

# Technology and Telecommunication Cases

*The Month Before: The People and Technology You Need  
to Get Your Case Filed*

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## **Technology and Telecommunications Committee**

### **The Month Before: The People and Technology You Need to Get Your Case Filed**

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## **2007 Winter Leadership Conference Agenda:**

During the 30 days prior to the filing of a chapter 11, it is crucial that the proper people and systems be put into place to provide the smoothest possible entry in the bankruptcy arena. Advance planning can be essential to the management of the case and the eventual exit from the reorganization/liquidation proceedings. This program focuses on the practical and practice side of bankruptcy planning (as opposed to venue selection, DIP financing, First Day Motions, etc.).

### **Participants:**

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### **Presentation Materials:**

- Biographies of participants
- Summary Of Contingency Planning Considerations
- Preparing for Chapter 11 - The Role of the Financial Advisor
- Administar Presentation Outline/Slides
  - Bankruptcy LifeCycle Timeline
  - Claims Agent Selection Criteria
  - Pre-Filing Administration

**ABC CORPORATION**

**SUMMARY OF CONTINGENCY PLANNING CONSIDERATIONS**

KIRKLAND & ELLIS LLP

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E	Case Staffing Structure

**ABC CORPORATION**

**SUMMARY OF CONTINGENCY PLANNING CONSIDERATIONS**

We have been asked to assist ABC Corporation and its subsidiaries (collectively, the “Company”) in connection with its contingency planning for the potential commencement by the Company and certain of its affiliates (collectively, the “Companies”) of bankruptcy cases under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the “Bankruptcy Code”). In connection with these efforts, this outline and its attachments: (a) identify and describe, on a preliminary basis, certain planning considerations for the potential bankruptcy filings; (b) identify and describe the necessary filing forms and, on a preliminary basis, certain motions, applications and related papers that potentially would be filed on the first day of the Companies’ bankruptcy cases (collectively, the “First Day Papers”); (c) identify and request certain information that will be needed to prepare the First Day Papers; and (d) propose a timeline and staffing structure for the completion of the First Day Papers and the other tasks necessary for the potential bankruptcy filings.<sup>1</sup>

Please note that many of the outstanding issues identified below will require an analysis both from a business and a legal perspective, making it essential that we work closely with you on developing appropriate strategies for the potential bankruptcy filings and in preparing the necessary filing documents. Moreover, as contingency planning proceeds, we anticipate that additional issues will arise that will require our joint consideration. These materials, therefore, should be used as a starting point for our joint efforts to develop a more tailored strategy for the Company’s contingency planning efforts.

**I. Initial Considerations**

The scope and timing of any chapter 11 filing will be affected by the following basic considerations.

**A. Availability of U.S. Jurisdiction to Commence Chapter 11 Cases**

**1. Eligibility to File in the United States**

The Companies are considering the potential commencement of chapter 11 cases in the United States. An initial inquiry, however, is whether the various non-U.S. entities within the Company’s corporate structure are eligible to file bankruptcy cases in the United States.

- For each non-U.S. entity, this eligibility inquiry will depend primarily on whether the entity maintains property or a place of

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<sup>1</sup> For a more complete description of the bankruptcy process under the Bankruptcy Code, a memorandum entitled “Summary of Chapter 11 Considerations” has been provided with these materials.

business in the United States. If either of these conditions is met, the entity may file a bankruptcy case in the United States.<sup>2</sup>

- Some courts have held that a non-U.S. entity is eligible to commence a case under the Bankruptcy Code even where it has only minimal property in the United States (*e.g.*, a small bank account).
- By contrast, other courts have required more substantial U.S. property interests to justify the commencement of a case under the Bankruptcy Code (*e.g.*, long-term holdings of real property with substantial value). Similarly, recent cases have called into question the chapter 11 eligibility of entities with “business activity” in the United States, but no actual property, employees or place of business in the United States.
- If some of the Companies lack sufficient contacts with the United States under these standards, they will be unable to commence chapter 11 cases.<sup>3</sup> Under these circumstances, the Companies ineligible for chapter 11 relief may examine the available options for commencing an insolvency proceeding under applicable non-U.S. laws.
- Whether or not any of the non-U.S. entities within the Companies’ corporate structure may qualify for filing in the United States will require additional analysis.

## **B. Determining Which Entities Will Commence Insolvency Proceedings**

The determination of which entities should file chapter 11 cases or other insolvency proceedings may depend on the examination of a variety of operational, financial and legal considerations that relate largely to the extent of corporate interrelationships among the Companies. These factors include the following:

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<sup>2</sup> Even if a non-U.S. entity properly commences a bankruptcy case under this standard, however, there is no assurance that the provisions of the Bankruptcy Code will apply to the entity in all circumstances. Where the Bankruptcy Code conflicts with the otherwise applicable law of a non-U.S. jurisdiction, a bankruptcy court may defer to the law of the non-U.S. jurisdiction with respect to matters affecting comity or creditor expectations.

<sup>3</sup> Likewise, an entity cannot create a connection with the United States — such as by placing property in the United States — simply to become eligible for relief under the Bankruptcy Code. A bankruptcy case based on such “gerrymandered” jurisdiction likely would be dismissed as a “bad faith” filing. Moreover, a bankruptcy court may dismiss a bankruptcy case otherwise properly filed by an eligible non-U.S. entity if doing so would (a) better serve the interests of *both* the debtor and its creditors or (b) promote fairness and comity where a parallel proceeding has been filed in a non-U.S. jurisdiction.

