CHAPTER 2 – APPOINTMENT AND QUALIFICATIONS OF THE STANDING TRUSTEE AND GENERAL REQUIREMENTS

The United States Trustee is authorized by law to appoint one or more individuals to serve as standing trustee in chapter 13 cases. 28 U.S.C. § 586 (b).

A. ELIGIBILITY

To be eligible for appointment as a standing trustee, an individual must have the qualifications set forth in 11 U.S.C. § 321 and at 28 C.F.R. §§ 58.3 and 58.4. Appendix A. The trustee applicant must qualify to be bonded. Trustees must successfully undergo initial and five-year background checks. The proposed appointee must submit an employment application, SF-86 (Questionnaire for Sensitive Positions), DOJ-488 (Tax Check Waiver), FD-258 (Fingerprint Cards), I-9 (Employment Eligibility Verification), and a Form 555[a] (Disclosure and Authorization pertaining to Consumer Reports Pursuant to the Fair Credit Reporting Act, 15 U.S.C. § 1681) to the United States Trustee.

B. RECRUITMENT AND SELECTION

When seeking a new standing trustee, the United States Trustee conducts an open solicitation of persons interested in serving as the standing trustee. The United States Trustee follows applicable diversity policies and initiatives in the recruitment process.

Appointments are made on a non-discriminatory basis, as provided in 28 C.F.R. § 58.5. Trustee employment practices must also be non- discriminatory to the same extent as provided in 28 C.F.R. § 58.5, and all prospective employees should be so advised by the trustee. Appendix A.

The number of trustees to be appointed in any judicial district is within the discretion of the United States Trustee in consultation with the Director. The assignment of cases to standing trustees is also within the discretion of the United States Trustee subject to administrative review, when appropriate, pursuant to 28 C.F.R. § 58.6. Appendix A. The standing trustee must be able to administer cases and to carry out fiduciary duties free from influence or conflict.

C. TRUSTEE SURETY BONDS

Sections 322 and 1302 require the standing trustee to maintain a bond in favor of the United States conditioned on the faithful performance of official duties. Therefore, one of the qualifications for appointment of an individual as standing trustee is the ability to be bonded. The amount of the bond and the sufficiency of the surety will be determined by the United States Trustee. 11 U.S.C. § 322(b)(2). The faithful performance surety bond of the standing trustee serves to protect the bankruptcy estates and trust accounts from acts by the standing trustee or employees of the standing trustee to whom duties have been delegated. The United States Trustee may approve one or more blanket bonds for the region. The standing trustee will be consulted concerning whether to procure an individual blanket bond or participate in a blanket bond covering multiple trustees.

Unless a group of standing trustees are included in a single bond, the minimum amount of the blanket bond for the standing trustee is 150% of the average monthly bank balances for the prior three months for all bank accounts, certificates of deposit or other permissible investments maintained by the trustee operation. The balances are to be determined from the bank records and reviewed monthly by the standing trustee and the United States Trustee. The standing trustee should discuss with the United States Trustee any significant increases in bank balances or any anticipated increase in funds. If the average monthly bank balances are such that the trustee's bond is less than 150% of those amounts, the standing trustee must confer with the United States Trustee. Adjustments to the bond should be made only as approved by the United States Trustee based upon significant increases or decreases in actual and projected bank balances. The amount of a blanket bond covering multiple trustees shall be set by the United States Trustee after consultation with the standing trustees in the region. After approval of the amount of the bond and the sufficiency of the surety, the original bond and any riders will be filed by the United States Trustee with the court.

As soon as the standing trustee becomes aware of an incident which may give rise to a bond claim, the standing trustee must notify the United States Trustee and the bonding company. The United States Trustee will assist the standing trustee with procedures to identify the extent of the potential loss and any parties responsible. The standing trustee will provide to the United States Trustee such information as the United States Trustee requires in order to perform this duty.

D. REQUIRED INSURANCE

1. **Employee Fidelity Coverage:** The standing trustee must obtain a reasonable amount of fidelity coverage on employees. The fidelity coverage may be in the form of a commercial crime policy that includes employee fidelity coverage or may be a separate blanket position fidelity bond. This coverage is almost always insurance although it may be referred to as a bond.

