DEPARTMENT OF JUSTICE

28 CFR Part 58

RIN 1105–AA54

Procedures for Suspension and Removal of Panel Trustees and Standing Trustees

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The United States Trustee Program (''Program''), a component of the Department of Justice, is formalizing procedures to govern the suspension and termination of future case assignments to panel and standing trustees. The final rule enables a trustee to obtain a determination by the Director of the Executive Office for United States Trustees whether a decision by a United States Trustee to suspend or terminate future case assignments is supported by the record and is an appropriate exercise of the United States Trustee's discretion. This rule specifies the method by which United States Trustees shall announce suspension and termination decisions. It also formalizes the procedure by which a trustee obtains review by the Director, the manner in which that review will be conducted, and the standard the Director will employ in reaching a determination.

The Director's decision will constitute final agency action by the Department of Justice. If the agency's final action is adverse, this rule enables a trustee to obtain judicial review of it pursuant to the Administrative Procedure Act. 5 U.S.C. 552, *et seq.*

EFFECTIVE DATE: This rule is effective November 3, 1997.

ADDRESSES: Office of the General Counsel, Executive Office for United States Trustees, 901 E Street, NW., Room 740, Washington, D.C. 20530.

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SUPPLEMENTARY INFORMATION: This final rule provides a method and a review process for suspending and terminating future case assignments to panel and standing trustees. A proposed rule on this subject was published in the **Federal Register** on May 23, 1997 (62 FR 28391) (the ''proposed rule''). A summary of background information, public comment, and agency response follows.

I. Background and Rulemaking History

A. The United States Trustee Program

Congress enacted the United States Trustee Program on a pilot basis in the Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549 (1978), as a component of the Department of Justice and charged it with the responsibility of supervising the administration of bankruptcy cases and trustees. The success of the pilot program led Congress to expand the Program nationwide in 1986 as a permanent component within the Department of Justice. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99–554, 100 Stat. 3088 (1986).

The Program consists of the Executive Office for United States Trustees, which is headed by the Director, and 21 United States Trustees. The Director is a Justice Department official who acts under authority delegated by the Attorney General. United States Trustees are Justice Department officials appointed by, and who serve at the pleasure of, the Attorney General. 28 U.S.C. 581(a) and (c). United States Trustees supervise the administration of bankruptcy cases and case trustees within specified geographic regions. 28 U.S.C. 581.

Congress created the Program to remedy two longstanding weaknesses that had impaired the efficient and fair administration of bankruptcy cases. The prior system's first weakness was its requirement that bankruptcy courts engage in both judicial and administrative functions in bankruptcy cases. Under the prior system, bankruptcy courts litigated disputes among parties, including trustees. At the same time, bankruptcy courts were responsible for appointing trustees to cases and awarding their compensation.

For nearly a century it was widely acknowledged that a separation of administrative and judicial functions was necessary to ensure the integrity of the system, to preserve its effective and fair administration, and to protect the innocent debtors and creditors for whose benefit the system exists. *See, e.g.,* William J. Donovan, *House Committee on the Judiciary, Administration of Bankrupt Estates,* 71st Cong. 3d Sess. (Comm. Print 1931) (recommending—based upon an examination of 4,000 witnesses and interviews with 19 federal judges, 102 bankruptcy referees and 200 current or former trustees—that Congress rectify the inadequate and corrupt administration of bankruptcy cases by creating a Federal Bankruptcy Commissioner); Solicitor General Thomas Thacher, *Report to the President on the Bankruptcy Act and its Administration in the Courts of the United States, Dated December 5, 1931, reprinted in* S. Doc. No. 65, 72nd Cong. 1st Sess. (1932) (recommending legislation that would remedy cronyism and the lack of administrative oversight in bankruptcy cases by authorizing career civil servant bankruptcy administrators to oversee the administration of bankruptcy cases); *Report of the Commission of the Bankruptcy Laws of the United States,* H.R. Doc. No. 137, 93d Cong. 1st Sess. (1973) (recommending legislation to improve bankruptcy administration and reduce cronyism by transferring administrative functions to an administrative body staffed by civil servants).

The prior system's commingling of trustee supervision and the adjudication of disputes between trustees and third parties in bankruptcy courts resulted in a widespread perception that an unduly close relationship existed between bankruptcy judges and trustees, and this fostered cornyism and insider influence and abuse. *See* H.R. Rep. No. 595, 95th Cong. 2d Sess. 92 (1977). The House of Representative's Report on the proposed Bankruptcy Code concluded that ''[a]s administrator of bankruptcy cases, and the individual responsible for the supervision of the trustee or debtor in possession, it is an easy matter for a bankruptcy judge to feel personally responsible for the success or failure of a case * * * The institutional bias thus generated magnifies the likelihood of unfair decisions in the bankruptcy court * * *.'' H.R. Rep. No. 595, 95th Cong., at 91, 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963.