- ***Financing Availability.*** The filing of a group of affiliated entities may be necessary to obtain adequate postpetition “debtor in possession” financing (“DIP Financing”) to permit these entities to continue operating or otherwise preserve their value. Given the size of the potential DIP Financing facility that may be required by the Companies to maintain operations on a going-forward basis in the event of a bankruptcy filing, a postpetition lender may require many of the Companies (including both operating and holding companies) to commence bankruptcy cases or insolvency proceedings and execute any postpetition financing agreement.
- ***Pending Litigation or Enforcement Actions.*** Entities faced with pending litigation or enforcement actions may wish to file a bankruptcy case to stay such matters from proceeding.
- ***Intercorporate Guarantees.*** The filing of a bankruptcy case generally stays all collection efforts by creditors of the debtor. However, these creditors generally will not be prohibited from seeking payment of these liabilities from third party guarantors or other obligors.
- ***Joint and Several Liability.*** As with guarantors, each obligor on significant joint and several liabilities should consider the commencement of a bankruptcy case to obtain the bankruptcy protections against the collection of these liabilities. Examples of obligations that may give rise to joint and several liability include (1) federal income taxes or other tax liabilities reported on a consolidated basis and (2) pension plan funding obligations for consolidated plans.
- ***Debt Acceleration by Reason of the Bankruptcy Filings.*** Debt obligations may be accelerated by the bankruptcy filing of one entity, creating adverse financial consequences to an affiliate. Under these circumstances, it may be prudent for the affiliate to file bankruptcy to avoid or mitigate these adverse consequences.
- ***Cross-Defaults.*** Cross-defaults triggered by the commencement of a bankruptcy case by one entity may require related entities to seek similar relief to avoid potentially adverse consequences to their businesses.
- ***Availability of Debtor in Possession Financing.*** The filing of a group of affiliated entities may be necessary to obtain adequate postpetition financing to permit these entities to continue operating or otherwise preserve their value. Moreover, the filing of affiliated entities may be dictated by the Company’s prospective postpetition lenders as a condition to providing new financing.
- ***Cash Management.*** Cash management practices and related intercompany obligations may be so entwined that it is prudent for each

affiliated entity participating in these practices to commence a bankruptcy case. Accordingly, an examination of the Companies' cash management practices should be performed in connection with the determination of which entities should commence bankruptcy cases.

**C. Venue Considerations**

- Generally, an entity may commence a chapter 11 case in any district where it is incorporated or where it maintains its principal place of business or its primary assets. Moreover, once one entity files in a district, all affiliated entities may commence their chapter 11 cases in the same district. Accordingly, to maximize convenience and efficiency, all of the Companies filing chapter 11 cases would do so in the same bankruptcy court.
- The ultimate choice of venue may be affected by, among other things, the following:
  - any perceived “home court” advantage in filing chapter 11 cases in a district where the Company has significant local ties;
  - any differences in the law among the districts on key issues;
  - the relative experience and predictability of bankruptcy courts in these districts;
  - the convenience of the district to the parties; and
  - the likelihood that venue may be challenged because the primary concentration or situs of the debtors' operations, property and creditors makes venue elsewhere more appropriate.
- For example, possible venues for a chapter 11 filing include (1) the United States Bankruptcy Court for District of Delaware, the Company's state of incorporation and (2) the United States Bankruptcy Court for the Eastern District of Michigan, where the Company's headquarters is located. Given the size and scope of the Companies' operations, numerous other venue options may be available, and a full venue analysis should be performed.

**D. Timing**

The timing of any bankruptcy filing under chapter 11 (or other insolvency proceedings) may be affected by numerous factors, including the following:

- ***Anticipated Cash Availability.*** Bankruptcy may not be necessary if the Company maintains sufficient cash to operate its business while it

continues to seek alternate solutions to its financial difficulties. In fact, if cash levels remain adequate and the Company maintains access to sufficient trade credit, a bankruptcy filing may be delayed. It may not be appropriate, however, to delay a bankruptcy filing while all cash is consumed by operations or other losses. It is preferable in most cases to enter bankruptcy with a “war chest” of available cash. In any event, projections of cash availability will be a key component in planning the timing of a bankruptcy filing.

- ***Availability of Necessary Debtor in Possession Financing or Use of Cash Collateral.*** Because adequate postpetition financing or use of the Companies’ cash collateral likely is essential to the Companies’ ongoing operations and ultimate reorganization, absent exigent circumstances, the Companies’ bankruptcy cases should not be filed until such financing arrangements are in place.
- ***Status of Pending Litigation.*** The initiation of bankruptcy will stay most pending litigation and the enforcement of judgments, as well as the Company’s need to make ongoing payments on account of prepetition judgments. Accordingly, the status of pending litigation and the burdens of allowing such litigation to continue may affect the timing of a chapter 11 filing. As with secured lenders, litigants may obtain relief from the bankruptcy stay to continue the prosecution of litigation under limited circumstances, such as to liquidate claims for payment from third party insurance proceeds.
- ***Status of Prepetition Loans and Foreclosure Actions.*** Among other things, the commencement of a bankruptcy case will (1) stay any foreclosure actions, (2) prohibit other lender self-help remedies, (3) stop the accrual of interest on unsecured or undersecured loans and (4) eliminate the requirement to make ongoing loan payments. Depending on the status of outstanding loans (such as the occurrence or anticipated occurrence of events of defaults), the need for these protections may affect the timing of a chapter 11 filing. Note, however, that the commencement of a bankruptcy case will not eliminate all of a lenders’ rights and remedies. For example, under appropriate circumstances, a secured lender may seek relief from the bankruptcy stay to liquidate collateral or obtain “adequate protection” payments to compensate for diminishing collateral value.
- ***Minimization of Impact Upon Operations.*** Despite the best efforts to achieve a “soft landing” in bankruptcy and minimize the negative effects of the bankruptcy filing, it is inevitable that the commencement of chapter 11 will result in some disruption and confusion in business operations. After an initial stabilization or adjustment period, however, operations in chapter 11 typically return to a normal ebb and flow.

Nevertheless, it may be prudent to plan the bankruptcy filing (to the extent possible) to avoid interference with key business operations.

