the debtor (E.D.N.Y. LBR 1007-4(a)(xv)).
- For the 30-day period following the petition date, estimated:
  - cash receipts;
  - cash disbursements;
  - net cash gain or loss;
  - obligations and receivables expected to accrue but that remain unpaid, other than professional fees; and
  - any other information relevant to understand these numbers.
- (E.D.N.Y. LBR 1007-4(a)(xvi).)
- Any additional information as necessary to fully inform the court of the debtor's rehabilitation prospects (E.D.N.Y. LBR 1007-4(a)(xvii)).

While EDNY Local Bankruptcy Court Rule 1007-4 has numerous information requirements, not every category of information is applicable to the debtor. If a particular category of information is not applicable to the debtor, the debtor should indicate which ones were not applicable in a footnote to the first day declaration.

Waiver of Requirements

A debtor may make a motion to the court on notice to the US Trustee showing that it is impracticable or impossible to furnish any of the information required by EDNY Local Bankruptcy Court Rule 1007-4(a) (E.D.N.Y. LBR 1007-4(c)). The court may then waive some of the requirements, except for the first seven pieces of information listed in EDNY Local Bankruptcy Court Rule 1007-4(a)(i)-(vii).

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 EDNY has adopted the Guidelines for First Day Motions (Guidelines).

The Guidelines provide that:

- The request for a first day order should be made by a first day motion and a copy of the proposed first day order should be filed as an exhibit to the first day motion (Guidelines, ¶ 2(a)).
- Only those motions seeking and appropriately requiring emergency relief are heard on an expedited basis. Other motions may still be filed shortly after the filing of a petition, but they should seek relief at a future hearing (Guidelines, ¶ 2(b)).

The Guidelines governing select first day motions and orders are summarized in the table below.

Motion	EDNY Bankruptcy Court Requirements
Joint Administration	This is typically a first day motion when multiple debtors file (Guidelines, ¶ 3(a)).
Ministerial Matters	■ This first day motion might request court authorization to: • extend the time to file schedules and statements (which ordinarily should not exceed 60 days from the petition date) (see Practice Note, Schedules and Statements of Financial Affairs: Overview (W-000-9982)); • establish procedures for mailing; • waive the requirement to file a list of creditors in cases where a motion to retain a claims or noticing agent has been filed; and • use prepetition business forms, including letterhead or checks. ■ This relief should, where requested, ordinarily be sought in a single omnibus motion. ■ This first day motion should not include requests to use prepetition bank accounts or waive the investment requirements of section 345 of the Bankruptcy Code. (Guidelines, ¶ 3(b).)
Cash Collateral and Financing	This first day motion should be brought consistent with the court's Guidelines for Financing Motions (see Local Rules: Cash Collateral and Local Rules: DIP Financing). (Guidelines, ¶ 3(c)).
Cash Management Arrangements	This first day motion should: ■ Describe the proposed cash management system and give a business purpose for inter-debtor transfers. ■ Seek authorization (but not direction) for banks to follow the debtor's instructions concerning clearing checks and authorize the banks to rely on the debtor's representations about which checks to clear. (Guidelines, ¶ 3(d).)
Prepetition Employee Compensation, Benefits, and Business Expenses	This first day motion should: ■ Disclose the gross amounts to be paid per employee or by employee group (for example, general job categories) and in the aggregate. ■ Estimate by category (such as salaries, commissions, or reimbursable business expenses) the aggregate amounts proposed to be paid. ■ State whether and the extent to which the claims proposed to be paid are priority claims under section 507 of the Bankruptcy Code and, if they are not, explain why those claims should be afforded the treatment requested. ■ For authority to pay amounts above the priority amount, attach a list of the names and position or job titles of all employees receiving those excess payments. Individual information may be presented confidentially in certain circumstances. ■ Describe any relief that will be sought at a later hearing concerning any prepetition employee retention plans. (Guidelines, ¶ 3(e).)
Critical Vendors	This first day motion should: ■ Ordinarily be brought as a single omnibus first day motion. ■ Identify, by category, the types of claims that the debtor proposes to pay and should authorize specific non-cumulative capped amounts and describe the basis for the estimate of the expenditure. Vendor information may be presented confidentially in certain circumstances. ■ State whether and the extent to which the prepetition claims proposed to be paid may constitute claims under section 503(b)(9) of the Bankruptcy Code and, if they are not, explain why those claims should be afforded the treatment requested. (Guidelines, ¶ 3(f) and see Practice Note, Critical Vendor Status in Bankruptcy (1-518-9996)).
Customer Claims	This first day motion: ■ Might request court authorization to honor prepetition obligations concerning refunds of deposits, lay-away plans, rebates, customer programs, or warranty claims. ■ Should specify a cap on the amount to be paid or honored per claimant and in the aggregate and the basis for this cap. ■ Should state whether and the extent to which the claims proposed to be paid are priority claims and, if they are not, explain why those claims should be afforded the treatment requested. (Guidelines, ¶ 3(g) and see Practice Note, Chapter 11 Customer Programs Motion (9-618-0670)).
Prepetition Taxes	This first day motion should state whether and the extent to which the claims proposed to be paid are trust fund taxes, *ad valorem* taxes that result in liens, and other taxes whose non-payment gives rise to personal liability for officers, directors, or employees, or other priority claims, and if not, explain why those claims should be afforded the treatment requested (Guidelines, ¶ 3(h)).

Motion	EDNY Bankruptcy Court Requirements
Investment Guidelines	■ This first day motion should disclose: • the estimated amount of funds that the debtor proposes to invest outside the enumerated investments permitted under section 345(b) of the Bankruptcy Code; • the proposed types of investments to be made; and • whether the US Trustee has approved the debtor's proposed arrangements. ■ If the debtor proposes to invest or deposit money in or with an entity that has not satisfied the requirements of section 345(b), this first day motion should explain why this investment or deposit is preferred and, to the extent known, why this entity cannot or has not satisfied the requirements of section 345(b). A list of US Trustee-approved depositaries for the EDNY can be found on the DOJ website. ■ (Guidelines, ¶ 3(i).)
Administrative Procedures	This first day motion may request court authorization to establish a core service list and set omnibus hearing dates (Guidelines, ¶ 3(j)).
Retention of Claims or Noticing Agent	Where the debtor expects that more than 1,000 proofs of claim will be filed: ■ The debtor should retain a claims or noticing agent to receive mailed proofs of claim. ■ Counsel should contact the clerk's office for appropriate procedures. (Guidelines, ¶ 3(k) and see Practice Note, The Retention and Role of a Claims Agent in Bankruptcy (W-001-1117)).
Restrictions on Certain Transfers	This first day motion may request court authorization to restrict certain transfers of claims against and equity interests in the debtor and establish procedures for notice of certain transfers regarding same (Guidelines, ¶ 3(l)).

Extraordinary Relief

Any first day motion requesting the relief identified in Federal Rule of Bankruptcy Procedure 6003 (Bankruptcy Rule 6003) before the 21-day period provided by Bankruptcy Rule 6003 expires is considered a request for extraordinary relief.

If the debtor requests any extraordinary relief, the first day motion, together with the omnibus affidavit or declaration, should specifically state that extraordinary relief is sought and provide appropriate justification, according to EDNY Local Bankruptcy Court Rule 9077-1.

Factors considered by the court include:

- The extent and adequacy of the notice provided.
- Whether only the minimal relief necessary is requested on an interim basis, with a broader final order to be submitted on notice.
- Whether a creditors' committee or other parties in interest can conduct an investigation and bring any appropriate proceedings related to the extraordinary relief.
- The urgency of the relief requested.

(Guidelines, ¶ 4.)

Participation of the Creditors' Committee

Absent good cause shown, the court does not grant an order approving final substantive relief concerning any matter that is granted on an interim basis under a first day motion unless the creditors' committee is in place for at least seven days before the motion is heard.

Absent good cause shown, the creditors' committee should be in place for at least seven days before motions are heard to:

- Reject leases and executory contracts.
- Establish procedures for payment of interim compensation for retained professionals.
- Approve severance and employee retention programs.
- Approve the assumption of existing employment agreements.

(Guidelines, ¶ 5(a), (b).)

Background and Factual Support

A single omnibus affidavit or declaration (or a small number of affidavits or declarations) should include the necessary general background as well as specific factual support for each first day motion, as necessary. The relevant affidavit or declaration may expressly be incorporated by reference into each motion in place of a lengthy background section of first day motions and other motions filed in the case.

(Guidelines, ¶ 6.)

Notice of First Day Motions

The debtor should prepare an index of first day motions and proposed first day orders that includes a brief one-paragraph summary of the relief sought in each. The index also should note any first day motions that include a request for extraordinary relief (see Extraordinary Relief). The index should inform parties that the first day motions and proposed first day orders may be viewed on the court's website and that copies can be obtained from the debtor's counsel or noticing agent.

