IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:)
)
CLERK'S INSTRUCTIONS REGARDING)
ADMINISTRATIVE PROCEDURES FOR)
CHAPTER 11 DISCLOSURE)
STATEMENTS AND PLANS)

CHAPTER 11 DISCLOSURE STATEMENTS AND PLANS

To facilitate the administration of Chapter 11 cases and to inform the bankruptcy bar of the Court's preferred practices, the Bankruptcy Clerk has promulgated the following, non-binding procedures to assist parties in the procedural administration of Chapter 11 disclosure statements and plans.

a. Definitions

1. Small Business Debtor

The term "small business debtor" applies to both individuals and businesses. The term is defined in 11 U.S.C. § 101(51D) (2013) as follows:

(51D) The term "small business debtor"--

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $ 2,343,300 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $ 2,343,300 (excluding debt owed to 1 or more affiliates or insiders).

2. Petition / Order for Relief

As used herein, the term "petition" means "order for relief." In a case converted

Chapter 11, the term "petition" or "order for relief" means the date of conversion.

3. Notice by Mail

"Notice by mail" is complete upon mailing. Fed. R. Bankr. P. 9006(e). Generally, when the Clerk issues the notice by mail, the mailing is completed by the Bankruptcy Noticing Center two days after the Clerk issues the notice. For example, when 28 days "notice by mail" is required, the time period will not expire until 30 days after the Clerk issues the notice on the case docket. For parties receiving electronic notification, notice is complete on transmission, Fed. R. Bankr. P. 9036, regardless of when the Bankruptcy Noticing Center places a document in the mail.

b. When the Disclosure Statement is Due

1. The purpose of the disclosure statement is to provide adequate information to an informed investor such that the informed investor can make an adequate judgment about the plan and whether to vote to confirm or deny it. 11 U.S.C. § 1125(a). Accordingly, approval of a disclosure statement is a general prerequisite to obtaining confirmation of a plan.

2. The Court and the Regional Office of the United States Trustee strongly encourage small business debtors to file disclosure statements that substantially conform to Official Form B25B, available through the Court's website: www.wvnb.uscourts.gov.

3. The disclosure statement must be filed with the proposed plan. Fed. R. Bankr P 3016(b). In small business cases, Official Form B25B requires the plan to be filed as an exhibit to the disclosure statement – not as a separate docket entry. Filing the plan as an exhibit to the disclosure statement in small business debtor cases is important because the Court must hold a confirmation hearing within 45 days after the filing of the plan, 11 U.S.C. § 1129(e), which means inadequate time exists to issue notice of the disclosures statement hearing and, once approved, issue a separate notice for the confirmation hearing. If a plan proponent in a small business case files the plan and the disclosure statement simultaneously as separate docket entries, the Clerk's Office may "correct" the entry to make the plan an exhibit to the disclosure statement. The Court and the Regional Office of the United States Trustee strongly encourage small business debtors to file proposed plans that substantially conform to Official Form B25A, available through the Court's website: www.wvnb.uscourts.gov.

4. Neither the Bankruptcy Code nor Rules detail when a disclosure statement is due; rather, the Bankruptcy Code measures time periods related to the filing of a 11 plan. Because: (1) the Court's preferred practice is to finally approve the disclosure statement before proceeding to a Chapter 11 plan confirmation hearing,

and (2) Fed. R. Bankr. P. 2002(b) requires at least 28 days notice by mail to before holding a hearing to approve a disclosure statement, the disclosure should be filed sufficiently in advance of any time constraints that the Bankruptcy Code places on the filing of a plan. (see *infra*, ¶ f).

c. Procedures on the Filing of the Disclosure Statement

1. On the filing of a disclosure statement, the Clerk issues a 28-day notice by mail of the time fixed for filing objections and the hearing to consider approval of a disclosure statement. Fed. R. Bankr. P. 2002(b). If no objection to a disclosure statement is timely filed, the Court may cancel the pending disclosure statement hearing and enter an order approving the disclosure statement. The Clerk generally does not, but may, designate the plan proponent as having the responsibility for noticing the disclosure statement hearing and the disclosure statement on the parties entitled to receive it. Attached to these instructions is a sample Order and Notice of Hearing on Disclosure Statement generated in the Clerk's Office for use by the Court in setting the disclosure statement hearing.