- ***Availability of Transfer Avoidance Actions.*** Bankruptcy grants the debtor enhanced powers to recover certain payments made to third parties or to undo other transactions, such as the granting of security interests or the transfer of other property. For example, certain payments made in the 90 days before a bankruptcy filing to satisfy an existing debt may be recoverable as “preferences.” In addition, preferential transfers to officers, directors or other insiders would be subject to a one-year preference period. Because these preference periods (as well as the bankruptcy fraudulent conveyance reachback period) are tied to the bankruptcy filing date, the desire to preserve certain avoidance actions could affect the Companies’ determination of an appropriate filing date.
- ***Need to Reject Contracts to Avoid Unnecessary Expenses.*** In chapter 11, a debtor may reject (*i.e.*, disavow) burdensome executory contracts and unexpired leases. Upon rejection, ongoing contractual obligations are eliminated and any damages are treated as prepetition obligations that share equally with other creditors, usually at cents on the dollar. Moreover, damages under certain types of contracts may be subject to even further limitations.<sup>4</sup> As a result, if the need to eliminate contract or lease obligations becomes pressing, an immediate bankruptcy filing may be appropriate.
- ***Support by Key Constituencies.*** The transition to bankruptcy likely will be easier with the support of key constituencies, such as employees, customers and vendors. As a result, in some cases, the support of key constituencies may be sought prior to the commencement of a chapter 11 case. Similarly, even in the majority of cases where such constituencies are *not* consulted in advance, the timing of the bankruptcy filing nevertheless may be chosen to limit the adverse impact on these entities. For example, a filing after the conclusion of the normal payroll cycle will decrease the chances that employees will suffer a delay in payment of their salaries.
- ***Asset Sales.*** The filing of a bankruptcy case may enhance a debtor’s ability to complete significant asset sales because a purchaser of assets in a bankruptcy case receives exceptionally clean title. Accordingly, if the completion of asset sales is important, a more expeditious bankruptcy filing may be justified.

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<sup>4</sup> For example, (a) the damage claim arising from the rejection of an employment contract generally is limited to one year’s salary and (b) the damage claim arising from the rejection of a nonresidential real property lease generally is limited to the rent reserved for the greater of one year or 15% of the remaining lease term, up to a maximum of three years’ rent.

## **II. Additional Pre-Bankruptcy Planning Issues**

In preparation for the potential filing of the Companies' chapter 11 cases, there are numerous additional issues that should be considered, and related activities that should be undertaken, to maximize the smooth transition to chapter 11:

### **A. Identify Potential Petition Date**

All of the planning activities for the Companies' chapter 11 cases must be coordinated so that they are completed by the date that the cases are commenced (*i.e.*, the "petition date"). As a result, it is essential that an effort is made immediately to establish a reasonable target date for the filing of the Companies' cases, based in large part on the timing considerations identified in Section I.D above.

### **B. Identify Potential DIP Lenders and Negotiate DIP Financing**

The success of the Companies' chapter 11 cases will depend on whether they have adequate financing to operate their businesses. As a result, it is critical that an effort is made immediately to seek proposals for DIP Financing and thereafter to negotiate and document the terms of a DIP Financing facility. As part of that process, it is important that the Companies first determine their financing needs so that the DIP Financing negotiated by the Companies provides sufficient cash availability to meet their needs and preserve their going concern value. In addition, it may be preferable to obtain DIP Financing from the Companies' existing lenders to avoid a dispute over the ability of a new lender group to "prime" the existing lenders (*i.e.*, to obtain a lien superior to the existing lenders' liens). If consent of the existing lenders cannot be obtained, however, it may be necessary to prepare to prime the existing lenders on a non-consensual basis.

### **C. Identify Potential Need to Use Cash Collateral and Negotiate Cash Collateral Agreements**

Upon the commencement of their chapter 11 cases, the Companies will not be permitted to use cash and similar assets that have been pledged as collateral for prepetition debt (*i.e.*, "cash collateral") without the approval of the secured lender or the approval of the bankruptcy court. This restriction would apply to any cash pledged as collateral to the Companies' existing lenders. Accordingly, the Companies should review their need to use any cash collateral in the postpetition operation of their businesses and, if necessary and appropriate, attempt to negotiate cash collateral agreements with the appropriate parties before the filing date. Even if such agreements cannot be reached, authority to use cash collateral may be obtained from the bankruptcy court if the secured lender's rights are "adequately protected." See Section IV.B.1 below. The resolution of cash collateral issues may be simplified if the Companies' existing lenders agree to

provide ongoing DIP Financing because any necessary cash collateral agreements could be incorporated into the terms of the DIP Financing documents.

**D. Identify and Retain Necessary Professionals**

In connection with their chapter 11 cases, the Companies will require the assistance and advice of qualified professionals from a variety of fields. Certain professionals — such as [Law Firm] (“Law Firm”) — already have been retained. Additional professionals may include, among others, the following: (1) accountants, (2) financial advisors, (3) independent auditors, (4) local counsel in the jurisdiction where the chapter 11 cases are filed and any special counsel, (5) communications consultants and (6) a bankruptcy claims and noticing agent. The Companies should have the remainder of their team of bankruptcy professionals in place as soon as possible so that: (1) these professionals can assist, if necessary, in the preparations for the Companies’ potential chapter 11 cases; and (2) appropriate papers can be prepared to obtain bankruptcy court approval for the Companies’ retention of these professionals. *See* Section IV.A below.

**E. Establish Procedures to Monitor Cash to Avoid Bank Setoffs**

Cash held in bank accounts may be subject to attempts by the depository banks to assert setoffs for other obligations owed to the banks. Upon the commencement of the Companies’ chapter 11 cases, such setoffs are improper without bankruptcy court approval. Nevertheless, such setoffs may be difficult to identify or reverse unless procedures are implemented prior to the filing date to monitor such activity.

**F. Identify and Prepay Trust Fund Taxes and Other Liabilities**

Once the Companies’ bankruptcy cases are filed, they will be prohibited from paying any obligations that arose prior to the filing date, except pursuant to a plan of reorganization or special authority of the bankruptcy court (which is granted only in exceptional or compelling circumstances).

- ***Trust Fund Taxes.*** Among other things, this prohibition applies to prepetition trust fund taxes. Nonetheless, the Companies’ failure to pay these taxes — even if prohibited from doing so — may give rise to personal liability of the Companies’ directors and officers or other “responsible persons.” As a result, it is recommended that all such trust fund taxes are prepaid through the date of the bankruptcy filing to avoid responsible person liability. To the extent that such liabilities are not prepaid, however, the Companies may seek authority from the bankruptcy court to pay these amounts. *See* Section IV.B.2 below.