The Bankruptcy Code fixed this problem by transferring administrative functions, including the appointment and supervision of trustees, to the United States Trustee Program within the Department of Justice. The Program now appoints and supervises trustees, and, if appropriate, suspends or terminates future case assignments to them.

The second reason Congress created the Program was the recognition that the wide-ranging administrative aspects of the system should be committed to one accountable agency. Congress charged the Program and the Department with the task of supervising the administrative aspects of the system in order to protect debtors and creditors by providing a more accountable and consistent focus, and by supplanting the disparate procedures emanating from separate judicial districts. As one court has noted, in creating the United States Trustee Program, ''Congress specified

that the U.S. Trustees were to be independent of direct court supervision, as 'executives of the bankruptcy network.' '' *United States Trustee* v. *Revco D.S., Inc. (In re Revco D.S., Inc.),* 898 F.2d 498, 500 (6th Cir. 1990) (quoting in part H.R. Rep. No. 595, 95th Cong. 88–89).

B. The Program's Supervision of Trustees

Among the most important administrative functions assumed by the Program are the appointment and supervision of trustees who administer cases under chapters 7, 12, and 13 of the Bankruptcy Code. 28 U.S.C. 509, 510 and 586. The United States Trustee Program has enacted standards that set minimum qualifications for appointment. 28 CFR 58.3 and 58.4.

Trustees are fiduciaries with wide-ranging responsibilities to effectuate the goals of the particular chapter under which a bankruptcy case is filed. Because they are fiduciaries, trustees are held to very high standards of honesty and loyalty. *See generally Woods* v. *City National Bank & Trust Co.,* 312 U.S. 262, 278 (1941); *Mosser* v. *Darrow,* 341 U.S. 267 (1951). *See also Meinhard* v. *Salmon,* 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (Cardozo, C.J.).

Trustees are held to high standards not only because of their fiduciary duties to debtors and creditors but because they take charge of debtors' property and they hold large amounts of other people's money. In 1996, chapters 7, 12, and 13 trustees held combined receipts of well over three and a half billion dollars:

1996 RECEIPTS HELD BY TRUSTEES BY CHAPTER

Chapter 7 trustees	Chapter 12 trustees	Chapter 13 trustees
$1,479,531,213	$52,372,261	$2,147,407,093

Trustees exist not for their own benefit but to collect, protect, account for, and distribute these revenues to creditors in accordance with the payment provisions set forth in the Bankruptcy Code. Trustees often oversee many cases; some chapter 13 trustees, for example, administer many thousands of cases. Given the large amounts of money they control and the many duties they perform, dishonest trustees and trustees who do not manage their estates properly diminish the integrity of the bankruptcy system and jeopardize the assets of the honest debtors and creditors whose property they hold. For this reason, it is crucial that trustees be monitored; if necessary, those who cannot fulfill their duties must stop receiving new cases.

C. Assignment of Cases to Trustees

Chapters 7, 12, and 13 trustees receive cases through a two step process. The first step entails appointment of a trustee to the pool of individuals eligible to receive future cases. The second step involves assigning specific cases to individuals from those pools.

The first step in receiving chapter 7 cases is to be selected as a member of the panel of chapter 7 trustees for a specific geographic area. 28 U.S.C. 586(a)(1). A panel is the group of persons within a specific geographic region who are eligible to receive cases.

A United States Trustee selects the persons who serve on the chapter 7 panels in each region. When a person becomes a panel member, the person is eligible for appointment as an interim trustee in chapter 7 cases. 11 U.S.C. 701(a)(1).

Chapters 12 and 13 standing trustees are appointed by United States Trustees, with the approval of the Attorney General, to act as trustees within a specific geographic area. In some districts only one chapter 12 or 13 standing trustee is appointed to receive future cases. Other districts have multiple standing trustees. Once appointed to be a standing trustee for a specific district by a United States Trustee, that trustee will then receive specific cases within that judicial district.

Chapter 7 trustees are appointed to a chapter 7 panel for a renewable one year term. Chapters 12 and 13 standing trustees currently serve no fixed term; they generally remain eligible to receive future cases until that eligibility is terminated. The appointment documents signed by every trustee, whether a chapter 7 panel trustee, or a chapter 12 or a chapter 13 standing trustee, specifically provides that the trustee's appointment may be terminated at any time.