The index and binder of all first day motions and proposed first day orders should be provided at least one business day before the petiton date to:

- The US Trustee.
- Any party with a security interest in substantially all of the debtor's assets.
- If appropriate, any unofficial committee.

Once the petition is filed and the debtor is notified of the scheduling of the hearing on the first day motions, the debtor should immediately send the index to:

- The US Trustee.
- Counsel to any party with a security interest in substantially all of the debtor's assets.
- Counsel to any other party adversely affected by the relief requested.

- The 20 largest unsecured creditors of each debtor, if not onerous in view of the number of debtor entities, or if a consolidated list is filed, to the 30 largest unsecured creditors, by hand delivery, fax, or email, along with a notice of the time and place of the hearing on the first day motions.

Whenever practicable, the debtor should provide, before the first day motions are filed and before the final hearing on any matter that is granted on an interim basis, a list of email addresses for:

- The debtor.
- The debtor's counsel.
- Counsel to any party with a security interest in substantially all of the debtor's assets.
- Counsel to any other party adversely affected by the relief requested.
- The 20 largest unsecured creditors of each debtor or, if a consolidated list is filed, the 30 largest unsecured creditors.

(Guidelines, ¶ 7.)

List of Unsecured Creditors

Whenever practicable, before the hearing on the first day motions is held, the debtor should file a separate list of the 20 largest unsecured creditors of each debtor, as required by Federal Rule of Bankruptcy Procedure 1007. In cases involving multiple debtors, if it would be impracticable for each debtor to file a separate list, the debtor should so explain in the Bankruptcy Rule 1007 affidavit and file a consolidated list of the 30 largest unsecured creditors.

(Guidelines, ¶ 8 and see Standard Document, List of Largest Unsecured Creditors (3-610-4108)).

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

On January 11, 2016, the EDNY Bankruptcy Court adopted the Procedural Guidelines for Prepackaged and Prenegotiated Chapter 11 Cases (Guidelines) that are similar to the SDNY Prepack Guidelines. The EDNY Prepack Guidelines are advisory only and are not binding on the bankruptcy courts within the EDNY. They are intended to provide guidance to practitioners on matters where the Bankruptcy Code and Bankruptcy Rules are silent or where these issues are addressed indirectly by statutes, general rules, or local rules that did not contemplate prepacks (for example, an appropriate solicitation period (see Practice Note, The Prepackaged Bankruptcy Strategy: Solicitation Procedures) (9-503-4934)). The Guidelines are mainly focused on procedures for commencing and administering a prepackaged bankruptcy but also provide forms for the prepackaged scheduling motion, ballots, and summary of the plan. However, unlike the SDNY Prepack Guidelines, the EDNY Prepack Guidelines also address prenegotiated cases (see Practice Note, Comparison: Prepackaged v. Pre-Arranged Bankruptcy (W-001-3394)).

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 (6-616-6524).
- 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 (0-616-6522)).

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

Professionals seeking compensation must comply with:

- The US Trustee fee guideline requirements (E.D.N.Y. LBR 2016-1; see Practice Note, Getting Paid as a Professional to a Chapter 11 Debtor or Trustee: US Trustee Fee Guidelines (8-616-5137)). A copy of the retention order must accompany all fee applications.
- The Guidelines for Fees and Disbursements for Professionals in Eastern District of New York Bankruptcy Cases, which are largely duplicative of the US Trustee fee guideline requirements.

The EDNY has issued Administrative Order No. 538, which provides that:

- All monthly fee orders must be requested by motion on notice to the parties described in the monthly fee order.
- All orders must conform substantially to the form of monthly fee order annexed thereto.
- Whether or not a motion for a monthly fee order will be granted is determined on a case-by-case basis by the judge to whom the case is assigned.

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

Required Disclosures

In addition to the requirements of Federal Rule of Bankruptcy Procedure 2014(a), an application for employment of a professional person must state:

- The terms and conditions of the employment, including the terms of any retainer, hourly fee, or contingent fee arrangement.
- All compensation already paid or promised to the professional person and the specific source of this compensation.
- Whether the professional person has previously rendered any professional services to the applicant, specifying:
  - the extent of these services; and
  - the status of the compensation for these services.

(E.D.N.Y. LBR 2014-1(a).)

The application must be accompanied by a verified statement of the person to be employed stating that:

- This person does not hold or represent an interest adverse to the estate except as specifically disclosed in the application.
- The professional is disinterested, if employment is sought under section 327(a) of the Bankruptcy Code.

(E.D.N.Y. LBR 2014-1(b).)

Section 327(a) Retention

In a Chapter 11 case, the verified statement required to accompany an application for employment of an attorney under section 327(e) of the Bankruptcy Code must include a statement of the attorney's qualifications and experience in handling Chapter 11 cases to enable the court to evaluate the attorney's competence (E.D.N.Y. LBR 2014-1(c)).

Retention of Accountant

An application seeking authority to employ an accountant must include a verified statement by an authorized representative of the accounting firm that sets out:

- Whether or not the accountant is a certified public accountant.
- The estimated cost of the accountant's proposed services, the basis of this estimate, and the extent to which the accountant is familiar with the debtor's books or accounts.

(E.D.N.Y. LBR 2014-1(d).)

Ex Parte Relief

All ex parte proposed orders and supporting documentation for employment of any professional must be submitted to the US Trustee for review before filing (E.D.N.Y. LBR 2014-1(e)).

REMOVAL, REMAND, AND ABSTENTION IN BANKRUPTCY

BACKGROUND/FEDERAL REQUIREMENTS

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

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

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

LOCAL RULES

The EDNY does not have any local rules regarding removal, remand, and abstention in bankruptcy.

RETAINING A CLAIMS AGENT

BACKGROUND/FEDERAL REQUIREMENTS

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

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

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

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

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

For more information on the role and responsibilities of a claims agent, see Practice Note, The Retention and Role of a Claims Agent in Bankruptcy (W-001-1117).

LOCAL RULES

The court may permit services or agents to maintain court records, issue notices, file documents, and maintain and disseminate other administrative information when the estate pays the costs of these services and agents (E.D.N.Y. LBR 5075-1).

The E.D.N.Y. has issued Administrative Order No. 658, which:

- Provides that certain administrative duties of the clerk of the court, such as noticing and claims processing, may be performed by a facility or service. The facility or service provider must be retained by order of the bankruptcy court, and its fees and costs must be paid from the estate.
- Authorizes the clerk of the court to issue a protocol, model documents, and guidelines pertaining to the retention of a claims and noticing agent, all which may be found on the court's website.

RETENTION OF LOCAL COUNSEL

BACKGROUND/FEDERAL REQUIREMENTS

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

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

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

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

LOCAL RULES

Retention of local counsel is not required for attorneys admitted out of state nor for attorneys admitted in the state but residing out of district.

A member in good standing of any bar may be permitted to practice *pro hac vice* (E.D.N.Y. LBR 2090-1).

SECTION 363 SALES

BACKGROUND/FEDERAL REQUIREMENTS

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

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

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

Courts have also held that the sale must:

- Be in the best interests of the estate and its creditors. The debtor generally has a fiduciary duty to obtain the highest or best price for the assets (see *Cello Bag Co., Inc. v. Champion Int'l Corp. (In re Atlanta Packaging Prods., Inc.)*, 99 B.R. 124, 130 (Bankr. N.D. Ga. 1988)). To satisfy this requirement, the sale is usually subject to

an auction. The highest price is not always the best price, and it is unnecessary to show that the purchase price was the highest possible price obtainable under the circumstances.

- Be proposed in good faith (see *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 150 (3d Cir. 1986)).
- Have a legitimate business justification (see *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 section 363 sales regarding:

- **Length and method of notice.** The clerk of the bankruptcy court or another person directed by the court must give parties at least 21 days' notice of the sale by mail, unless the court limits or shortens the time or directs another method of giving notice (Fed. R. Bankr. P. 2002(a)(2)).
- **Content of notice.** The notice must include:
  - the time and place of any public sale;
  - the terms and conditions of any private sale;
  - the time fixed for filing objections; and
  - a general description of the property to be sold. The notice of a proposed sale of PII must state whether the sale is consistent with the debtor's privacy policy (see Section 363(b)(1)(A) and (B): Sale of PII Requirements).
- (Fed. R. Bankr. P. 2002(c)(1).)
- **Parties served.** The notice of the sale must be served on:
  - the debtor;
  - the trustee, if any;
  - all creditors;
  - any indenture trustees;
  - any official creditors' committees and equity committees, or their authorized agents;
  - the Securities and Exchange Commission (SEC), if appropriate;
  - the Commodity Futures Trading Commission, in a commodity broker case;
  - the Internal Revenue Service (IRS);
  - the US attorney for the district where the case is pending, if a debt is owed to the US other than for taxes, and on the department, agency, or instrumentality of the US through which the debtor became indebted;
  - the Secretary of the Treasury, if the US has a stock interest;
  - the US Trustee;
  - equity security holders, in sales of all or substantially all assets, unless the court orders otherwise; and
  - entities who have requested notice under Federal Rule of Bankruptcy Procedure 2002.
- (Fed. R. Bankr. P. 2002(a)(2), (d), (g), (i), (j), (k).)
- **Additional parties served.** Notice must also be served on:
  - the consumer privacy ombudsman, if applicable (§ 332(a), Bankruptcy Code and see Section 363(b)(1)(A) and (B): Sale of PII Requirements and Bankruptcy Rule 6004(g): Sale of PII Requirements);
  - all parties to executory contracts or unexpired leases to be assumed and assigned, or rejected as part of the sale (see Section 365 Requirements) (Fed. R. Bankr. P. 6006(c));
  - all parties known or reasonably believed to have asserted a lien, encumbrance, claim, or other interest in the assets to be sold (Fed. R. Bankr. P. 6004(c) and see Bankruptcy Rule 6004 Requirements); 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 of the ordinary course of business must be given consistent with Bankruptcy Rule 2002 (Fed. R. Bankr. P. 6004(a) and see Bankruptcy Rule 2002 Notice Requirements).
- **Objections.** Objections to the proposed sale must be filed and served at least seven days before the date of the sale or within the time fixed by the court (Fed. R. Bankr. P. 6004(b)). An objection

gives rise to a contested matter governed by Federal Rule of Bankruptcy Procedure 9014 (Bankruptcy Rule 9014).

- **Sale free and clear of liens.** A sale free and clear of liens or other interests under section 363(f) of the Bankruptcy Code is a contested matter for which a motion must be made under Bankruptcy Rule 9014 and served on the parties who have liens or other interests in the property to be sold (Fed. R. Bankr. P. 6004(c)). The notice must include the date of the sale hearing and the deadline to file and serve objections on the debtor or the trustee. Under Bankruptcy Rule 9014, the motion must be served in the manner provided for service of a summons and complaint by Federal Rule of Bankruptcy Procedure 7004.
- **Hearing.** If a timely objection is made, the hearing date may be set out in the original notice of the sale (Fed. R. Bankr. P. 6004(e)). No hearing is required if there are no objections. If the original sale notice does not contain a hearing date, the objecting party commonly obtains a hearing date and time from the court and states it on the objection.
- **Public or private sale.** The sale may be by private sale or public auction. On the completion of the sale, unless it is impracticable, the trustee or the debtor must file and transmit to the US Trustee an itemized statement of:
  - the property sold;
  - the name of each purchaser; and
  - the price received for each item or lot or for the property as a whole if sold in bulk.
- (Fed. R. Bankr. P. 6004(f)(1).)
- If an auctioneer sells the property, then the auctioneer must file the statement and provide a copy to the US Trustee and the debtor or the trustee.
- **Execution of instruments.** The debtor or the trustee must execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser (Fed. R. Bankr. P. 6004(f)(2)).
- **Stay of sale order.** Sale orders are stayed for 14 days, unless the court orders otherwise (Fed. R. Bankr. P. 6004(h)). This gives any objecting parties time to seek a further stay while they appeal the sale order. Courts can waive or reduce the 14-day appeal period, on request of the parties, if there is a reason to close the sale early.

Bankruptcy Rule 6004(g): Sale of PII Requirements

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

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

EDNY Local Bankruptcy Court Rule 6004-1, EDNY Local Bankruptcy Court Rule 6005-1, and the Sale Guidelines (Guidelines) supplement the requirements of Bankruptcy Rule 6004 for sales in the EDNY (see Bankruptcy Rule 6004 Requirements).

Conflict of Interest

An appraiser, an auctioneer, or any officer, director, stockholder, agent, employee, or insider of an appraiser or auctioneer must not purchase directly or indirectly or have a financial interest in the purchase of any property of the estate that the appraiser or auctioneer has been employed to sell (E.D.N.Y. LBR 6004-1(a)).

Notice of Sale of Estate Property by Private Sale

A party seeking to sell property of the estate outside the ordinary course of business must give the notice required by Bankruptcy Rule 2002(a)(2) (see Bankruptcy Rule 2002 Notice Requirements) and, if applicable, Bankruptcy Rule 6004(g) (see Bankruptcy Rule 6004(g): Sale of PII Requirements).

This notice must contain:

- A general description of the property.
- A statement explaining where a complete description or inventory of the property may be obtained or examined.
- The terms of sale and procedures for bidding and the terms of any pending offer proposed to be accepted.
- The place, date, and time of the sale.
- The place, date, and time the property may be examined before the sale.
- The date by which objections to the sale must be filed with the court.
- The date of the hearing to consider any objections to the sale.
- The name and address of any trustee.

(E.D.N.Y. LBR 6004-1(b).)

Manner of Display and Conduct of Auction

In conducting the auction:

- The property must be on public display for a reasonable period of time before the auction.
- Before receiving bids, the auctioneer must announce the terms of sale.
- The property shall be offered for sale first in bulk and then in lots, when practicable.
- Before the sale, the auctioneer must announce any property not included in the sale, which must be set apart and conspicuously marked as "not included in the sale."

(E.D.N.Y. LBR 6004-1(c).)

Joint Auctions

Whenever the trustee and a secured party or other third party having an interest in the property want to conduct a joint auction, the court may enter an order fixing the method of allocating the commissions and expenses of sale (E.D.N.Y. LBR 6004-1(d)).

Auction Proceeds

On receipt of the sale proceeds, the auctioneer must:

- Immediately deposit the proceeds in a separate account that it maintains for each estate under section 345(a) of the Bankruptcy Code.
- Promptly but no later than seven days after receiving the proceeds pay the gross proceeds of the sale to the trustee or debtor.

(E.D.N.Y. LBR 6004-1(e).)

Report of Auction

Within 21 days of the sale, the auctioneer must file a verified report and provide a copy to the trustee and the US Trustee. If it has not received all proceeds by this date, the auctioneer must also file a supplemental report within 14 days after all proceeds are received (E.D.N.Y. LBR 6004-1(f)).

EDNY Local Bankruptcy Court Rule 6004-1(f) provides that the report must include:

- The time, date, and place of the auction.
- The gross dollar amount of the sale.
- If the property was sold in lots, a description of:
  - the items in each lot;
  - the quantity in each lot;
  - the dollar amount received for each lot; and
  - any bulk bids received.
- An itemized statement of expenditures, reimbursements, and commissions allowable under EDNY Local Bankruptcy Court Rule 6005-1, including:
  - the name and address of the payee;
  - receipts or canceled checks for the expenditures or disbursements (counsel should state if the canceled checks are unavailable and file as soon as they become available);
  - where labor charges are included, the days worked and the number of hours worked each day by each person, supported by an affidavit from each payee that also sets out all amounts received;
  - a statement of how the insurance expense charged to the estate was computed, if the auctioneer has a blanket insurance policy covering all sales it conducts;
  - a statement of any articles withdrawn from the auction because of a third-party claim of an interest in those articles, reflecting the names of these third parties;
  - the names and addresses of all purchasers;
  - the sign-in sheet or, if none, the estimated number of people attending the auction;
  - the items for which there were no bids and the disposition of those items;
  - the terms of sale that were announced before receiving bids;
  - a statement of the manner and extent of advertising the auction, including a copy of the published advertisement and a certificate of publication;
  - a statement of the manner and extent of the availability of the items for inspection;
  - a copy of the order retaining the auctioneer; and
  - any other information that the trustee, the US Trustee, or the court may request.

Auctioneer's Affidavit

The auctioneer must submit with the report of auction an affidavit stating:

- Whether the auctioneer is a duly licensed auctioneer.
- The auctioneer's license number and place of business.
- The authority under which it conducted the auction.
- The date and place of the auction.
- That the labor and other expenses incurred on behalf of the estate as listed in the report of auction were reasonable and necessary.
- That the gross proceeds were remitted to the trustee or the debtor and the date of remittance.

(E.D.N.Y. LBR 6004-1(g).)

Advertisement and Publication of Notice of Sale

EDNY Local Bankruptcy Court Rule 6004-1(h) provides that the court need not approve an advertisement or publication of notice of sale if it is sufficient to provide adequate notice of the sale and is advertised or published at least once in a newspaper of general circulation in the city or county where the property is located. The advertisement or publication must include:

- The date, time, and place of the sale.
- A description of the property to be sold.
- The terms and conditions of the sale.
- The name, address, and telephone number of the auctioneer.

(E.D.N.Y. LBR 6004-1(h).) The judge may fix the manner and extent of advertising and publication at any time.

No Order Needed to Confirm Sale

Unless a timely objection is made, a court order is not required to confirm a sale of property otherwise authorized by the Bankruptcy Code, the Federal Rule of Bankruptcy Procedure, or court order. The trustee or debtor:

- May execute any documents necessary to complete the sale.
- Must file with the clerk and transmit to the US Trustee a report of the sale as required by EDNY Local Bankruptcy Court Rule 6004-1(f) when the sale is completed (see Report of Auction).