- ***Payment of Other Obligations.*** The Companies should work with [Law Firm] to identify any other liabilities that should be paid prior to the commencement of any bankruptcy cases, such as expense reimbursements to employees. Additionally, payments of retainers and other obligations to the Companies' professionals likely will be necessary prior to the filing date.

**G. Make Any Delinquent Utility Payments**

Typically, utility companies may seek deposits from entities in bankruptcy as a condition for providing future services. To avoid potentially burdensome utility deposit requirements, the Companies may file a motion with the bankruptcy court, arguing that their past payment record and any existing deposits provide assurance that they will pay for future utility services without the need to give additional deposits. See Section IV.B.2 below. Because this argument has the greatest likelihood of success if there are not substantial delinquent utility bills, it may be prudent (if possible) to consider paying any delinquent utility bills prior to the filing date.

**H. Identify Any Burdensome Contracts or Leases for Immediate Rejection**

As noted in Section I.D above, a chapter 11 debtor may reject (*i.e.*, disavow) burdensome executory contracts and unexpired leases. Until the date of rejection, however, a debtor may be responsible for all obligations and liabilities that accrue under the contract or lease. Accordingly, if possible, prior to commencing the Companies' chapter 11 cases, a preliminary review of their contracts and leases should be performed to determine if there are any particularly burdensome contracts or leases that should be rejected immediately to eliminate the accrual of significant ongoing liabilities. For example, leases on closed facilities that accrue above-market rent probably should be rejected immediately.

**I. Identify Any Essential Contracts or Leases for Immediate Assumption**

The Bankruptcy Code also gives debtors the right to assume (*i.e.*, affirm) beneficial executory contracts and unexpired leases. In reviewing the Companies' contracts and leases, particular effort should be made to identify key contracts for which immediate assumption may be considered. Assumption of contracts and leases on the first day of a chapter 11 case, however, is not advisable in the overwhelming majority of cases because the assumption may create significant postpetition liabilities that cannot be undone by a later rejection. Nevertheless, assumption may be appropriate in certain very unique or compelling circumstances. This is particularly true where important concessions are obtained from the other party to a critical contract, such as an agreement to (1) improve the economic terms of the contract or (2) permit assumption of an agreement that arguably is not subject to assumption (*e.g.*, an agreement that arguably is a nonassumable "financial accommodation"). In the long run, the retention of an

executory contract consultant may prove beneficial in addressing these types of issues.

**J. Identify Any Business Activities Affected by the Bankruptcy Filing**

As described in Section IV.B below, we have identified certain typical forms of relief potentially to be requested from the bankruptcy court to promote the Companies' smooth transition to chapter 11. A review of the Companies' business operations should be performed, however, to determine (1) if other critical business activities will be adversely affected by the bankruptcy filing and (2) whether additional relief can be sought from the bankruptcy court to alleviate or mitigate these potential problems.

**K. Develop Preliminary Chapter 11 Business Plan**

If possible, a preliminary chapter 11 business plan should be developed as an outline of business activities and cash needs in the initial postpetition period. For example, the Companies should determine if they wish to sell certain assets in the early stage of their chapter 11 cases or implement reductions in workforce or other cost reduction measures. Many such activities will require bankruptcy court approval or have other legal effects that must be examined. Additionally, to avoid the need for bankruptcy court approval of certain activities, the Companies may wish to consider the completion of certain of these activities — such as layoffs and the payment of resulting severance benefits — prior to filing their bankruptcy cases.

**L. Analyze Intercompany Debt**

As a general matter, *bona fide* “insider” claims held by affiliated entities against debtors on account of prepetition debt are treated the same as claims on account of prepetition debt held by unaffiliated entities. Such insider claims, however, typically are scrutinized closely to determine whether the intercompany indebtedness at issue is properly characterized, and thus treated for purposes of the bankruptcy, as debt or equity or otherwise should be subordinated. The Company should analyze its intercompany debt to determine how the claims arising therefrom likely would be treated in bankruptcy.

**M. Prepare for Post-Filing Communications with Employees, Unions, Vendors, Customers, Media, Etc. and Others**

Upon the commencement of the Companies' chapter 11 cases, it is important to communicate with key constituencies immediately to minimize the potentially disruptive effects of the bankruptcy filings on, among other things, customer and vendor confidence, employee morale, union relationships and public perception. Likewise, the Companies must assure that they comply with any Securities and Exchange Commission (the “SEC”) or similar reporting requirements in

connection with the bankruptcy filings. The development of a strategy to address the concerns of key constituencies should be completed prior to the filing date and implemented immediately upon filing.

**N. Prepare for Operations in Chapter 11**

The commencement of chapter 11 cases will require the Companies to operate their businesses as “debtors in possession” and comply with the related obligations and prohibitions imposed by, among other things, chapter 11 of the Bankruptcy Code, any orders of the bankruptcy court and the financial reporting requirements of the United States trustee. These new obligations will impact virtually all aspects of the Companies’ businesses, especially the accounting, finance/treasury and legal functions. As a result, it is useful to begin preparations for postpetition operations even before the commencement of the Companies’ chapter 11 cases. Such preparations may include:

- identifying a core staff of individuals responsible for chapter 11 reporting, case administration activities and other related matters;
- preparing “corporate directives” to ensure compliance with the key operating requirements of chapter 11 in the days immediately following the commencement of the Companies’ chapter 11 cases (*e.g.*, explaining the prohibition on paying prepetition claims);
- scheduling “seminars” with employees to teach the basic do’s and don’t’s of operating in chapter 11;
- establishing lines of communication between the Companies and their professionals on matters potentially impacted by the chapter 11 filings;
- establishing procedures to stop the payment of prepetition claims, except where such payments have been expressly authorized by the bankruptcy court;
- establishing procedures to (1) respond to creditor inquiries and potential violations of the automatic stay and (2) collect any reclamation demands; and
- initiating the complex and time-consuming process of preparing the Companies’ schedules of assets and liabilities and statements of financial affairs.