   Minimum coverage limits of liability are to be established based on a review of the employees' duties and job descriptions to determine access to funds and to accounting records. These limits will be reviewed by the United States Trustee as part of the budget process. See Appendix N for minimum guidelines for employee fidelity coverage.

2. **Property Coverage:** The standing trustee must maintain all insurance required by contract, such as insurance required by the trustee's real property lease. In addition, physical assets that are the property of the office of the standing trustee must be adequately insured. The property policy should include general liability insurance.

3. **Other Insurance:** Appendix N discusses other insurance that may be appropriate for the standing trustee operation. Premium amounts will be considered by the United States Trustee as part of the budget process. Generally premiums for policies that fall within the guidelines discussed in the Appendix may be paid from the expense account. Deductible amounts that fall within the Appendix guidelines for claims under these policies may be paid from the expense account absent extraordinary circumstances and upon approval by the United States Trustee or budget amendment. One extraordinary circumstance would be where the trustee directly contributed to the loss.

Purchase of insurance policies which are not discussed in this Handbook or Appendix will not be approved without written justification for its need and the prior written authorization of the United States Trustee.

E. TRAINING

The United States Trustee provides ongoing training for all trustees. The training should help the standing trustee keep abreast of recent developments in bankruptcy law and issues which affect chapter 13 administration. Training covers standards and other requirements for trustee performance, including record keeping and reporting. The training for a new standing trustee may include visiting or working in an existing trustee's office prior to case assignments and periodic one-on-one training with the United States Trustee thereafter, as needed. A standing trustee may request specific types of training from the United States Trustee, including participation in an ongoing mentoring program with an experienced standing trustee.

F. EVALUATION RECORD

The United States Trustee prepares a formal annual written review of the standing trustee's performance. The review monitors the standing trustee's competency, adherence to fiduciary standards, and commitment to effective case administration for the benefit of creditors. The annual performance review is based upon a variety of factors, including (but not limited to):

1. preparation and filing of timely, complete and accurate monthly reports with bank account information;

2. standing trustee's performance in § 341(a) meetings, investigation of the financial affairs of the debtor and, when appropriate, making criminal referrals;

3. substantive case administration including filing appropriate pleadings and performing effectively in court;

4. response to inquiries from the public and parties in interest and the number and nature of complaints against the standing trustee as well as the standing trustee's responsiveness in addressing the complaints;

5. filing of budgets, annual reports and final reports as well as the judicious use of expense funds;

6. response to audits, site visits and reviews as well as response to requests of the United States Trustee; and

7. maximizing and safeguarding of trust assets and investments as well as compliance with the requirements of the United States Trustee for banking and bonding.

The standing trustee will receive a copy of the evaluation record and may discuss it with the United States Trustee personally. Any written response by the standing trustee concerning issues raised in the evaluation record will become part of the United States Trustee's standing trustee oversight file, which will be made available to the standing trustee upon request. Appendix B.

g. **Noticing:** Charges incurred in providing noticing to interested parties, including postage, supplies and processing costs.

h. **Telephone:** Charges for phone service.

i. **Postage:** All postal charges and rental of post office boxes, except those related to noticing.

j. **Office Supplies:** Charges incurred for consumable supplies and other property of little monetary value, such as hand-held calculators, except those related to noticing.

k. **Bond Premiums:** Fees for premiums on surety bonds, including any premiums paid to bond an employee.

l. **Clerk Fees:** Does not include any filing fees or other court costs that are provided to be paid under the plan.

m. **Publications and On-Line Services:** Charges for subscriptions to and copies (paper or on-line) of journals and periodicals, books and directories as pertinent to the duties of the standing trustee. Includes charges related to on-line research services, including PACER and Internet. Standing trustees should consider the necessity of obtaining both hard copy and electronic versions of the same document.

n. **Insurance, other than Employment Related:** Charges for premises liability insurance for the office of the standing trustee (such as fire, theft, accidental injury to property or third persons), workers' compensation insurance, and other insurance as approved by the United States Trustee. The standing trustee must maintain adequate insurance on the physical assets that are property of the office of the standing trustee. Costs of different types of insurance are to be identified separately. Policies must meet the minimum requirements established by the United States Trustee Program for insurance premiums to be paid from the expense fund. See Appendix N for the minimum guidelines for the following insurance: commercial crime, property and general liability, errors and omissions, and employment practices liability.

o. **Training Expenses:** Job-related training of standing trustees and their employees is encouraged.