(E.D.N.Y. LBR 6004-1(i).) On request, the clerk must issue a certificate stating that a notice of a proposed auction, with proof of service, has been filed under EDNY Local Bankruptcy Court Rule 2002-1 and that no timely objection has been filed.

Auctioneers

A debtor or trustee may retain the services of an auctioneer, subject to prior court approval (E.D.N.Y. LBR 6005-1(a)).

Subject to court approval, auctioneers may receive:

- Commissions of:
  - ten percent of any gross proceeds of the sale up to $50,000;
  - eight percent of any gross proceeds of the sale above $50,000 up to $75,000;
  - six percent of any gross proceeds of the sale above $75,000 up to $100,000;
  - four percent of any gross proceeds of the sale above $100,000 up to $150,000; and
  - two percent of any gross proceeds of the sale above $150,000.
- Reimbursement for reasonable and necessary expenses directly related to the sale, including labor, printing, advertising, insurance, and transport of goods (when so directed by the trustee or debtor) but excluding workers' compensation, social security, unemployment insurance, other payroll taxes, and travel expenses (except as ordered by the court).

(E.D.N.Y. LBR 6005-1(b).)

Before an auctioneer employed under section 327 of the Bankruptcy Code can act, it must file, at its own expense, either:

- A surety bond for each estate, in favor of the US, in an amount fixed by the US Trustee.
- A blanket bond covering all cases in which the auctioneer may act, in favor of the US, in an amount fixed by the US Trustee.

(E.D.N.Y. LBR 6005-1(c), (d).)

EDNY Local Bankruptcy Court Rule 6005-1(e) provides that:

- An auctioneer must file an application with the court for approval of commissions or reimbursement of expenses and give notice under Federal Rule of Bankruptcy Procedure 2002(a).
- An application cannot be granted if the report of sale (see Report of Auction) and auctioneer's affidavit (see Auctioneer's Affidavit) have not been filed.

SALE GUIDELINES

The Guidelines, promulgated by Administrative Order No. 557, supplement the requirements of section 363(b) and 365 of the Bankruptcy Code, Bankruptcy Rules 2002 and 6004, and EDNY Local Bankruptcy Court Rule 6004-1 and EDNY Local Bankruptcy Court Rule 6005-1.

Motion Content

The debtor should file a single motion, to be considered at two separate hearings, seeking entry of:

- The sale procedures order, which approves bidding and auction procedures for the sale process, including any protections for an initial or stalking horse bidder (Sale Procedures Order) (see Bidding Procedures). This is not required if no stalking horse bid protections or auction is contemplated, but the debtor must explain why it proposes to structure the sale in this manner.
- The sale order, which approves the sale to the successful bidder at the auction (Sale Order) (see Sale Hearing).

(Guidelines, ¶ 1(a).)

The motion must comply in form with the EDNY Local Bankruptcy Court Rules and should:

- Include as an attachment the proposed purchase agreement or a form of proposed agreement acceptable to the debtor if the debtor has not yet entered into an agreement with a proposed buyer.
- Include a copy of the proposed orders, especially if the orders include any extraordinary provisions (see Extraordinary Provisions).
- Request appointment of a consumer privacy ombudsman under section 332 of the Bankruptcy Code if a hearing is required regarding

the sale of PII subject to a debtor's privacy policy and the proposed sale does not fall under section 363(b)(1)(A) of the Bankruptcy Code (see Section 363(b)(1)(A) and (B): Sale of PII Requirements and Bankruptcy Rule 6004(g): Sale of PII Requirements).

(Guidelines, ¶ 1(a)(i)-(iv).)

Bidding Procedures

A Sale Procedures Order should include a motion for proposed bidding procedures if these procedures are likely to maximize the sale price and:

- Do not chill the receipt of higher and better offers.
- Are consistent with the debtor's fiduciary duties.

(Guidelines, ¶ 1(b).)

If the debtor expects to conduct multiple sales over time, it should consider seeking court approval of global bidding procedures. It should also consider seeking court approval of global notice and other appropriate procedures for *de minimis* sales.

The following table summarizes the recommended bidding procedures provisions.

Provision	EDNY Recommended Information
Qualification of bidders.	Provisions governing an entity's obligation to: ■ Deliver financial information by a stated deadline to the debtor and other key parties (ordinarily excluding other bidders) that demonstrates its financial ability to close a sale, such as current audited or verified financial statements or verified financial commitments obtained by the potential bidder. ■ Make a non-binding expression of interest by a stated deadline. ■ Execute a reasonable form of non-disclosure agreement before being provided due diligence access to non-public information (see Practice Note, Confidentiality Issues Arising Under Section 363 of the Bankruptcy Code (W-000-6107)). (Guidelines, ¶ 1(b)(i).)
Qualification of bids.	Provisions governing a bid being a qualified bid, including: ■ Any deadlines for submitting a bid and notification whether the bid is a qualifying bid. ■ Any requirements to mark each qualified bid against the form of a stalking horse agreement or a form of proposed agreement, showing amendments and other modifications. Bidding procedures may limit bidding to the terms of a stalking horse agreement or proposed form of agreement, provided that bidding on less than all of the assets proposed to be acquired by a stalking horse normally should be permitted, unless this bidding is inconsistent with the purpose of the sale. ■ All conditions to the qualified bidder's obligation to close the sale. ■ A good faith deposit that is non-refundable if the winning bidder fails to close the sale (other than due to a breach by the seller) and refundable to all other bidders (other than as a result of their own breach). The amount of and rules governing the good faith deposit are determined on a case-by-case basis, but generally all qualified bidders should be required to make the same form of deposit. (Guidelines, ¶ 1(b)(ii).)
Backup buyer.	In the reasonable exercise of its judgment, the debtor may accept and close on the second highest qualified bid received if the winning bidder fails to close the sale within a specified period. The debtor may retain this bidder's good faith deposit until it is relieved of its obligation to be a back-up buyer. (Guidelines, ¶ 1(b)(iii).)
Stalking horse protections and bidding increments.	Provisions providing a stalking horse bidder a form of bid protection, including: ■ Break-up or topping fees and expense reimbursement. They are determined on a case-by-case basis and generally should be payable only from the proceeds of a higher or better transaction with a third party within a reasonable time of the closing of the sale. These provisions must be prominently disclosed and described with particularity. ■ Bidding increments. If the bidding procedures contemplate a break-up or topping fee or expense reimbursement, the initial bidding increment must be more than the maximum payable of those amounts. Additional bidding increments should be appropriate in light of the value of the asset being sold and should not be so high as to chill further bids. ■ Rebidding. If a break-up or topping fee is requested, the Sale Procedures Order should state whether the stalking horse waives these fees by rebidding or whether it receives a credit equal to these fees if the stalking horse is the successful bidder at a higher price than its initial bid. ■ No-shop or solicitation provisions. These provisions must be prominently disclosed with particularity and are permissible if they: • are necessary to obtain a sale; • are consistent with the debtor's fiduciary duties; • do not chill higher or better offers; and • are appropriate under the circumstances of the case. (Guidelines, ¶ 1(b)(iv)(1)-(4) and see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview: Bidding Incentives (1-385-0115)).

Provision	EDNY Recommended Information
Auction procedures.	If an auction is proposed: ■ The Sale Procedures Order generally should provide that the auction will be conducted openly and that each bidder will be informed of the terms of the previous bid. The motion otherwise should explain why a different auction format was proposed. ■ A professional auctioneer conducting the auction should refer to Bankruptcy Rule 6004 (see Bankruptcy Rule 6004 Requirements) and EDNY Local Bankruptcy Court Rule 6004-1 and EDNY Local Bankruptcy Court Rule 6005-1 (see Section 363 Sales: Local Rules). ■ If the auction is sufficiently complex or disputes are foreseeable, ask the court to consider conducting the auction in open court or otherwise be available to resolve disputes. If proposing to conduct the auction outside the presence of a judge, the actual bidding should be recorded to ensure a record or the motion should explain why this is not appropriate. ■ Each bidder should confirm at the auction that it has not engaged in any collusion concerning the bidding or the sale. ■ The Sale Procedures Order should provide that the court will not consider bids after the auction has been closed, unless a motion to reopen the auction is made and granted (see Practice Note, Reopening Section 363 Bankruptcy Auctions (2-617-1867)). (Guidelines, ¶ 1(b)(v).)