**O. Timeline**

To assist in these various contingency planning activities, a proposed Chapter 11 Contingency Planning Timeline is attached hereto as Annex A.<sup>5</sup> This timeline identifies on a preliminary basis certain of the key activities that we believe should be performed in the period leading up to the proposed petition date and in the period immediately after the filing. *We strongly encourage the use of this timeline or a similar timeline of key activities to ensure that (1) the Companies are prepared to file their chapter 11 cases if and when necessary and (2) the Companies are able to make as smooth a transition into chapter 11 as possible.*

**III. Required Filing Materials**

**A. Chapter 11 Petition and Filing Forms**

A chapter 11 case is initiated by filing a bankruptcy “petition” and other related forms. For your convenience, copies of the basic bankruptcy forms are attached hereto collectively as Annex B. The basic package of filing forms and required papers *for each filing entity* include:<sup>6</sup>

- Voluntary Petition;
- Exhibit A to Voluntary Petition (filed only by entities that are required to file periodic reports with the SEC pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934, such as annual and quarterly reports on Forms 10-K and 10-Q);
- List of Creditors Holding 20 Largest Unsecured Claims;<sup>7</sup>
- Creditor/Equity Security Holder Lists;
- Corporate Resolutions Authorizing the Bankruptcy Filing; and
- Bankruptcy Filing Fee.

*A complete set of these filing materials is required for each entity commencing a chapter 11 case. Attached hereto as Annex C (and as further described below) is a chart identifying the information needed and certain issues arising in connection with the preparation of the bankruptcy filing package for each potential debtor.*

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<sup>5</sup> The Company and [Law Firm] should work together to refine the tasks to be completed and insert appropriate target dates into the timeline. The attached timeline provides a starting point for these discussions.

<sup>6</sup> Separate requirements will apply to any foreign affiliate commencing an insolvency proceeding in a non-U.S. jurisdiction.

<sup>7</sup> The Company may seek relief to file creditor lists on a consolidated basis. See Annex C.

**B. Non-U.S. Proceedings and Ancillary Cases**

Additionally, any entity filing a non-U.S. insolvency proceeding must complete any form or papers required in the applicable jurisdiction. In turn, an ancillary case may be filed with the bankruptcy court, as described in Section I.A. 2 above.

**C. Schedules of Assets and Liabilities and Statements of Financial Affairs**

Generally, within 15 days after the commencement of a chapter 11 case, a debtor must prepare a statement of financial affairs and schedules of assets and liabilities. These various documents are commonly referred to together as a debtor's schedules. Because of the vast amount of financial data and creditor information that must be included in the schedules, the task of completing the schedules is exceptionally burdensome. Accordingly, debtors in large cases typically request an extension of time to complete their preparation of the schedules. *See* Section IV.A below.

**IV. "First Day" Pleadings**

In addition to filing the necessary bankruptcy forms on the first day of a bankruptcy case, chapter 11 debtors generally file a number of motions and other pleadings requesting immediate bankruptcy court relief on numerous emergency matters. This emergency relief is necessary primarily to (A) permit critical components of a debtor's business to continue uninterrupted after the commencement of a bankruptcy case, despite the limitations and restrictions imposed by the Bankruptcy Code, where the continuation of such activities is essential to preserve the value of the debtor's business for the benefit of its creditors (*e.g.*, the payment of certain critical prepetition claims), (B) implement new financing and related matters, (C) obtain protection from adverse creditor actions, (D) establish procedures for the efficient administration of a debtor's bankruptcy case and any related cases and (E) authorize the retention of bankruptcy professionals.

Attached hereto as Annex C is a chart identifying, on a preliminary basis, (A) certain potential first day motions, applications and other pleadings and (B) the information needed and certain issues arising in connection with the preparation of these first day pleadings. This list was developed by [Law Firm] based on its experience in many similar cases. *Because the facts of each case are unique, however, it is important for the Companies to work with [Law Firm] and their other professionals to modify this list and tailor the relief to meet their specific needs. For example, a number of the proposed motions seek authority to pay prepetition claims or honor prepetition obligations. The authority sought in these motions is extraordinary relief that will be granted only where it can be firmly established that the payment of such amounts is essential to the preservation of value for the benefit of creditors.*

*In addition, if it becomes necessary to commence chapter 11 cases on an expedited basis, it may be necessary to limit the First Day Papers to those matters that are absolutely essential to have approved on the petition date. Additional pleadings then may be filed in the days immediately following the petition date.*

**A. Case Administration Motions**

The following motions would seek relief to (1) assist in the day-to-day administration of the chapter 11 cases, (2) provide for the retention of necessary professionals, (3) ensure that the other first day motions are timely heard and approved and (4) thereby assist the debtors in preserving their value.

- motion to approve the *joint administration* of the Companies' separate chapter 11 cases;
- motion for an *extension of time to file schedules* of assets and liabilities and modifying certain creditor matrix requirements;
- motion for an *expedited hearing* on emergency first day relief (not required in all jurisdictions);
- applications for authority to retain *bankruptcy professionals* (counsel, financial advisors, accountants, auditors, noticing agent, etc.);
- motion to establish a procedure for the *monthly payment of bankruptcy professionals*;
- motion to permit the retention and payment of *ordinary course professionals* without the further approval of the bankruptcy court; and
- motion to *permit certain [Law Firm] attorneys to appear and practice* in the bankruptcy court during the Companies' chapter 11 cases.

**B. First Day "Emergency Relief"**

The following motions would seek relief necessary to ensure that the Companies (1) are adequately financed, (2) have the other resources to operate as chapter 11 debtors and (3) make a smooth transition into chapter 11 with the minimum possible disruption to their businesses.

**1. Financing Matters**

- Motion for interim and final approval of *debtor in possession financing* (see Section II.B above); and
- motion for interim and final approval of the use of *cash collateral* (see Section II.C above).