Chapter 7 panel trustees, and a chapters 12 and 13 standing trustees, effectively function as economic monopolists, must like public utilities. Debtors cannot select who will act as their trustee. They must accept the trustee who is appointed for them. With one exception, chapters 7, 12, and 13 trustees do not have to compete in the marketplace for cases as they arise. This single exception applies to chapter 7 cases where creditors may elect a chapter 7 trustee to replace the interim chapter 7 trustee initially appointed by the United State Trustee. 11 U.S.C. 701. Such elections are exceedingly rare: the Administrative Office of U.S. Courts reports that 3,944,893 chapter 7 cases were filed from January 1, 1991 through December 31, 1996 while Program reports show only 251 elections in chapter 7 cases between January 1, 1991 and February 3, 1997.

Rather than requiring trustees to compete for the assignment of specific cases based upon competence or price, Congress created the Program to appoint trustees and to regulate and assure their competence. United States Trustees act to protect debtors and creditors through careful and thorough trustee selection and supervision. Under existing law, trustees have no right or entitlement to receive future cases. 28 U.S.C. 586. *See Joelson* v. *United States,* 86 F.3d 1413 (6th Cir. 1996) (holding that trustees have no statutory or constitutionally protected interest in their positions as trustees); *Richman* v. *Straley,* 48 F.3d 1139, 1143 (10th Cir. 1995) (trustees have no constitutional right to continue acting as trustees); *Shaltry* v. *United States,* 182 B.R. 836, 842 (D. Ariz.) (same), *aff'd,* 1995 WL 866862 (9th Cir. 1995). This enables United States Trustees to stop assigning cases to current trustees if there are others who could do a better job protecting debtors and creditors or who could represent their interests as a lower cost. It also enables United States Trustees to stop assigning cases to trustees whose performance is weak or who engage in improper conduct.

The Program has carefully developed its structure and procedures for supervising trustees. Ensuring that trustees are competent is a time consuming process. It requires United States Trustees to observe all facets of a trustee's operation, often over a long period of time. It requires United States Trustees to have audits or similar reviews performed to analyze trustees' operations. Often, United States Trustees take months or even years to evaluate all information, to alert a trustee to problems, to attempt to assist a trustee in rectifying those problems, and to determine whether a trustee has

performed, or will be able to perform, his or her functions effectively.

The Program's structure enables it to carry out these functions more effectively than isolated bankruptcy courts were able to carry them our under the old system. Bankruptcy courts lacked the resources and the institutional structure to perform those tasks. For this reason, Congress charged United States Trustees with the administrative responsibilities of appointing and supervising panel and standing trustees. Although current law gives trustees no right or expectation to future cases, neither does it give any third party, no matter how better qualified or more cost effective than the trustee, any statutory or constitutional right to demand that future cases be assigned to that individual.

D. Suspension and Termination of Trustees

It is the Program's responsibility to protect debtors and creditors by ensuring that trustees are the appropriate individuals to continue receiving future cases. The Program is also responsible for ensuring that the system is operating smoothly and that cases are being administered efficiently. To fulfill these responsibilities, the Program closely monitors trustees' performance by regularly reviewing their administration of cases. Indeed, Program employees work with trustees almost on a daily basis.

As part of their supervisory responsibilities, United States Trustees must ensure that the Program does not devote inordinate amounts of its resources to supervising a limited number of chronically under-performing trustees. The Bankruptcy Code places many responsibilities upon the Program beyond simply supervising trustees. Trustees who are deficient in basic case administration, or who have to be coaxed, reminded, or prodded into fulfilling their responsibilities, force the Program to divert its limited resources from its other statutory tasks. Although problem trustees may tax the patience of the other participants in the bankruptcy system only occasionally, and those participants may not be fully aware of the shortcomings in those trustees' performance, deficient trustees need constant supervision, which drains the Program's limited resources. Consequently, the efficient administration of the bankruptcy system requires that United States Trustees cease assigning cases to them.

When appropriate, including when a trustee engages in improper conduct or fails to perform adequately, the Program will stop assigning future cases to trustees. Sometimes, a suspension is an appropriate regulatory tool that is used to give a trustee an opportunity to improve performance; in other circumstances termination is appropriate. The Program also may stop assigning future cases to trustees when the caseload in a judicial district declines, resulting in too many trustees for too little work. The Program also may stop assigning future cases when it determines that more competent, better qualified candidates may be available.