Sale Hearing

The evidence presented at any sale hearing should allow the court to find that:

- There is a sound business reason for the transaction.
- The property has been adequately marketed and that the purchase price is the highest or best offer and provides fair and reasonable consideration. If the bid includes any deferred payments or any equity component, the debtor should identify any material purchase price adjustment provisions and present evidence concerning, as applicable, its assessment of the proposed buyer's:
  - creditworthiness; or
  - ability to realize the projected earnings on which future payments or other forms of consideration are based.
- The proposed transaction is in the best interests of the debtor's estate, its creditors, and interest holders.
- The purchaser has acted in good faith, within the meaning of section 363(m) of the Bankruptcy Code.
- Adequate and reasonable notice has been provided.
- The free and clear requirements of section 363(f) of the Bankruptcy Code, if applicable, have been met (see Practice Note, Buying Assets in a Section 363 Bankruptcy Sale: Overview: Free and Clear of Interests (1-385-0115)).
- If applicable:
  - the sale is consistent with the debtor's privacy policy concerning PII; or
  - after appointment of a consumer ombudsman under section 332 of the Bankruptcy Code and notice and a hearing, no showing was made that the sale would violate applicable non-bankruptcy law (see Section 363(b)(1)(A) and (B): Sale of PII Requirements and Bankruptcy Rule 6004(g): Sale of PII Requirements).
- The proposed assumption and assignment or rejection of any executory contracts and unexpired leases satisfy the requirements of section 365 of the Bankruptcy Code (see Section 365 Requirements). Additional notice and opportunity for a hearing may be required if the winning bid:
  - is not submitted by the stalking horse; or
  - identifies different contracts or leases for assumption and assignment or rejection from the initial bid that was noticed for approval.
- (See Contents of Notice.)
- Where necessary, the debtor's board of directors or other governing body has authorized the proposed transaction.
- The debtor and the purchaser have entered into the transaction without collusion, in good faith, and from arm's-length bargaining positions, and neither party has engaged in any conduct that would avoid the agreement under section 363(n) of the Bankruptcy Code.

(Guidelines, ¶ 1(c).)

Extraordinary Provisions

The following table summarizes the provisions that the debtor must conspicuously disclose in a **separate section** of the sale motion and, where applicable, in the related proposed Sale Procedures Order or Sale Order. Each provision must be substantially justified other than by the fact that a similar provision was included in an order in a different case.

Provision	EDNY Bankruptcy Court Required Information
Sale to insider.	Disclose any measures taken to ensure the fairness of the sale process and the proposed transaction (Guidelines, ¶ 1(d)(i)).
Agreements with management.	Disclose: ■ The material terms of any agreements with management or key employees regarding compensation or future employment. ■ Measures taken to ensure the fairness of the sale and the proposed transaction in light of these agreements. (Guidelines, ¶ 1(d)(ii).)
Private sale or no competitive bidding.	If no auction is contemplated, state if the debtor has agreed to a limited no-shop or no-solicitation provision or has otherwise not sought or is not actively seeking higher or better offers, and explain why this is likely to maximize the sale price (Guidelines, ¶ 1(d)(iii)).
Deadlines that effectively limit notice.	Explain why the proposed transaction includes any deadlines for the closing or court approval of the Sale Procedures Order or the Sale Order that have the effect of limiting notice to less than that described in Notice Period (Guidelines, ¶ 1(d)(iv); see Notice Period).
No good faith deposit.	Explain why any qualified bidder, including a stalking horse, is excused from submitting a good faith deposit (Guidelines, ¶ 1(d)(v)).
Interim arrangements with proposed buyer.	Disclose: ■ Any interim arrangements with the proposed buyer, such as interim management arrangements (for which approval must also be sought after notice and a hearing under section 363(b) of the Bankruptcy Code). ■ The terms of these agreements. (Guidelines, ¶ 1(d)(vi).)
Use of proceeds.	Describe the intended disposition and rationale for any: ■ Release of sale proceeds on or after the closing without further court order. ■ Definitive allocation of sale proceeds between or among various sellers or collateral. (Guidelines, ¶ 1(d)(vii).)
Tax exemption.	Disclose provisions seeking the sale declared exempt from taxes under section 1146(a) of the Bankruptcy Code, including: ■ The type of tax (such as recording tax, stamp tax, use tax, or capital gains tax). ■ The state in which the affected property is located. (Guidelines, ¶ 1(d)(viii).)
Record retention.	In a sale of substantially all assets, confirm whether the debtor will retain or have reasonable access to its books and records to enable it to administer its bankruptcy case (Guidelines, ¶ 1(d)(ix)).
Sale of avoidance actions.	State and explain any provisions seeking to sell the debtor's rights to pursue Chapter 5 avoidance claims (Guidelines, ¶ 1(d)(x) and see Practice Notes, Fraudulent Conveyances in Bankruptcy: Overview (4-382-1268) and Preferential Transfers: Overview and Strategies for Lenders and Other Creditors (6-381-6416)).
Requested findings about successor liability.	If the debtor seeks findings limiting the purchaser's successor liability, disclose the adequacy of the debtor's proposed notice of this requested relief and the basis for this relief. The proposed Sale Order generally should not contain voluminous findings concerning successor liability or injunctive provisions (except as provided in Sale Order). (Guidelines, ¶ 1(d)(xi); see Sale Order.)
Future conduct.	Describe the legal authority for any determination sought by the debtor regarding the effect of conduct or actions that may or will be taken after the date of the Sale Order (Guidelines, ¶ 1(d)(xii)).
Requested findings about fraudulent conveyance.	If the debtor seeks a finding that the sale is not a fraudulent conveyance, explain why a finding that the purchase price is fair and reasonable is not sufficient (Guidelines, ¶ 1(d)(xiii) and see Practice Note, Fraudulent Conveyances in Bankruptcy: Overview (4-382-1268)).
Sale free and clear of unexpired leases.	If the debtor seeks to sell property free and clear of a possessory leasehold interest, license, or other right, identify the non-debtor parties whose interests will be affected and explain what adequate protection will be provided for those interests (Guidelines, ¶ 1(d)(xiv)).
Relief from Bankruptcy Rule 6004(h).	Disclose the business or other basis for any request for relief from the stay imposed by Bankruptcy Rule 6004(h) (Guidelines, ¶ 1(d)(xv) and see Bankruptcy Rule 6004 Requirements).

Notice Parties

Section 363(b) always requires notice. However, a hearing is required only if there are timely objections or the court otherwise schedules a hearing (Guidelines, ¶ 2(a)).

The sale and hearing to approve the sale requires more notice than the sales procedures hearing. The following table summarizes the parties that the debtor should provide notice of the proposed sale procedures (Guidelines, ¶ 2(b)) and the proposed sale (Guidelines, ¶ 3(a)).

Notice party	Proposed sale procedures	Proposed sale
Any official and unofficial committees or the 20 largest unsecured creditors if no creditors' committee exists	x	x*
Office of the US Trustee	x	x
Entities who have requested notice under Bankruptcy Rule 2002 (for publicly traded debt securities, notice to indenture trustees and record holders may be sufficient if the identity of the beneficial holder is not known)	x	x
All known creditors of the debtor (in a proposed sale of a significant portion of the debtor's assets)		x
Postpetition lenders or administrative agents	x	x
Indenture trustees	x	x
Entities known or reasonably believed to have asserted a lien, encumbrance, claim, or other interest in any of the assets offered for sale	x	x
Parties to executory contracts or unexpired leases to be assumed and assigned or rejected as part of the transaction	x	x
Entities known or reasonably believed to have expressed an interest in acquiring any of the assets offered for sale	x	x
All affected federal, state, and local regulatory agencies and taxing authorities, including environmental agencies, the IRS, and applicable taxing authorities affected by the relief requested under section 1146(a), such as the state attorney general		x
If applicable, a consumer privacy ombudsman appointed under section 332		x
The SEC (if appropriate)		x
If the sale implicates the US antitrust laws or a debt (other than for taxes) is owed by the debtor to the US government: ■ The FTC ■ The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice ■ The US Attorney's Office		x
Parties to executory contracts and unexpired leases proposed to be assumed and assigned or rejected under section 365, if there are changes to the proposed transaction that had originally been noticed		x
Publications of national circulation or other appropriate publications (for a sale of significant assets in larger cases)		x

*In practice, generally more notice is preferable to less notice. In cases in which no official or unofficial creditors' committee exists, it seems preferable to provide notice to the 20 largest unsecured creditors not only of the proposed sales procedures (as provided by section 2(b)(i)(1)), but also of the sale and the hearing thereon (even though apparently not required by section 3(a)(i)). In this regard, note that section 3(a) of the Sale Guidelines provides "Generally the sale and hearing to approve the sale requires more notice than the hearing on approval of sale procedures."

Notice Period

The minimum 21-day notice period provided by Bankruptcy Rule 2002(a)(2) (see Bankruptcy Rule 2002 Notice Requirements) to request approval of a proposed Sale Procedures Order can be shortened if it:

- Does not involve extraordinary provisions (see Extraordinary Provisions).
- Complies with the Guidelines.

(Guidelines, ¶ 2(c).) The 14-day notice period provided for in EDNY Local Bankruptcy Court Rule 9006-1(a) is usually sufficient to enable parties-in-interest to file an objection to the proposed sale procedures.