**2. Relief to Facilitate a "Soft Landing"**

- Motion for authority to continue using the Companies' existing *cash management system and business forms*;

- motion for authority to honor prepetition *obligations to customers* and other key constituencies;
- motion for authority to pay prepetition *employee wages and benefits*;
- motion for authority to honor prepetition *workers' compensation obligations*;
- motion for authority to maintain any existing *insurance premium financing programs*;
- motion for authority to pay certain prepetition *vendor claims* (e.g., claims held by bonded creditors, creditors with lien rights and other key vendors and service providers);
- motion for authority to pay certain prepetition *trust fund taxes*;
- motion for authority to assume or reject certain *executory contracts or unexpired leases*;
- motion for relief from requirement to post *utility deposits*;
- potential motion for a “comfort order” to authorize *payment of postpetition obligations*; and
- potential motion for a “comfort order” to *maintain operations and implement the automatic stay*.

**3. Other Papers**

- Affidavit in support of chapter 11 petitions and other first day relief (required in some jurisdictions and recommended even where not required).
- Any Cross-Border Protocol or related relief needed in the event that any non-U.S. insolvency proceedings also are commenced.

**C. “Second Day” Relief**

In addition to the administrative and emergency first day relief described above, the Companies may require or benefit from other forms of relief in the days immediately after commencing their chapter 11 cases. Although important, these matters typically either (1) are not essential on the petition date or (2) cannot be heard on limited notice or on an expedited basis. Accordingly, the pleadings seeking such relief typically are filed shortly after the petition date (or filed on the petition date but heard by the court later) and are sometimes referred to as

“second day” papers. Additionally, as noted above, if it becomes necessary due to the potential need to commence chapter 11 cases on an expedited basis, certain of the First Day Papers identified above may become “second day” papers.

**V. Information Request**

To complete the bankruptcy filing forms described in Section III.A above, general information must be provided with respect to *each potential debtor's* business, creditors and financial status. Likewise, a substantial amount of additional financial and business information is required to prepare the various first day pleadings described in Section IV above.

- Included as part of Annex C is a preliminary request for information that will be needed to complete each of the bankruptcy filing forms and other First Day Papers. This information request is organized by document, identifying the information needed for each paper anticipated to be filed upon the commencement of these cases.
- As the first day process progresses, it is likely that additional information will be needed that is not currently identified on the attached information requests. *We will use our best efforts to (A) request that additional information as soon as the need is identified and (B) allow as much lead time as the circumstances permit.* Unfortunately, the first day process is a highly fact intensive and expedited process. Accordingly, despite our best efforts, to meet the potential expedited filing deadline, information will be required on a highly accelerated schedule.

**VI. Staffing**

**A. First Day**

Completion of the various tasks necessary to prepare the Companies' First Day Papers will require the dedication, cooperation, hard work and coordination of a large group of professionals and business persons. From past experience, we believe that this significant task can be best accomplished by dividing the various substantive responsibilities among smaller groups of individuals organized into teams. These teams then would be organized and coordinated by an oversight team to ensure that the first day process stays on course for a successful conclusion.

- One of the immediate goals for the Company and **[Law Firm]** should be to determine (1) the composition of these first day teams; (2) the locations best suited for the team members to complete their respective responsibilities; and (3) appropriate target dates for the completion of each necessary task.

- To assist in understanding the first day staffing plan, a schematic chart of the team structure is attached hereto as Annex D.

**B. [Law Firm] Case Staffing**

After the Companies' chapter 11 cases and related insolvency proceedings are commenced, [Law Firm] typically utilizes a similar, but less rigid, staffing structure to assist in administering the reorganization process. Coordinated ultimately by [Law Firm]'s partners-in-charge of this representation, activities in the Companies' chapter 11 cases and any related insolvency proceedings will be organized into function-based teams based upon substantive area.

- Each team typically will have its own lead partner under the supervision of the partners-in-charge.
- Where appropriate, [Law Firm] utilizes not only bankruptcy attorneys, but also attorneys with expertise in unique substantive areas such as finance, securities, litigation, employee benefits, government regulation and tax.
- This team structure avoids duplication of effort and ensures that matters are staffed with lawyers having the expertise and experience to match the needs of the project.
- To assist in understanding this case staffing structure, a schematic chart identifying its basic elements is attached hereto as Annex E.



Protiviti Outline  
Preparing for Chapter 11  
The Role of the Financial Advisor

**1) Overview**

- a) Financial advisor provides strategic direction (in concert with counsel, and the investment banker)
- b) Important to engage a financial advisor in advance of filing
- c) Chapter 11 places unique demands on Debtor's financial staff
  - i) 13 week cash flows
  - ii) Mid month close
  - iii) Information requests from constituents
  - iv) Bankruptcy schedules / Statement of Financial Affairs
  - v) Data for first day motions
- d) Financial Advisor provides on site consulting to extract/package information to assist counsel and facilitate the process.

**2) Preparing for a Chapter 11 Bankruptcy|**

- a) Administrative
  - i) Voluntary petitions
    - (1) assemble federal tax ID numbers and recent balance sheet data. Check AP master file for number of creditors
  - ii) List of top 20 (or 30) creditors
    - (1) Typically not generated solely from aged AP file
    - (2) Must check executory contracts, leases, lawsuits, benefit plans, etc.
    - (3) Provide the trustee with accurate names, e-mail addresses and fax numbers
    - (4) Generally acceptable to provide one list for consolidated debtors
  - iii) Creditor matrix
    - (1) Don't underestimate the task
    - (2) Must include addresses for all current and recent employees, shareholders, board members, vendors (present and past) unsecured creditors, secured creditors, parties to executory contracts, plan administrators, taxing authorities, regulators, ordinary course professionals, and parties to litigation.
    - (3) For telecommunications companies, should include lessors on cell towers, switching stations and grantors of easements.
  - iv) Engage Noticing Agent

b) Operations

- i) Identify/anticipate vendor supply problems
  - (1) Identify alternative vendors
  - (2) Consider making a preference payment
  - (3) Critical vendor motions are less popular
  - (4) Ease vendor stress by informing them of the 502(b)(9) claims available to them under BAPCPA
  - (5) Advance communication with key vendors generally works better than the ambush approach.
  - (6) Negotiate post-petition payment terms (interest free money)
- ii) Develop performance-based incentive plan for key managers
  - (1) Tie to DIP budget if possible, get DIP lender to endorse
  - (2) Traditional KERP plans are no longer acceptable without a bona fide alternative job offer for each key employee
- iii) Plan for reclamation claims
  - (1) Insure accurate records of shipments received