E. Effect of Suspension or Termination on Current Caseload

A decision to terminate or suspend a trustee's appointment to future cases has no legal impact upon a trustee's ability to continue administering cases that were previously assigned to the trustee. Current law allows trustees to continue administering cases to which they have been appointed unless the court issues an order removing the trustee in one or more specific cases pending under title 11 of the U.S. Code. 11 U.S.C. 324. Thus, suspensions and terminations are prospective only, and do not affect existing cases that have been assigned to panel and standing trustees.

F. Procedures for Determining Suspensions and Terminations

The Program has always had informal procedures through which an affected trustee could ask the Director of the Executive Office for United States Trustees to review a termination or suspension. The final rule formalizes these procedures. The final rule benefits the Program by allowing it to ensure that its final decision not to assign cases in the future will be based upon a deliberate consideration of all relevant factors at the highest level within the Program. It also has the effect of benefiting trustees by ensuring that a United States Trustee does not suspend or terminate trustees inappropriately or without support in the record.

Panel and standing trustees asked the Program to adopt more formal procedures regarding such decisions. In response to those requests, the Program began in July of 1996 to devise comprehensive written procedures. Prior to issuing its proposed rule, the Program solicited comments from trustees and others regarding what form those procedures should take The result of this lengthy process culminated in the publication of a proposed rule in the **Federal Register** for notice and comment. See 62 FR 28391 (May 23, 1997).

II. Purpose of the Final Rule

Through this rulemaking, the Program is devising a procedure by which it will reach a final determination whether a trustee should receive cases in the future. This rule does not affect a United States Trustee's decision to continue assigning future cases to existing panel and standing trustees. The rule applies when a United States Trustee concludes cases should not be assigned to a trustee. In such a case, the United States Trustee must notify the trustee why the decision has been reached. If a United States Trustee stops assigning cases to a trustee and the trustee chooses not to dispute the propriety of that decision, the decision becomes final and is not subject to review. If the trustee disputes the action, the final rule provides a process for review.

The rule sets forth fourteen non-exclusive examples of conduct or circumstances which may constitute reasons why a United States Trustee might reach such a decision. Those reasons fall into three general categories. The first relates to dishonesty or lack of competence. The second relates to circumstances in which the trustee's performance may meet minimal levels of competence but other more qualified persons may be available to better serve debtors and creditors. The third involves external factors that can reduce the demand for trustees in a specific geographic area, such as when the area's volume of cases declines.

The Program relied upon a number of sources in devising these categories, the foremost of which is its considerable experience in supervising trustees. The Program also considered procedures adopted by the Judicial Branch for supervising trustees in North Carolina and Alabama. Under section 302(d)(3)(I)(i) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Bankruptcy Administrators, who are Judicial Branch officials, supervise trustees in those two states until 2002, at which time those supervisory responsibilities shall transfer to the Program. In reaching their decisions, Bankruptcy Administrators may consider 16 factors that are, in large measure, identical to many of the factors set forth in the final rule.

The Administrative Office procedure differs from this rule in at least one significant respect. The judicial procedure allows the trustee to seek reconsideration only from the Bankruptcy Administrator who made the initial decision, but it does not provide for any further review. In contrast, this rule provides that review

of a United States Trustee's decision shall be conducted by the Director and a trustee may obtain judicial review of the Director's final decision under the Administrative Procedure Act.

If a trustee disagrees with a United States Trustee's decision not to assign cases to the trustee in the future, the trustee must notify the Director within 20 days of the trustee's decision to seek review of the United States Trustee's conclusions. If review under the rule is triggered, the rule entitles the trustee and the United States Trustee to explain to the Director their position on the propriety of a cessation of future case assignments. Both may provide the Director with any material they believe supports their conclusion.

Under the rule, the Director will review those submissions to determine whether a decision not to assign cases in the future is an appropriate exercise of a United States Trustee's discretion and whether that decision is supported by the record before the Director. Neither party bears the burden of proof in such a proceeding. After reviewing the material, the Director will reach a decision, which shall constitute final agency action. The agency's administrative record will consist of the materials provided by the trustee and the United States Trustee and the Director's decision.

Before this rule became effective, such a decision would have been final and unreviewable because 28 U.S.C. 586 commits such termination decisions to the Program's discretion and does not create a standard that a court can use to review the reasonableness of the Program's administrative decision. *Joelson* v. *United States,* 86 F.3d 1413 (6th Cir. 1996).