However, the 21-day notice period should not be shortened for notice of the actual sale without a showing of good cause (Guidelines, ¶ 3(b)). The service of a prior notice or order that discloses an intention to conduct a sale but does not state a specific sale date does not constitute good cause to shorten the notice period.

Contents of Notice

The notice of proposed sale procedures and the notice of the actual sale should comply with Bankruptcy Rules 2002 and 6004 (Guidelines, ¶¶ 2(d) and 3(c) and see Bankruptcy Rule 6004 Requirements).

The notice of the sale and of the hearing to approve the sale should include:

- The Sale Procedures Order (including the date, time, and place of any auction, the related bidding procedures, the objection deadline for the sale motion, and the date and time of the sale hearing).
- Reasonably specific identification of the assets to be sold and instructions for promptly obtaining a bid package or any other detailed information being made available to prospective bidders.
- The proposed form of asset purchase agreement or instructions for promptly obtaining a copy.
- If appropriate, representations describing the sale as being free and clear of liens, claims, interests, and other encumbrances (other than consumer claims and defenses under a consumer credit transaction subject to the Truth in Lending Act or a consumer credit contract), with these interests all attaching to the sale proceeds with the same validity and priority.
- Any commitment by the buyer to assume the debtor's liabilities.
- Notice of proposed cure amounts and the right and deadline to object to these and otherwise to object to the proposed assumption and assignment or rejection of executory contracts and unexpired leases.
- Notice of any changes to the list of executory contracts and unexpired leases to be assumed and assigned or rejected from the initial bid that was noticed for approval or if the winning bidder is not the stalking horse. This notice may be provided in a separate schedule sent only to the parties to these agreements.

(Guidelines, ¶ 3(c)(i)-(vi).)

Sale Order

Findings in a proposed sale order should typically be limited to those recited in the sale motion (Guidelines, ¶ 4 and see Sale Hearing). The decretal paragraphs should also be limited, and if more than one decretal paragraph deals with the same subject matter or form of relief, explain the reason in a separate pleading. The sale order may contain a decretal paragraph approving the purchase agreement or authorizing the debtor to execute the purchase agreement, but it should not also contain separate decretal paragraphs approving specific provisions of the purchase agreement or declaring their legal effect.

If substantiated through evidence presented or proffered in the motion or at the sale hearing, the sale order may contain the provisions summarized in the following table.

Approval of Sale and Purchase Agreement	Authorize the debtor to: ■ Execute the purchase agreement and any additional instruments or documents necessary to implement the agreement, if these additional documents do not materially change its terms. ■ Close the sale under the terms and conditions of the purchase agreement and its contemplated instruments and agreements. ■ Take all actions reasonably requested by the purchaser to transfer the assets, including directing every federal, state, and local government agency or department to accept any documents and instruments necessary and appropriate to close the transaction. (Guidelines, ¶ 4(a).)
Transfer of Assets	Assets will be transferred free and clear of all liens, claims, encumbrances, and interests in the property, other than consumer claims and defenses under a consumer credit transaction subject to the Truth in Lending Act or a consumer credit contract. These interests attach to the sale proceeds with the same validity and priority, and the same defenses, as existed immediately before the sale. Persons and entities holding these interests will be enjoined from asserting them against the purchaser, its successor or assigns, or the purchased assets, unless the purchaser has otherwise agreed. If any person or entity has not delivered to the debtor before the closing the documents releasing these interests, the debtor may be authorized and directed to execute and file these documents on behalf of that person or entity. (Guidelines, ¶ 4(b).)
Assumption and Assignment of Executory Contracts and Leases to Purchaser	Authorize and direct the debtor to assume and assign executory contracts and leases to the purchaser free and clear of all liens, claims, encumbrances, and interests, with these interests attaching to the sale proceeds with the same validity and priority as they had in the assets being sold (Guidelines, ¶ 4(c)).
Statutory Provisions	Specify those provisions of the Bankruptcy Code and Bankruptcy Rules that are being relied on, identifying those sections that are, to the extent permitted by law, proposed to be limited or abridged (Guidelines, ¶ 4(d)).
Good Faith and No Collusion	The transaction has been proposed and entered into by the parties without collusion, in good faith, and from arm's-length bargaining positions, specifying that neither the debtor nor the purchaser have engaged in any conduct that would avoid the transaction under section 363(n) of the Bankruptcy Code (Guidelines, ¶ 4(e)).

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

A debtor requesting an order setting a bar date must conform its request to the EDNY's Bar Date Order Guidelines (Guidelines). The Guidelines include a standard form of bar date order and form of notice to creditors.

The intention of the Guidelines and the standard forms is to expedite court review and entry of bar date orders.

The EDNY does not have local rules regarding bar date notices to mass tort claimants.

Time for Filing Application

The Guidelines require that a debtor's application for entry of a bar date be filed within 30 days of the later of:

- The initial case conference.
- The filing of the schedules and statements.

(Guidelines, ¶ 1.)

Notice of Proposed Order

The Guidelines also provide that the debtor's application for a bar date may be submitted to the court without the need for a hearing if:

- The debtor complies with the court's specific guidelines and requirements for preparing the bar date notice and order.
- The bar date application represents that the creditors' committee, the DIP financing lender, and any secured creditor with a lien on a significant portion of the debtor's assets approved the bar date order.

If the debtor cannot make the representation that it received approval from the creditors' committee, the DIP lender, and secured creditors, the debtor may submit the proposed bar date order by notice of presentment or by motion. Notice of the bar date application must be made to:

- Any official committee.
- The DIP lender.
- The US Trustee.
- Any party that requested notice in the bankruptcy case.

(Guidelines, ¶ 2.)

Suggested Dates

The application may contain suggested dates for:

- The bar date.
- Mailing the notice of the bar date to creditors.
- Publication, where appropriate.

(Guidelines, ¶ 3.) In most cases the suggested bar date should be at least 35 days after the mailing date and at least 28 days after the publication date.

Jointly Administered Cases

If there is more than one debtor, the notice should list each of the debtors and their related case numbers as part of or as an addendum to the notice of the bar date to creditors (Guidelines, ¶ 4).

Publication

Counsel should:

- State in the application for a bar date whether they believe publication is required and, if so, the proposed:
  - time;
  - place; and
  - method of publication.
- Raise the issue at the initial case conference, in appropriate cases.

(Guidelines, ¶ 5.)

Instructions for Filing Claims

The form of bar date order and notice of bar date contain instructions for proofs of claim to be:

- Filed electronically with the court.
- Mailed to the court.
- Delivered by hand directly to the court site where the case is pending.

In cases **without** claims agents, attorneys (with full access accounts) and employees of institutional creditors (with limited access accounts) may file proofs of claim electronically on the court's Case Management/Electronic Case File (CM/ECF) system.

(Guidelines, ¶ 6.)

Administrative Expense Claims

Notice of a deadline for the filing of administrative claims should **not** ordinarily be combined with notice of any other bar date (Guidelines, ¶ 7).

Notice Provisions

The notice of bar date to creditors should contain the name and telephone number of an individual at the debtor's counsel or claims

agent to whom questions may be addressed. The notice should **not** indicate that it has been signed by the bankruptcy judge but may provide that the notice is "By Order of the Court."

(Guidelines, ¶ 9.)

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

For more information on withdrawal of the reference, see Practice Note, Withdrawal of the Reference (W-000-9965).

LOCAL RULES

EDNY Local Bankruptcy Court Rule 5011-1 provides that the party seeking withdrawal of the reference must:

- File its motion with the court.
- Notify all other parties.

The bankruptcy clerk must transmit the motion to the district clerk promptly and then notify the movant. After transmittal of the motion, all further papers concerning the motion must be filed in the district court.

OTHER TOPICS

SIGNIFICANT REVISIONS

The EDNY Local Bankruptcy Court Rules are under active study and review by an EDNY Bankruptcy Court-led rules committee. Significant revisions are expected in late 2018 or early 2019.

INFORMATION ABOUT JUDGES

On the court's website, each judge has included information regarding a host of topics, including:

- Court and chambers contact information.
- Court calendars and hearings.
- Judges' procedures.
- Written opinions.
- Form orders.
- Judge biographies.

JUDGES' PROCEDURES

The information provided in the Judges' Procedures on the court's website is especially important and, depending on the particular judge, may set out information regarding:

- Requests for legal advice.
- Communication with chambers by letter.
- Rules of civility.
- Electronic filing procedures.
- Obtaining a hearing date.
- Chambers copies.
- Requesting adjournments on consent.
- Settlement or withdrawal of motions and adversary proceedings.
- Requesting telephone or video appearances.
- Waivers of appearance.
- Uncontested matters.
- Trial exhibits.
- Notices of presentment.
- Submission of order.
- Motions for relief from stay to foreclose a mortgage on real property or a security interest in a cooperative apartment.
- Payment and cure of prepetition judgment of possession involving residential real property.
- Bar date orders (see Setting Bar Dates in Chapter 11 Cases: Local Rules).
- Monthly compensation requests (see Professional Fee Requests: Local Rules).
- Financing motions (see Cash Collateral: Local Rules and DIP Financing: Local Rules).
- Asset sales (see Section 363 Sales: Local Rules and Section 363 Sales: Sale Guidelines).
- First day motions (see First Day Motions: Local Rules).
- Loss mitigation.
- Fees and disbursements for professionals (see Professional Fee Requests: Local Rules).