c) 1<sup>st</sup> Day Motions

- i) Assistance with first day motions is a vital role of the financial advisor
- ii) Involves detailed data assembly in a format and a timing interval unfamiliar to the debtors accounting department
  - (1) DIP budgets (13 week cash flow projections)
    - (a) Perhaps the most important document prepared by the FA
    - (b) Must be attainable and accurate
    - (c) Should reconcile / compare to last three months actual
    - (d) Must include proper professional fees, DIP fees, dishonored checks, tightening vendor terms, noticing agent costs, continuation of wages, essential capital expenditures.
    - (e) Routinely requested in a crisis
    - (f) Routinely requested with insufficient time to prepare
    - (g) Reminder to engage the financial advisor early
  - (2) Adequate protection analyses
  - (3) Unpaid employee compensation and benefit expenses
  - (4) Cash management system diagrams
  - (5) Utility providers
  - (6) Insurance coverages and benefit plans
  - (7) Trust Funds and sales taxes due
  - (8) Marketing programs / gift certificates / coupons

d) Prepare 4-walls analysis (if needed)

- i) Quantify net cash impact of facility closing, asset sales, AR collections etc...

- ii) Determine the appropriate timing of any closures relative to the filing date. Consider WARN act liabilities.
- iii) Determine appropriate time to reject real estate leases associated with closed facilities.
- iv) Identify debtor personnel responsible for the wind-down of the closed facilities. Provide adequate compensation to the wind-down team.

e) Communications

- i) Develop a communication plan for all constituents. Include information about DIP financing, if available, in communications.
  - (i) Employees
  - (ii) Vendors
  - (iii) Customers
  - (iv) Shareholders
  - (v) Regulators
  - (vi) Press
  - (vii) Lenders
- ii) Develop presentation for 341 meeting of creditors
  - (i) Demonstrate control and competence
  - (ii) Give preview of debtors strategy
  - (iii) Share information on financial condition and DIP financing|
  - (iv) Do not make promises or give estimates of returns
- iii) Establish, staff, and script a toll free “Vendor Hotline” to field and resolve post-petition calls regarding vendor, employee, and customer inquiries and issues.
- iv) Prepare informational package for the legal and financial professionals selected to represent the creditors committee and other creditor groups to minimize and streamline post filing requests.
- v) Consider a virtual data room (e.g. Intralinks)

f) Cash Management

- i) Arrange for printing of new “DIP” check stock. All post-petition checks must display “Debtor-in-possession” on the face of the check.
- ii) Diagram the cash management system to be included in the debtors’ first day motion seeking permission to use the existing system and bank accounts in the post petition period.
- iii) Identify owner, tax ID number, and cash balance as of the petition date in all checking accounts.
- iv) Collection of A/R – manage attempts to offset or hold hostage the debtor’s cash assets.
- v) Ensure court allows, at a minimum, the use of the current payroll accounts and processes to avoid interruption in employee pay.
- vi) Prepare an analysis of all outstanding checks as of the petition date. Prepare instructions to Bank to dishonor all outstanding checks except those that have been specifically allowed by the court.



# Administar Outline

## 1) Bankruptcy Lifecycle Timeline

### **a) Period A (Pre-Filing)**

- i) Preparation of Petition(s) and First Day Motions
- ii) Prepare Creditor Data and Import
- iii) Identify Master Service List
- iv) Identify Top 20 Unsecured Creditors for each Debtor
- v) Prepare Master Mailing Matrix
- vi) Development and approval of Website
  - (1) Does it contain ample information to limit calls?
  - (2) Is the website easy to navigate?
- vii) Contact center setup
  - (1) Development and approval of call center scripts
  - (2) Is multi-lingual environment necessary?
  - (3) Understanding who will be receiving notices and anticipation of questions that will be asked in order to limit confusion to creditors/employees

### **b) Period B (Date of Filing)**

- i) File Bankruptcy Petition
- ii) Service of First Day Motions
- iii) Bring Communications Systems on Line

### **c) Period C (First Couple of Weeks after Filing)**

- i) Service of 341 Notice (Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors & Deadlines)
- ii) Filing and Service of Utility Motion/Order
- iii) Service of Notice of Bankruptcy (litigation)
- iv) Setup PO boxes and training of claims entry team for new case
  - (1) Special stratification of claims needed based on industry/company requirements
  - (2) Anticipated volumes
  - (3) Anticipated bar date (statutory or to be set at later date)
- v) File Schedules

### **d) Period D (Period from Couple Weeks Post-Petition to Disclosure Statement Hearing)**

- i) Claims docketed by Claims Agent
- ii) Public Information Management maintained and updated
  - (1) Website
  - (2) Call center
- iii) Claims Bar Date

- iv) Claims Analysis
- v) Claims Estimation
- vi) Plan Development (assign claims and liabilities to classes)
- vii) Claims Objections

**e) Period E (Solicitation Period)**

- i) Disclosure Statement approved and mailed with ballot to affected classes
- ii) Ballots received and tabulated
- iii) Ballot tabulation affidavit

**f) Period F (Confirmation)**

- i) Clearing Objections to Confirmation
- ii) Confirmation Hearing

**g) Period G (Post Confirmation/Distributions)**

- i) Plan Consummated (initial distributions)
- ii) Subsequent Distributions – varies upon Plan
- iii) Upon resolution of all claims and completion of all required distributions –  
Final accounting report filed with Court

**2) Claims Agent Selection Criteria**

**a) Why do I need one**

- i) Requirements by some Courts
- ii) Last minute high volume noticing jobs
- iii) Properly equipped with claims databases that help stratify data in order to manage the process
- iv) Able to have reorganization team concentrate on running the business instead of additional requirements of bankruptcy

**b) Price**

- i) Unit Prices
  - (1) Scanning
  - (2) Notice Printing
- ii) Hourly Prices
  - (1) Can I afford to talk to, and work with, the highest paid people?
  - (2) How efficient will they work?
  - (3) Will they try to do more than I need?