2. The 28-day notice of time to object to a disclosure statement and notice of the disclosure statement hearing is mailed to the parties listed on the mailing matrix. These parties should include those listed below. The Clerk's Office generally does not police the mailing matrix other than to ensure that the Internal Revenue Service and the U.S. Attorney for this District are included. As applicable, the mailing matrix should include (see Fed. R. Bankr. P. 2002(b), (d), (i), (j), (k)):

   A. the debtor
   B. the Chapter 11 trustee (if appointed)
   C. all creditors and indentured trustees
   D. equity security holders
   E. committees or authorized agents
   F. Security and Exchange Commission (see Fed. R. Bankr. P. 2002(j)).
   G. Internal Revenue Service
   H. U.S. Attorney for the District
   I. Secretary of the Treasury (see Fed. R. Bankr. P. 2002(j))
   J. United States trustee

3. Distinguishing Between the Notice of Hearing on the Disclosure Statement and Notice of the Disclosure Statement

   A. Not all of the parties listed above in ¶ 2(A-J) are entitled to receive a copy of the disclosure statement and proposed plan with the notice of the time to object to the disclosure statement and notice of the disclosure statement hearing. Only the parties listed below are required to be mailed a copy of the disclosure statement and attached plan pursuant to Fed. R. Bankr. P. 3017(a):

i. the debtor (not necessary when the debtor files the disclosure statement);
ii. Trustee (if one is appointed, and not if the trustee files the disclosure statement);
iii. Appointed Committee (if represented by counsel, counsel would most likely have previously received the disclosure statement through the notice of electronic filing);
iv. Security and Exchange Commission (if applicable – see Rule 2002(j));
v. Parties requesting copies (e-filers will have already received the disclosure statement through the notice of electronic filing; non-e-filers must be mailed a copy);
vi. United States Trustee (the U.S. Trustee would have previously received the disclosure statement though the notice of electronic filing).

B. Consequently, when no party has specifically requested copies, and the Security and Exchange Commission is not involved in the case, all the parties required to receive the disclosure statement and attached plan are likely to have already received it through the notice of electronic filing when the proponent filed the disclosure statement. The Clerk's Office may issue two notices regarding the disclosure statement hearing. The first consists of the notice of the disclosure statement hearing mailed to all parties on the matrix. The second consists of the notice of the disclosure statement hearing and the disclosure statement, which is mailed only to the six categories of parties entitled to delivery of the disclosure statement. In lieu of the Clerk issuing the required notices, the Court or Clerk may delegate noticing responsibilities to the plan proponent.

d. Objections to the Disclosure Statement

1. The Court prefers that filed objections to a disclosure statement be limited to whether the disclosure statement provides "adequate information" to allow an informed judgment about voting on the plan. While the Court encourages the parties to communicate and work through plan based objections to the disclosure statement, such objections may be overruled or held in abeyance by the Court as prematurely filed.[1] Likewise, the Court encourages the disclosure statement proponent to cooperate in the disclosure statement process to give requesting

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1 The Court is aware of the general practice of objecting to "everything" at the disclosure statement stage so that potential confirmation objections may be resolved before the plan is distributed for voting. The Court encourages the early identification and communication of confirmation issues between the parties, and the Court appreciates being generally informed about potential confirmation issues. The substance of an objection to a disclosure statement, however, should address the merits of 11 U.S.C. § 1125(b).

parties the information desired, so far as possible.