APPEARANCE COUNSEL

EDNY Local Bankruptcy Court Rule 2090-2(a) requires that an attorney who appears for a debtor must be the attorney of record or an attorney acting of counsel to this attorney and who is knowledgeable in every aspect of the case.

FILING PETITION/BROOKLYN AND CENTRAL ISLIP COURTHOUSES

EDNY Local Bankruptcy Court Rule 1002-1(a) provides that a petition commencing any case in which the debtor's address is located in:

- Kings, Richmond, or Queens County must be filed in the clerk's office in Brooklyn or designated as an electronically filed case in Brooklyn.
- Nassau or Suffolk County must be filed in the clerk's office in Central Islip or designated as an electronically filed case in Central Islip.

CREDITOR LIST

In addition to the schedules, the debtor must file a creditor list, certified as accurate, which sets out for each creditor:

- A name (in alphabetical order).
- A post office address.
- A zip code.
- The specific amount of debt owed, if known.

(E.D.N.Y. LBR 1007-1(a).)

MAILING MATRIX

EDNY Local Bankruptcy Court Rule 1007-3(a)(i) provides that the debtor must file a mailing matrix, which must:

- Include:
  - in alphabetical order, the name and last known mailing address (including zip codes) for every scheduled creditor; and
  - those agencies and officers of the US entitled to receive notice under Federal Rule of Bankruptcy Procedure 2002(j).
- Be filed when the list of creditors required by Federal Rule of Bankruptcy Procedure 1007(a) is filed.

If the debtor is a partnership, the mailing matrix must contain the names and current mailing addresses of each general and limited partner (E.D.N.Y. LBR 1007-3(a)(ii)).

If the debtor is a corporation, the mailing matrix must contain:

- The names and current mailing addresses of the present officers and directors and the position held by each, or if none, the immediate past officers and past directors.
- The name and address of any person who may be served under Federal Rule of Bankruptcy Procedure 7004(b)(3).

(E.D.N.Y. LBR 1007-3(a)(iii).)

The debtor must also file with its list of equity security holders a separate mailing matrix containing the name and last known address or place of business of each equity security holder (E.D.N.Y. LBR 1007-3(a)(iii)).

For more information, see Standard Document, Creditor Matrix (4-610-6545).

OPPORTUNITIES FOR COURTROOM SKILLS DEVELOPMENT

On May 16, 2018, the EDNY adopted a policy of encouraging participation by junior lawyers who are familiar with the matter under consideration but are not experienced in arguing before a court. In these cases, the court is amenable to permitting more than one lawyer to argue for a party.

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 (5-613-8145)).

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

- New York.
- Connecticut.
- Vermont.

This Note discusses the general operating guidelines and procedural requirements enacted by the US Trustee for Region 2 (Region 2 Guidelines) as they apply to Chapter 11 cases filed in the EDNY.

The US Trustee's operating guidelines covering cases filed in the EDNY are publicly available and can be obtained from the website for the US Trustee's office for Region 2 (see US Trustee Operating Guidelines, Region 2).

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 EDNY concerning a debtor's initial Chapter 11 obligations and reporting requirements during the first few days of a case.

US Trustee Operating Requirements	EDNY Bankruptcy Court Requirements
List of Creditors	On filing the petition, the debtor must file a list of its 20 largest unsecured creditors (excluding insiders), including each creditor's: ■ Complete name. ■ Address. ■ Email address. ■ Telephone number. ■ Fax number. ■ Name of contact. (See Standard Document, List of Largest Unsecured Creditors (3-610-4108)).

US Trustee Operating Requirements	EDNY Bankruptcy Court Requirements
Books and Records	The debtor must: ■ Close books and records (general ledger accounts) as of the petition date and open new books and records. ■ Retain old books and records and make them available to the US Trustee for review and inspection. (See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Postpetition Books and Records (W-000-5977)).
Bank Accounts	The debtor must: ■ Close on the petition date all prepetition bank accounts in its control and immediately open new debtor-in-possession bank accounts at a bank insured by the Federal Deposit Insurance Corporation (FDIC) and authorized by the US Trustee (see Practice Note, Understanding FDIC Deposit Insurance (0-386-5607)). ■ Maintain separate accounts for: • operating accounts; • payroll accounts; and • tax accounts. ■ Write postpetition checks containing imprinted on the face of the check: • the case name; • the Chapter 11 case number; • the words "debtor-in-possession"; and • the type of account (operating, payroll, or tax). ■ Make all disbursements by numbered check. Counter checks are prohibited. ■ Submit, in writing, to the US Trustee, any request to use, create, or maintain a petty cash account. ■ Within 15 days of the petition date, provide a sworn statement describing all prepetition accounts by depository name, account number, and account name and verifying that all prepetition accounts have been closed (the US Department of Justice website provides a form that complies with this requirement). The debtor must also provide proof from the bank that it closed prepetition accounts and opened new accounts. (See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Bank Accounts (W-000-5977).
Insurance	The debtor must: ■ Maintain insurance coverage, as appropriate to the debtor's business, for: • general comprehensive liability; • property (personal and theft); • casualty and theft; • workers' compensation (see Practice Note, Workers' Compensation: Common Questions (0-504-9497)); • vehicle; • product liability; • flood insurance; • directors and officers insurance; • professional malpractice; • other coverage customary or prudent in the debtor's business or required by law; and • proof of renewal insurance during the Chapter 11 case. ■ Instruct insurance companies to add the US Trustee as a certificate holder on each policy. ■ If insurance coverage expires or ends, immediately provide the US Trustee with adequate proof of replacement coverage. ■ Within 15 days of the petition date, provide proof of insurance coverage, disclosing at a minimum: • the effective date of coverage; • the termination date of coverage; • the types and limit of coverage; and • the identity of all loss payees. ■ Include paid receipts with any insurance binders dated after the petition date. (See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Insurance (W-000-5977)).

US Trustee Operating Requirements	EDNY Bankruptcy Court Requirements
Taxes	The debtor must: ■ Pay all taxes, including state and local taxes, from the tax account, accompanied by the appropriate tax deposit coupons. ■ When making each payroll, transfer sufficient funds from the payroll account to the tax account to cover payroll taxes (see Practice Note, Payroll (FICA) Taxes (1-512-7630)). ■ Deposit sales and use taxes to the tax account on a weekly basis. ■ Timely file tax returns and reports, accompanied by evidence that the debtor has paid the tax liability in full. ■ Serve the US Trustee with a copy of each tax return and verification of payment. (See Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Taxes (W-000-5977)).

ADDITIONAL US TRUSTEE PROCEDURAL REQUIREMENTS

In addition to the significant first day requirements (see First Day Requirements), the US Trustee Operating Guidelines, Region 2 require debtors to provide additional information to the US Trustee relating to the debtor's finances and operations during the first month of the case.

Within 15 days of the petition date, the debtor must provide the US Trustee with copies of:

- **Rental property records.** For debtors that own commercial or residential real property, provide a rent roll for the petition date that includes:
  - a description of each property owned;
  - the rental price of each unit;
  - the amounts of security or other deposits held by the debtor;
  - the occupancy and payment status of each unit;
  - the name, address, and phone number of the management company, if any; and
  - the monthly management fee.
- **Prepetition** financial statements**.** Provide copies of debtor's most recent audited and unaudited financial statements.
- **Federal income tax returns.** Provide copies of the debtor's federal income tax returns for the two years before the petition date.

If requested by the US Trustee, within 30 days of the petition date, the debtor must provide the US Trustee with a **physical inventory** for the petition date. Inventory is defined in the Region 2 Guidelines to include all finished and unfinished goods owned by the debtor and intended for sale to customers assets. Inventory does not include fixed assets owned by the debtor. The inventory list provided to the US Trustee must:

- Be itemized.
- Indicate cost values for the goods.

PROFESSIONAL RETENTION AND COMPENSATION

The Region 2 Guidelines explain that the bankruptcy court must approve both the retention and compensation of a debtor's professionals (§§ 327 and 330, Bankruptcy Code and see Practice Notes, Getting Retained as a Professional to the Debtor-in-Possession (0-616-6522) and Getting Paid as a Professional to a Chapter 11 Debtor or Trustee (8-616-5137)).

A debtor's professionals include:

- Lawyers.
- Accountants.
- Financial advisors.
- Appraisers.
- Auctioneers.
- Real estate agents or brokers.
- Consultants.

