

OFFICIAL COMMITTEES**A. THE COMMITTEE**

Section 1102 of the Bankruptcy Code directs and authorizes the United States Trustee to appoint an official unsecured creditors' committee and provides the United States Trustee with the discretion to appoint additional committees, including equity security holders' committees. The United States Trustee must endeavor to appoint a committee of creditors holding unsecured claims "as soon as practicable after the order for relief...and may appoint additional committees of creditors or of equity security holders as the United States Trustee deems appropriate." 11 U.S.C. § 1102(a)(1).

Section 1102(b)(1) of the Bankruptcy Code provides that "a committee of creditors...shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee ..." The legislative history, as well as the context of the statute itself, makes clear that this is precatory language. H.R. Rep. No. 595, 95th Cong., 1st Sess. 401(1977).

B. ORGANIZATIONAL MEETING

In larger chapter 11 cases, the United States Trustee typically conducts a formation meeting in which creditors along with professionals seeking to provide their services to any appointed committee will attend. All creditors identified by a debtor in its list of Top 20 or 30 largest unsecured creditors are in such cases served with a Notice of Formation Meeting for Official Committee of Unsecured Creditors (the "Formation Meeting Notice"). In such larger cases, attendance of over 100 persons at the formation meeting is not uncommon.

The District of Delaware and Southern District of New York recently adopted a revised Questionnaire for Official Committee of Unsecured Creditors' Committee and Committee Information Sheet ("Revised Questionnaire"). The United States Trustee uses the Revised Questionnaire to elicit sufficient information about the creditor, the claim, and the creditor's connections with the estate to evaluate which creditors may be eligible to serve on the Official Committee of Unsecured Creditors. The United States Trustee also uses this information to assist the United States Trustee in appointing committee members reflective of the unsecured creditor constituencies that may be present in a particular case, such as trade creditors and unsecured bondholders. In the Revised Questionnaire, creditors are also asked to provide additional information regarding their connections with the debtor so the United States Trustee may ascertain if an applicant has an administrative or secured claim against the debtor's estate, or if the applicant is or was an "insider," holds equity in the debtor, or has purchased its claim post-petition. A copy of the Formation Meeting Notice and the Revised Questionnaire are included with these materials.

The debtor is required to attend the formation meeting to give a short presentation to the creditors concerning the events that led to the filing of the case, as well as to respond to limited inquiries by creditors about the case.

It is not uncommon for attorneys, accountants, and other professional persons to attend a formation meeting. These professionals usually wish to solicit representation of the committee as the committee typically holds its initial meeting and interviews professionals it may wish to retain immediately following the formation meeting.

After consideration of the information contained in the Revised Questionnaire and gathered at the formation meeting, the United States Trustee announces the names of creditors being appointed to the committee. In forming the committee, the United States Trustee considers whether each distinct creditor group seeking to serve is represented on the committee. Other factors the United States Trustee may consider when evaluating the composition of the committee include:

- whether the creditor holds equity in the debtor;
- whether or not an applicant has conflicts of interest inconsistent with committee membership;
- whether or not the creditor is a critical vendor;
- whether or not the creditor has 503(b)(9), other administrative or secured claims.

C. PERIODIC CERTIFICATIONS

If a creditor is selected for membership on the committee, the United States Trustee in her sole discretion may require that the individual members of the committee provide periodic certifications that list all claims or interests in the debtor held by the committee member. The certification requirement seeks, among other things, to ensure that a committee member remains a creditor of the debtor and thus qualified to remain on the committee.

Generally, the submission of this certification to the United States Trustee will be a quarterly requirement until the earlier of (1) confirmation of a plan of reorganization, (2) dismissal of the bankruptcy case, (3) conversion of the chapter 11 case to another chapter of the Bankruptcy Code, (4) the member's resignation from the Creditors' Committee, or (5) disbandment of the Creditors' Committee.

In addition to the quarterly certification, the United States Trustee also requests that members of the committee notify the United States Trustee in writing of any material changes in the amount of total debt owned or managed by the committee member no later than COB of the day upon which such change actually occurs. The written notice should specify the amount of debt involved and the

reason for the change (for example, a transfer of claim, or consummation of any type of credit protection transaction).

Furthermore, by submitting a Questionnaire, a creditor appointed as a member of the committee agrees that it may not purchase, sell or otherwise trade in or transfer claims against the Debtor while it serves as a committee member, absent order of the court. Absent an order of the court, this prohibition applies until the earlier of 1) confirmation of a plan of reorganization, (2) dismissal of the bankruptcy case, (3) conversion of the chapter 11 case to another chapter of the Bankruptcy Code, (4) the member's resignation from the Creditors' Committee, or (5) disbandment of the Creditors' Committee.

D. POWERS AND DUTIES OF A CREDITORS' COMMITTEE

The powers and duties of a creditors' committee are set forth in 11 U.S.C. § 1103(c). They include:

- the power to retain professionals to represent the committee
- the right to consult with the trustee or debtor in possession concerning the administration of the case;
- investigating the acts, conduct, assets, liabilities, and financial condition of the debtor;
- investigating any matters relevant to the formulation of a plan;
- participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated;
- the power to request the appointment of a trustee or examiner
- and perform such other services as are in the interest of those represented.

Other matters in which a committee may play a role include:

- review and object to professional fees;
- negotiation of executive compensation issues;
- negotiating bid procedures in a proposed sale of substantially all assets of the estate;
- acquiring the right to pursue avoidance and other Chapter 5 claims or other claims on behalf of the estate;
- investigating the bona fides of pre-petition secured debt.

E. FIDUCIARY DUTIES

Members of a creditors' committee are fiduciaries and represent the entire unsecured creditor body without regard to the types of claims which individual unsecured creditors hold against the debtor. *See Iridium Operating LLC v. Motorola, Inc. (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d

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Cir. 2007) (“The Committee has a fiduciary duty to maximize their recovery of the Estate’s assets”); *In re Kensington International LLC*, 368 F.3d 289, 315 (3d Cir. 2004) (“...it is established that a Creditors Committee owes a fiduciary duty to the unsecured creditors as a whole, not to the individual members”); *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 256 (3d Cir. 2001) (“We have construed § 1103(c) as implying a fiduciary duty on the part of members of a creditor’s committee toward their constituent members.”).