2. Pursuant to Fed. R. Bankr. P. 3016(a), objections to disclosure statement are required to be "served" on:

   A. the debtor
   B. the trustee (if appointed)
   C. any committee appointed under the Code; and
   D. any other entity directed by the Court.

3. To date, the Court has not directed that an objection to a disclosure statement be served on any entity other than those specifically listed in Rule 3016(a). Regarding service, when the debtor (or debtor's counsel), the trustee, and committee are e-filers, those parties receive electronic service of the objection through the notice of electronic filing. In such a case, no need exists to separately serve a paper copy of the objection under Fed. R. Bankr. P. 7004.

4. If objections are filed to the disclosure statement that are not resolved by the parties, the Court will either dispose of the filed objections based on the papers filed, or will hold the disclosure statement hearing. After the hearing, the Court will do one of the following:

   A. approve the disclosure statement;
   B. deny approval of the disclosure statement;
   C. approve a disclosure statement amended before or at the hearing; or
   D. "pre-approve" an amended disclosure statement to be amended after the hearing. In such a case, the Court or the parties should suggest a reasonable time frame to file the amended disclosure statement and that the amended disclosure statement be circulated for approval by the objecting parties to ensure the amendments conform to the expectations at the disclosure statement hearing. In its discretion, the Court may require that a disclosure statement amended after the hearing be noticed for another 28-day objection period.

e. Conditional Approval of Disclosure Statement

1. In small business cases only, the court may conditionally approve a disclosure statement and proceed directly to a joint disclosure statement and confirmation hearing. Fed. R. Bankr. P. 3017.1

2. A motion to conditionally approve a disclosure statement may be granted *ex* In addition, the Court may, *sua sponte*, conditionally approve a disclosure statement and proceed directly to a joint hearing on final approval of the statement and confirmation of the proposed plan. In its discretion, the Court, through the Clerk, may allow the United States trustee 48 hours to advise the

as to whether the United States trustee objects to the conditional approval of the disclosure statement.

3. On the conditional approval of the disclosure statement, the procedures outlined below for the plan confirmation hearing are followed (*infra*, ¶ g); provided that any reference to the "disclosure statement" means the "conditionally approved disclosure statement."

4. Pursuant to Fed. R. Bankr. P. 3016(b), the plan proponent may opt not to file a separate disclosure statement. In such a case, the proposed plan must provide adequate information under 11 U.S.C. § 1125(f)(1), and the caption of the document should plainly indicate that the filing is both a disclosure statement and proposed plan. Although a single document, the Court may grant conditional approval to the disclosure statement portion of the document.

5. Before or at the joint disclosure / confirmation hearing, the Court may cancel the disclosure statement portion of the hearing if no objections are timely filed. The Court may also determine that the disclosure statement does not provide adequate information, which will require an amended disclosure statement to be filed, approved, and a confirmation hearing to be noticed. The Court's preferred practice is not to use the conditional disclosure statement approval process.

f. When the Plan is Due

1. Non-Small Business Cases

A. The debtor may file a plan at any time during a voluntary or involuntary case. 11 U.S.C. § 1121(a).

B. The debtor has the exclusive right to file a plan for 120 days after the filing of the petition. § 1121(b). This 120-day period may be reduced or extended "for cause" by order of the Court on a motion filed within the 120-day period. § 1121(d). The Court, however, may not extend the debtor's exclusivity period for more than 18 months following the filing of the petition. § 1121(d)(2)(A).

C. A party other than the debtor may file a plan when one of the following circumstances exist, § 1121(c):

i. a chapter 11 trustee has been appointed;

ii. the debtor has not filed a plan within 120 days after the date of the order of relief, or any extension of that period; or

iii. the debtor has not filed a plan that has been accepted by each class

of impaired claims and impaired interests before 180 days after the date of the order for relief or any extension of that period.

2. Small Business Debtors

   A. In a small business case, the debtor has the exclusive right to file a plan for 180 days after the date of the Chapter 11 petition. § 1121(e)(1).