(1) Training not Sponsored by the United States Trustee: A standing trustee may use up to one percent of the fiscal year operating expense fund or $10,000, whichever is greater, to provide training for employees and the standing trustee. For example, as computer use has become more critical to operations, training of employees on software applications may be advisable. A standing trustee does not have to receive preapproval for

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APPENDIX N INSURANCE

A standing trustee must purchase property insurance (including general liability insurance) to cover the physical assets of the trust operation and a commercial crime or employee fidelity policy. A standing trustee may purchase other insurance after an assessment of risk and prior approval of the United States Trustee. A policy that meets the minimum requirements discussed in this Appendix is considered reasonable. Deviations, such as exceeding the limits of liability or deductibles, must be approved in advance by the United States Trustee. Reasonable premiums for mandatory or approved coverage will be considered an actual and necessary expense of the standing trustee. Premiums and deductibles may be paid from the standing trustee's expense account, barring extraordinary circumstances. One extraordinary circumstance would be where the trustee directly contributed to the loss. The standing trustee must take all contractual steps required by the insurer to reduce risk to reduce amount of the premiums and frequency of claims.

As soon as the standing trustee becomes aware of an incident which may give rise to an insurance claim, the standing trustee must notify the United States Trustee and the insurance carrier. The United States Trustee will assist the standing trustee with procedures to identify the extent of the potential loss and any parties responsible. The standing trustee will provide to the United States Trustee such information as the United States Trustee requires in order to perform this duty. The United States Trustee will monitor the number and type of claims.

An insurance carrier providing coverage to a standing trustee must be listed on Treasury Department Circular 570 or possess an A.M. Best Financial Rating of "A" or greater and be domiciled in the United States. The insurance company or the reinsurer must be licensed to do business in the state in which the standing trustee is appointed. Any reinsurer must provide documentation to show agreement to reinsure at least 75% of the covered activity.

A. COMMERCIAL CRIME INSURANCE OR EMPLOYEE FIDELITY BOND

If the standing trustee has employees, the standing trustee is required to purchase employee fidelity coverage. See Handbook chapter 2, section (D)(1). This coverage is almost always insurance although it may be referred to as an employee fidelity bond. The standing trustee may purchase either an employee fidelity bond or an employee fidelity insurance policy. A fidelity "bond" is a business insurance policy that protects the employer in case of any loss of money or property due to employee dishonesty. Employee fidelity insurance is usually a part of a commercial crime policy which offers broader coverage against loss, including, for example, burglary and computer fraud.

To be approved for purchase, an employee fidelity policy must comply with the following guidelines:

1. Limits of Liability

The amount of coverage should be based on a risk assessment of each employee as reflected in the classification of each employee to one of three broad categories that describe various levels of potential access to funds and accounting records, and administrative control over computer security features. Examples of the latter include ability to view the passwords of other employees or ability to modify access rights. The standing trustee must make this classification as part of the end-of-year financial audit process. The classifications of risk and required minimum limits of coverage are:

a. If the standing trustee has one or more employees with significant supervisory responsibilities, access to funds or accounting records, or administrative control over computer security features at a level similar to the standing trustee, then the standing trustee should be insured or bonded under this policy in the amount of the trustee's bond*;

b. If the standing trustee has one or more employees with responsibilities in cash receipt or disbursement area, access to funds or accounting records, or administrative control over computer security features, the standing trustee should be insured or bonded under this policy at a minimum of 20% of the standing trustee's bond amount*; or

c. If the standing trustee has no employees with responsibility for or access to cash or accounting records, or administrative control over computer security features, then the standing trustee must, nonetheless, be insured under this policy for a minimum of 10% of the standing trustee's bond amount.*

* If the standing trustee is covered under a bond with two or more trustees, then "the standing trustee's bond amount" is the amount of an individual bond that the trustee would be required to carry.

Regardless of the level of risk assessment assigned by the standing trustee to his employees, the standing trustee must implement, maintain, consistently monitor, and test a system of internal controls as covered in more detail in Handbook chapter 9, section E, Special Considerations for Computer Systems, and section F, Internal Control Features. These sections are not necessarily comprehensive guidance on internal control procedures; the standing trustee's internal control practices should be enhanced by additional reports developed by the chapter 13 software vendor.