In the EDNY, the Region 2 Guidelines also explain that the debtor must:

- File all applications to employ professionals with the bankruptcy court, and the bankruptcy court must enter an order before the professionals can provide services to the debtor.
- Provide the US Trustee with copies of any application to employ or compensate a professional.
- Submit an affidavit from each professional disclosing any relationship or contact that the professional has with:
  - the debtor;
  - any secured creditor or unsecured creditor;
  - the party in interest;
  - attorneys and accountants of the debtor or creditors; and
  - employees of the US Trustee.

EMPLOYMENT OF PRINCIPALS

The Region 2 Guidelines require a debtor to provide information concerning the employment and compensation of a debtor's principals, including:

- The name and position of the principal.
- A detailed description of the principal's duties and responsibilities.
- Reasons why employment of the principal is necessary to the debtor's successful Chapter 11 reorganization.
- Details of the principal's compensation.
- Details of any other benefits or consideration the principal has received, including:
  - housing;
  - cars;
  - expense reimbursement;

  - insurance; and
  - pension or profit sharing.
- Each principal's salary and benefits for the year immediately before the petition date.

This information must be provided to the US Trustee on or before the date of the scheduled section 341 meeting of creditors (see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Section 341 Meeting (W-000-5977)).

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 EDNY, the US Trustee requires debtors to provide certain key financial documents when attending the initial debtor interview, including:

- Proof that all applicable insurance is in place, including:
  - general comprehensive liability;
  - workers' compensation;
  - fire and theft;
  - product liability; and
  - any other insurance applicable to the debtor's business.
- Copies of the debtor-in-possession bank statements for the new postpetition bank accounts or documentary proof that the debtor notified the authorized depository to open new debtor-in-possession bank accounts.
- A copy of a voided check verifying that the debtor opened a new debtor-in-possession bank account and a listing of the account's signatories (see First Day Requirements).
- Completed schedules and a statement of financial affairs if the bankruptcy court did not grant an extension to file (see Practice Note, Schedules and Statements of Financial Affairs: Overview (W-000-9982)).
- Copies of the latest audited or unaudited financial statements, including the balance sheet, income statement, and statement of cash flows.
- Copies of the last two filed federal income tax returns, including all applicable schedules (for example, Federal Corporate Income Tax Return Form 1120).
- A schedule of accounts receivable with aging.
- Copies of all licenses or permits, including licenses for intellectual property.
- A listing of all of debtor's disbursements for the 90 days before the petition date.
- Copies of all written policies the debtor gave to customers regarding the sale of personally identifiable information (see Practice Note, Property of the Estate: Special Intangible Property Interests (3-616-3701)).

MEETING OF CREDITORS

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

For more information on section 341 meetings, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Section 341 Meeting (W-000-5977).

In the EDNY, the Region 2 Guidelines explain that:

- The US Trustee holds a section 341 meeting of creditors between 20 to 40 days after the petition date.
- The debtor and its counsel must appear at the meeting.
- A representative of the US Trustee, creditors, and other parties that attend the meeting examine the debtor under oath.
- The clerk of the bankruptcy court notifies all creditors and other parties in interest of the time and location for the meeting.

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 EDNY.

US Trustee Operating Requirement	EDNY Bankruptcy Court Requirements
Format	The debtor must: ■ Use the local forms provided on the US Trustee's website. ■ Every month, attach a copy of its bank: • statements; and • reconciliations.

US Trustee Operating Requirement	EDNY Bankruptcy Court Requirements
Timing	The operating report is based on a calendar month and must be filed by the 20th day of the month following the reporting period. For example, the debtor must file the report on February 20 for the period of January 1 to January 31. The debtor's first operating report only covers the first month the debtor is in bankruptcy and is therefore only a partial month. The debtor cannot combine the partial month report with the next first full month report. For example, if the petition date is January 15, the debtor's first report is for the period of January 15 to January 31 and cannot be combined with the report for the month of February without permission from the US Trustee trial attorney assigned to the debtor's case. The debtor must complete and file monthly operating reports until the court approves and confirms a plan of reorganization.
Filing	The debtor must electronically file an original monthly operating report with the clerk of the bankruptcy court.
Service	The debtor must serve one filed copy of the operating report on the US Trustee and one copy on the creditors' committee, if one exists. The US Trustee cannot accept service of the operating report by the debtor's electronic submission to ECF.

POST-CONFIRMATION OPERATING REPORTS

After confirmation of a plan, a debtor no longer must file operating reports on a monthly basis. The debtor instead must file a post-confirmation operating report on a fiscal quarterly basis (see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: Post-Confirmation Reports (W-000-5977)).

The following table summarizes the requirements for filing post-confirmation operating reports in the EDNY.

US Trustee Operating Requirement	EDNY Bankruptcy Court Requirements
Format	The debtor must: ■ Use the local forms provided on the US Trustee's website (see US Trustee Region 2 website). ■ Include an itemized list of all payments made under the debtor's plan of reorganization as well as payments made in the ordinary course of doing business.
Timing	The report is based on a calendar fiscal quarter, which the debtor must file by the 15th day of the month following the end of the fiscal quarter reporting period. For example, the debtor must file the report on April 15 for the first quarter of the year. The debtor must file the report until the bankruptcy court enters a final decree, dismisses the case, or converts the case to another chapter in bankruptcy.

US TRUSTEE QUARTERLY FEES

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

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

The fees are payable on a fiscal quarterly schedule and are paid 30 days following the end of each calendar quarter. For example, fees for the first fiscal quarter ending March 31 are due on April 30. Failure to pay quarterly fees may result in the court converting or dismissing the Chapter 11 case (§ 1112(b)(4)(K), Bankruptcy Code). A court cannot confirm a Chapter 11 plan unless the plan provides for payment of all unpaid quarterly fees accrued by the effective date (§ 1129(a)(12), Bankruptcy Code). For more information on the required fees, see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors: US Trustee Fee Guidelines (W-000-5977).

The Region 2 Guidelines provide policies regarding:

- **Fee calculation.** The quarterly fee is calculated by totaling the debtor's total disbursements reported in the monthly operating reports for the three-month calendar quarter and then determining the amount owed based on the US Trustee's quarterly fee schedule. The US Trustee Program amends the quarterly fee schedule from time to time (see DOJ: US Trustee Quarterly Fee Guideline Schedule). A minimum fee of $325 is due from each debtor even if the debtor makes no disbursements during a calendar quarter. The quarterly fee amount is estimated if the debtor has not reported its disbursements for all three months in the fiscal quarter. The estimated fee is typically based on:

  - the debtor's reported disbursement history;
  - the debtor's initial financial data provided to the US Trustee when the case was filed; or
  - an independent estimation done by the US Trustee.
- **Payment process.** The Executive Office for the US Trustee sends the debtor a bill or statement for the quarterly fee before the payment due date. The debtor must then complete the payment form enclosed with the statement and make a check payable to the US Trustee and send the check to the address listed in the statement. The debtor is responsible for timely payment of the quarterly fee. If the debtor fails to receive a bill from the Executive Office for the US Trustee, the debtor must immediately contact its local district US Trustee office.
- **Interest assessment.** The US Trustee assesses interest on unpaid Chapter 11 quarterly fees at an interest rate determined by the US Department of the Treasury (31 U.S.C. § 3717). If the debtor pays the full principal amount and the payment is received within 30 days of the date of notice of the initial interest assessment, the interest assessed is waived.
- **Post-confirmation fees.** Quarterly fees continue to accrue after the court confirms a Chapter 11 plan and must be paid quarterly until the court enters an order converting, dismissing, or closing the case.

USE OF TAXPAYER IDENTIFYING NUMBER

The Region 2 Guidelines provide notice to the debtor that the US Trustee intends to provide the debtor's taxpayer identifying number to the US Department of Treasury. The US Department of Treasury assists the US Trustee in collecting and reporting on any delinquent debts of the debtor, including Chapter 11 quarterly fees. If a debtor has outstanding debts, the Department of the Treasury may:

- Submit the debt to the IRS so that the amount owed may be deducted from any payment made by the federal government to the debtor, including tax refunds.
- Report the delinquency to credit reporting agencies.
- Send collection notices to the debtor.
- Engage private collection agencies to collect the debt.
- Engage the US Attorney's office to sue for collection.

Any collection costs incurred by the US Trustee or the Department of Justice are added to the balance of the debt.

OTHER OPERATING PROCEDURES

In the EDNY, the Region 2 Guidelines also require:

- **Notice to the US Trustee in certain situations.** The debtor must immediately advise the US Trustee of any significant change in the debtor's business. Significant changes include:
  - casualty or theft loss;
  - changes in insurance coverage;
  - allegations of violations of laws, ordinances, or regulations; or
  - failure to pay taxes.
- **A written request for waiver or modification of reporting requirements.** If the debtor requires a waiver or modification from any of the US Trustee's reporting requirements, it must submit a written request to the US Trustee demonstrating sufficient cause for the requested waiver or modification and specifying an alternative proposal. A waiver or modification is not effective unless it is in writing and signed by the US Trustee or an authorized delegate.

07-18