**c) Capabilities**

- i) What is their history?
- ii) Which law firms/financial advisors have they worked with?
- iii) Which cases have they worked on and in what capacity?
- iv) Do they have good references from companies similar to mine?

- v) Can they complete all administrative aspects of reorganization?
  - (1) Large scale, last minute noticing
  - (2) Notice Publication in National/Regional/Local newspapers
  - (3) 363 Sale
  - (4) Preference Analysis and Collection
  - (5) Contract assume/reject database with cure amounts
  - (6) Document preparation
  - (7) Balloting (on-line and conventional, public securities, rights offerings, etc.)
  - (8) Subscription Agent
  - (9) Distribution – Cash/Stock
  - (10) Web Site availability
  - (11) Remote access of database to Financial Advisors, Attorneys, Accounting Department, etc.
  - (12) Consulting on ways to make processes more efficient/save money

**d) Reputation**

- i) References
- ii) Responsiveness
- iii) Accuracy
- iv) Knowledge
- v) Easy to Use

**3) Pre-Filing Administration**

**a) Setting expectations of all team members responsibilities to avoid duplicative efforts and to ensure all bases are covered with most amount of organization and efficiency**

**b) Data Management**

- i) Creation of Creditor Matrix in standard upload format pursuant to local rules
- ii) Retaining important data elements in order to facilitate efficient claims resolution
- iii) Removing duplicative records to limit number of notices needed to be served when serving generic notices
- iv) Ability to serve multiple documents when multiple accounts are held by same creditor
- v) Changes in record(s) tracking
- vi) Multiple stratifications needed to manage data (i.e. multiple types of litigation, multiple types of contracts, multiple types of employee records)

**c) Notice/Pleading Management**

- i) Matrix of First Day Motions – Helps to limit chaos in first day noticing activities

- (1) Which parties receive?
  - (2) How is the document served? (Overnight, fax, email, regular mail, hand delivery)
  - (3) When is the document to be served?
  - (4) How many parties are to be served?
  - (5) What is the number of pages?
  - (6) What can be done to enhance delivery of documents to important players?
- ii) Means of Service
- (1) Overnight Service
  - (2) Email
  - (3) Facsimile
  - (4) Website posting
  - (5) USPS regular mail
  - (6) Hand Deliver

# Bankruptcy Lifecycle Timeline

Period A Pre-Filing	Period B Date of Filing	Period C First Couple of Weeks After Filing	Period D Period from Couple of Weeks Post-Petition to Disclosure Statement Hearing	Period E Solicitation Period	Period F Confirmation	Period G Post Confirmation Distributions
<ul style="list-style-type: none"> <li>Preparation Petitions and First Day Motions</li> <li>Prepare Creditor Data and Import</li> <li>Identify MSL</li> <li>Identify Top 20</li> <li>Prepare Mailing Matrix</li> <li>Development and Approval of Website</li> <li>Contact Center Setup</li> </ul>	<ul style="list-style-type: none"> <li>File Bankruptcy Petition</li> <li>Service of First Day Motions</li> <li>Bring Communications Systems on Line</li> </ul>	<ul style="list-style-type: none"> <li>Service of 341 Notice</li> <li>Filing and Service of Utility Motion/Order</li> <li>Setup PO Boxes</li> <li>Training of claims entry team</li> </ul>	<ul style="list-style-type: none"> <li>Claims docketed by Claims Agent</li> <li>Public Information Management maintained and updated</li> <li>Claims Bar Date</li> <li>Claims Analysis</li> <li>Claims Estimation</li> <li>Plan Development</li> <li>Claims Objections</li> </ul>	<ul style="list-style-type: none"> <li>Disclosure Statement Approved and Mailed with Ballot to affected classes</li> <li>Ballots received and tabulated</li> <li>Ballot tabulation affidavit</li> </ul>	<ul style="list-style-type: none"> <li>Clearing Objections to Confirmation</li> <li>Confirmation Hearing</li> </ul>	<ul style="list-style-type: none"> <li>Plan Consummated (initial distributions)</li> <li>Subsequent Distributions</li> <li>Final accounting report filed with Court</li> <li>Final Decree Issued</li> </ul>

# Claims Agent Selection Criteria

## WHY DO I NEED ONE?

- > Requirements by some Courts
- > Last minute high volume noticing jobs
- > Claim databases that help stratify data
- > Ability for reorganization team to concentrate on running of business

## PRICE

- > Unit Prices
  - > Scanning
  - > Notice Printing
- > Hourly Prices
  - > Can I afford to talk to, and work with, the highest paid people?
  - > How efficient will they work?
  - > Will they try to do more than I need?

# Claims Agent Selection Criteria

## CAPABILITIES

- > What is their history?
- > Which law firms/financial advisors have they worked with?
- > Which cases have they worked on and in what capacity?
- > Do they have good references from companies similar to mine?
- > Can they complete all administrative aspects of a reorganization ?

## REPUTATION

- > References
- > Responsiveness
- > Accuracy
- > Knowledge
- > Easy to Use

# Pre-Filing Administration

## EXPECTATIONS

- > Setting expectations of all team members responsibilities to avoid duplicative efforts and to ensure all bases are covered with most amount of organization and efficiency

## DATA MANAGEMENT

- > Creation Creditor Matrix in standard upload format pursuant to local rules
- > Retention of important data elements in order to facilitate efficient claims resolution
- > Remove duplicate records to limited number of notices needed to be served when serving generic notices
- > Ability to serve multiple documents when multiple accounts are held by same creditor
- > Changes in record(s) tracking
- > Multiple stratifications needed to manage data

# Pre-Filing Administration

## NOTICE/PLEADING MANAGEMENT

- > Matrix of First Day Motions - Helps limit chaos in first day noticing activities
  - > Which parties?
  - > How is document to be served?
  - > When is the document to be served?
  - > How many parties are to be served?
  - > What is the number of pages?
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  - > Facsimile
  - > Website posting
  - > USPS regular mail
  - > Hand Deliver