2. Deductible

The deductible must be no more than $10,000 for each claim, commensurate with the level of total coverage. If the standing trustee is unable to obtain a deductible of $10,000 or less, then the deductible shall be in an amount as agreed with the United States Trustee.

3. Coverage

a. Coverage shall be for the loss of or damage to "money," "securities," and "other property" which results directly from "theft" by an "employee," whether or not identifiable, while acting alone or in collusion with other persons (excluding the standing trustee).

b. Coverage may, dependent on the specific policy, also extend to insure losses caused by third parties due to theft, forgery, alteration of checks, robbery, disappearance and destruction of money and securities, burglary, computer fraud, and the intentional, unauthorized, or fraudulent creation of data.

c. The definition of "employee" is to include employees of the standing trustee while acting within the scope of the person's duties as such.

d. The policy period should be for one year.

e. Written notice of cancellation by the insurance carrier is required at least 60 days in advance of cancellation.

f. The insurance company must provide a written statement to the standing trustee that the insurer or reinsurer meets all of the minimum requirements as set forth by the USTP.

4. Insuring Agreements

In addition to the requirements discussed above, the standing trustee should consider the following additions to the policy:

a. Include in the definition of "employees" those persons leased from a third party.

b. Include any software vendor as an additional insured.

B. PROPERTY AND GENERAL LIABILITY INSURANCE

The standing trustee is required to purchase insurance to cover the physical assets of the trust operation. Property and general liability insurance is the most customized and office specific of the USTP approved coverages. No two trust operations will have the same amount of office equipment, furniture and liability exposure. However, to be approved for purchase, a liability policy should comply with the following guidelines:

1. Limits of Liability

a. Property. For coverage of the physical assets of the trust operation, the amount of coverage is specific to each office based upon replacement cost of the assets.

b. General liability. Coverage under a general liability policy must be a minimum of $1,000,000 for each occurrence and have a $1,000,000 annual aggregate.

c. Umbrella coverage. An umbrella policy would provide supplemental liability coverage. The amount of coverage shall be reasonable and determined by the standing trustee after an assessment of the risks to the trust operation.

2. Deductible

The maximum deductible shall be $2,500 for property and general liability policies, and $10,000 for an umbrella policy. An umbrella policy shall have no more than a $10,000 limit on retention.

3. Within the required insurance, the following coverages are recommended:

a. Property Insurance.

- Replacement cost coverage for business personal property rather than actual cash value.
- Specific policy language for computers and media including not only direct physical loss, but also electromagnetic injury caused by power surges, power failure, brownouts, and computer viruses.
- Valuable papers and records, manuscripts, and books.

- Money and securities, including money orders, involving loss by disappearance, destruction, theft, forgery, and alteration of instruments.

- Business income interruption that involves direct physical loss of or damage to the property at the described premises or other location where the trustee does business. Coverage would be for normal operating expenses, including payroll, and provide business income for twelve consecutive months after the date of the loss or damage.

b. General Liability Insurance.

- Business liability involving bodily injury, property damage and personal injury.

- A duty to defend imposed on the carrier.

- Medical expenses for bodily injury.

- Hired and non-owned auto endorsement that provides liability for automobiles not owned by the insured but used in business (employees' vehicles when used for trust operation business, but only in an amount in excess of the employees' personal automobile insurance).

c. Umbrella Insurance.

- Umbrella coverage is insurance that will apply in excess of the primary layer of insurance. This excess coverage will apply in the event a liability claim occurs which exhausts the limits of the general liability policy. In some instances, the umbrella coverage may provide broader coverage than the underlying policies resulting in a claim being covered which otherwise would not have been. In this event, a self-insured retention limit applies and acts as a deductible.

- While umbrella coverage is excess coverage, it is not necessarily an excess liability policy. Excess liability is usually not broader than the underlying coverage and can actually be more restrictive.

- The insurance company should pay on behalf of the insured and not provide an indemnity provision requiring the individual to first pay for defense and judgment with later reimbursement by the company.

- The policy should provide for defense costs in addition to its limits, rather than as part of its limits.

- The umbrella policy should provide that no material change in the underlying policy will automatically affect the umbrella coverage in an adverse manner. This will prevent automatic termination if the underlying coverage is canceled or not renewed.