   B. A small business plan must be filed on or before the 300th day following the Chapter 11 petition. § 1121(e)(2). Thus, a small business debtor has a 180-day exclusive period and an additional 120-day nonexclusive period in which to file a plan.

   C. The Court may extend the 180-day exclusivity period, and/or the 300-day period for filing a plan only if the debtor demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable time. § 1121(e)(3). The new deadline must be imposed at the time the extension is granted, and the court must sign the order granting such extension before the existing deadline has expired. § 1121(e)(3). On receipt of a motion to extend the 180-day or 300-day period, the Clerk or Court may issue a notice to parties in the case allowing 21 days to object to the motion, or set the motion directly for hearing to allow the debtor to present evidence and testimony regarding the standards for an extension. Importantly, the motion to extend the 180-day or 300-day limits must be filed sufficiently in advance of the deadline to allow the Court to rule on the motion because, by statute, the Court's order must be signed (not entered) before the deadline expires.

g. Procedures After the Approval of a Filed Disclosure Statement: Confirmation Hearing

1. For plans filed as an exhibit to the disclosure statement, on the approval of the disclosure statement the plan proponent should file the Chapter 11 plan in the case. The Clerk's Office may also perform this task.

2. Fed. R. Bankr. P. 3017 requires that – after the Court approves a disclosure statement – the Clerk or proponent of a plan shall mail to all creditors, equity security holders, and the United States trustee:
   A. the plan or a court approved summary of the plan;
   B. the disclosure statement approved by the Court;
   C. notice of the time within which acceptances and rejections of the plan may be filed;
   D. any other information as the Court may direct;
   E. notice of the time fixed for filing objections to confirmation to those entitled to vote on the plan;
   F. a form of ballot conforming to Official Form (B 14) to those entitled to

on the plan;

G. if the court orders that the disclosure statement and plan need not be sent to unimpaired classes, then the unimpaired classes must receive notice of where to receive the disclosure statement and plan, and notice of the time fixed for filing objections to confirmation;

H. if the plan contains an injunction prohibiting action by a non-creditor (regarding actions not otherwise enjoined by the Bankruptcy Code), the plan and disclosure statement must be mailed to the non-creditor along with a notice that specifically states that the proposed plan contains an injunction; and

I. the notice of the date first set for the confirmation hearing must also contain notice of the time to object to entry of discharge under Fed. R. Bankr. P. 4004(a).

3. A derivation of Official Form B 13 is generally used by the Court and Clerk's Office when approving a disclosure statement. A sample is attached. The sample: (a) approves the filed disclosure statement; (b) fixes the time for filing acceptances and rejections of the proposed plan; (c) fixes the time for filing objections to the plan; (d) sets the confirmation hearing date; (e) notices the objection to discharge deadline; (f) provides instructions regarding plans containing injunctions, and (g) provides noticing instructions to the plan proponent.

4. Fed. R. Bankr. P. 2002(b) requires at least 28-days notice by mail to elapse between the mailing of the disclosure statement, plan, notice of hearing, and ballots and the confirmation hearing. To provide adequate time to object to discharge under Fed. R. Bankr. P. 4004(a), parties may be unable to reduce the 28-day period. Fed. R. Bankr. P. 9006(c)(2). Moreover, because the 28-day notice is measured from the date of mailing, and the mailings are accomplished by both the Clerk's Office and the plan proponent, a sufficient amount of time must be allotted between the approval of the disclosure statement and the confirmation hearing to ensure the proper notices are timely placed in the mail. In the Clerk's Office, mail is issued from the Bankruptcy Noticing Center two days after the document is issued (docketed) by the Clerk. E-filers receive the "mail" on the day of issuance.

h. Plans Containing Third Party Injunctions

1. Under Fed. R. Bankr. P. 2002(c)(3), if a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice of the confirmation hearing required under Rule 2002(b)(2) shall:

A. include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction;

B. describe briefly the nature of the injunction; and

C. identify the entities that would be subject to the injunction.

2. The Clerk's Office does not independently review the language of a proposed Chapter 11 plan to ascertain whether it proposes a third party injunction. The order approving the disclosure statement and setting the confirmation hearing should instruct the plan proponent to separately mail notice of any injunction against conduct not otherwise enjoined under the Code. The plan proponent should file a certificate of notice with the Clerk.

i. Confirmation Hearing

1. The Court encourages parties to work through confirmation hearing objections in advance of the hearing. If objections are filed, the plan proponent should inform the Judge's courtroom deputy in advance of the hearing whether the objections are resolved and whether the confirmation hearing will be consensual. If filed objections are not resolved, the plan proponent should provide the Judge's courtroom deputy with an estimate for the amount of time needed to hold the confirmation hearing. Where possible, this information should be imparted three days before the scheduled hearing.

2. In cases where confirmation is consensual, the Court's preferred practice is to have testimony from the debtor's principal regarding the satisfaction of the confirmation requirements listed in 11 U.S.C. § 1129(a)(1-16), as applicable. In the event the plan is confirmed, the confirmation order prepared by the plan proponent should also reflect the existence of the requirements listed in § 1129(a)(1-16), as applicable.

3. Chapter 11 requires creditor participation. A Chapter 11 plan cannot be confirmed unless the plan is consensual, no class is impaired, or at least one impaired class accepts the plan. Whether a class accepts a plan is determined by 11 U.S.C. § 1126. In previous uncontested cases, the Court has considered only the ballots actually cast in an impaired class when considering whether the ½ in number and 2/3 in amount requirement is met. § 1126(c).

j. Special Confirmation Considerations in Small Business Cases

Particular problems exist in small business cases regarding the deadlines for proposed plans and obtaining confirmation. If special attention to the deadlines and the Court's preferred practices is not paid by the plan proponent, the case may be dismissed for failure to obtain confirmation.

1. The Court prefers to approve the disclosure statement first, and then move on the plan confirmation process. Twenty-eight days notice by mail is required to consider a disclosure statement. Fed. R. Bankr. P. 2002(b). Once approved, 28 days notice by mail is required to hold a hearing on confirmation. Fed. R. Bankr. P. 2002(b). Because the date first set for the confirmation hearing also provides the objection to discharge deadline, parties may be unsuccessful in shortening the

28 days notice by mail of the confirmation hearing. Fed. R. Bankr. P. 4004(a), 9006(c)(2).

2. The Court is required to confirm (or deny) a small business debtor plan "not later than 45 days after the plan is filed." § 1129(e)(3). The plan must be filed not later than 300 days following the petition. 11 U.S.C. § 1121(e)(2). The plan should be filed as an exhibit to the disclosure statement. Thus, if insufficient time exists to obtain approval of the disclosure statement before the 300th day of the case, the only method to obtain confirmation is to obtain conditional approval of the disclosure statement.

3. A small business plan filed on the 300th day must be ready for a confirmation hearing on or before the 345th day of the case. § 1129(e).

4. The extension of the 300-day deadline in § 1121(e)(2), and the 45-day deadline for holding a confirmation hearing in § 1129(e)(3), may only be extended under § 1121(e)(3), which requires satisfaction of three conditions:

    A. the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;

    B. a new deadline is imposed at the time the extension is granted; and

    C. the order extending time is signed before the existing deadline has expired.

5. Obtaining an extension of the deadlines set forth in the above paragraph does not require a mini-confirmation hearing. It may require evidence and testimony as to whether the preponderance of the evidence standard is met.

6. The Court may excuse compliance with the 45-day confirmation hearing deadline if the Court's divisional hearing calendar will not accommodate the parties within the statutory time period.

Updated: July 18, 2013.