C. ERRORS AND OMISSIONS INSURANCE

In order for the E&O insurance policy to be approved for purchase, it must meet the following requirements:

1. **Limits of Liability**

   The E&O policy must insure up to $1,000,000 for each occurrence and up to $1,000,000 annual aggregate.

2. **Deductible**

   The minimum deductible for a claim shall be $1,000 and the maximum deductible shall be $10,000.

3. **Coverage**

   The contract must contain a severability provision and the insurance carrier must have the duty to defend. Also, the definition of "insured" in the policy must include employees of the standing trustee and third parties to whom the standing trustee would be legally obligated. The insurance company or the reinsurer must provide a written statement to the trustee that the insurer or reinsurer meets all of the minimum requirements as set forth by the United States Trustee Program. An E&O policy must provide coverage for:

   a. Actual or alleged acts, errors, or omissions arising out of professional services rendered for others by the trustee or any person or organization for whom the trustee is legally liable.

   b. Damages and claims expense.

   c. An event or circumstance which occurred prior to the effective date of the policy if it involves a bankruptcy case that was open as of the effective date of the policy, unless the insured had knowledge of the event or circumstance prior to the effective date of the policy.

   d. Failure to discharge fiduciary obligations.

   e. Incorrect, ambiguous or late disbursement of funds.

   f. Failure to investigate acts, operations or conduct of a debtor.

   g. Failure to complete services on time.

   h. Failure to estimate costs correctly.

   i. Failure to maintain insurance where the insured does not have custody or control of assets, other than money.

   j. Damages resulting in bodily injury or property damage claims as a result of failure to maintain insurance in cases where the insured does not have physical control of assets, other than money.

   k. Unintentional violations of statutes, ordinances, or codes.

   l. Failure to pay creditors on a timely basis.

m. Failure to establish and maintain administrative controls.

n. Damages resulting from the improper computation of fees.

o. Wrongful termination (other than resulting from illegal discrimination).

4. Extended Reporting Period

If the E&O policy is other than an occurrence form – a "claims made" contract– then the policy must provide for an extended reporting period.

D. EMPLOYMENT PRACTICES LIABILITY INSURANCE

1. Limits of Liability

The maximum of EPL coverage shall be $1,000,000 for each claim and $1,000,000 annual aggregate.

2. Deductible

The minimum deductible shall be $2,500 and the maximum deductible shall be no more than $10,000.

3. Coverage

The EPL policy must provide coverage for:

a. Legal costs and compensatory damages resulting from claims alleging wrongful employment practices, including wrongful discrimination, sexual harassment, wrongful termination, failure to employ or promote, breach of employment contract, employment-related misrepresentation, wrongful discipline, equal pay violations, wrongful deprivation of career opportunity, negligent evaluation, invasion of privacy, employment-related defamation, retaliation and employment-related wrongful infliction of emotional distress.

b. Legal costs and compensatory damages resulting from claims alleging acts of discrimination with regard to another person's employment due to race, religion, creed, age, gender, national origin, disability, handicap, status as an individual with a disability (as defined by the Americans with Disabilities Act and court decisions construing the ADA), sexual orientation or preference, or pregnancy.

c. A failure to act with respect to public accommodation or accessibility as required by the ADA.

d. Defense costs for the insured for allegations of intentional acts of discrimination until the point it is proven in a legal proceeding that the insured committed the act intentionally. At that point, all defense and damages protection will cease for the individual but will continue for the trust operation or any other insured named in the suit.

e. The insurance carrier cannot settle a claim without the consent of the named insured.

f. The definition of "insured" is to include employees of the standing trustee while acting within the scope of the persons duties as such.

g. The policy period shall be for one year.

h. Written notice of cancellation by the insurance carrier is required at least 60 days in advance of cancellation.

i. If the policy is not renewed by the insurance carrier, the insured has the right, under certain conditions, to purchase a one-year extension period policy.

j. The insurance carrier has the duty to defend.

k. The insurance company or reinsurer must provide a written statement to the standing trustee that the insurer or reinsurer meets all of the minimum requirements as set forth by the USTP.

l. The policy must contain severability provisions.

E. OTHER INSURANCE

Other types of insurance may be purchased when the standing trustee and United States Trustee agree a policy covering the risk would be advisable. The terms and conditions of coverage, as with as the cost of the premiums shall be as negotiated by the standing trustee and approved by the United States Trustee.

APPENDIX O

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