This rule creates a standard that courts can review pursuant to the Administrative Procedure Act by providing that the Director shall determine whether a challenged decision not to assign future cases constitutes an appropriate exercise of the United States Trustee's discretion and is supported by the record. *See, e.g., Clifford* v. *Pena,* 77 F.3d 1414, 1417 (D.C. Cir. 1996) (providing that an agency can facilitate judicial review by creating a standard in a rule); *Block* v. *Securities and Exchange Commission,* 50 F.3d 1078, 1084–85 (D.C. Cir. 1995) (same).

In preparing this rule, the Program has been mindful that trustees hold billions of dollars of other people's money, yet the interests they represent have little or no say in their hiring or their firing. The Program also has been mindful of Congress' charge that the Program, as the primary regulator of trustees, ensure that future cases be assigned only to trustees who are honest and capable. The Program also has been mindful of the need to balance the number of cases and the number of trustees. Finally, the Program has concluded that the best interests of the bankruptcy system are fostered by an open process which encourages competent, qualified individuals to apply to serve as trustees. As the United States courts of appeals have recognized, case assignment is not a government entitlement program created so the first person appointed to act as a trustee will always get future cases. Instead, trustees are service providers to debtors and creditors, selected by the Program for the benefit of those debtors and creditors.

This rule allows the Program to ensure that appropriate decisions are made about whether to stop assigning cases to a trustee. It gives affected trustees meaningful input in that process and allows for judicial review of the Program's final decision. This comprehensive process will maximize rational decision-making by the Program, promote a fair and efficient system of case administration, and protect the intended beneficiaries of the bankruptcy process, the debtors and creditors for whom the bankruptcy laws were created.

III. Summary of Major Changes in Final Rule

The final rule makes a number of changes based upon the comments submitted to the Program. Three changes are major.

First, subsection (c) of the final rule provides that suspensions and terminations will not become effective, and trustees will continue to receive cases, until a trustee's time to seek administrative review from the Director has expired or, if such review is sought, until the Director issues a final written decision; the proposed rule had suggested making suspensions and terminations effective upon the date specified in the notice of suspension or termination, which could have been a date earlier than the completion of the review process. In order to protect innocent debtors and creditors, however, the final rule provides that upon issuing a notice of suspension or termination a United States Trustee may issue an interim directive immediately suspending case assignments during the review process if the United States Trustee determines that a trustee is placing estate assets at risk, has lost his eligibility status, or has engaged in fraudulent, illegal or other gross misconduct. The final rule enables a trustee to obtain a stay of an interim directive from the Director.

Second, the rule allows a trustee to ask that specific documents in the United States Trustee's possession be included in the record. This will enable trustees to rely upon documents they believe are relevant but which are under the United States Trustee's control.

Third, the final rule cuts the time necessary to complete the review process roughly in half. If must now be completed no more than 45 days from the date on which a trustee requests administrative review. This has been accomplished by (a) reducing the time for, and the scope of, the United States Trustee's response to the trustee's request for review, (b) deleting the trustee's reply brief, and (c) making optional the use of a reviewing official, who was to have been a Program employee who had 30 days in every case to prepare and submit a report to the Director before the Director could issue a final decision on a trustee's request for review. In order to permit resolution of more complex disputes, the 45 day deadline may be extended by the Director, but only if all parties, including the trustee, agree.

In addition, the commentary to the final rule clarifies that the Director, or his designee, may conduct a face to face meeting with the trustee and the United States Trustee if the Director determines that there is a genuine dispute over facts material to the Director's determination. The level of formality and complexity of a meeting in a particular case will turn upon the nature of the factual dispute presented.

IV. Discussion of Public Comments

A. Overview

The Program received 12 comments on the proposed rule. Three comments were written by lobbyists or associations that represent the interests of trustees. Eight trustees submitted comments. One member of Congress wrote to express ''strong support for th[e] proposed rule.''

Although one comment was submitted late, the late submission reflects ideas raised in timely comments. The Program has considered each comment carefully and appreciates the time taken to provide them. The Program's responses to the comments are discussed below.

B. Specific Comments

1. Some comments questioned the power of United States Trustees to suspend or terminate the assignment of future cases to trustees. Section 586(a)(1) of title 28 allows the Program to ''establish, maintain, and supervise a

panel of private trustees that are eligible and available to serve as trustees in cases under chapter 7'', and section 586(b) allows it to ''appoint one or individuals to serve as standing trustee'' in cases filed under chapter 12 and chapter 13 of the Bankruptcy Code. Section 586 commits appointment decisions to the discretion of the Program and section 701(a)(2) of the Administrative Procedure Act shields these termination decisions from judicial review under the APA. *Joelson* v. *United States,* 86 F.3d 1413, 1415–18 (6th Cir. 1996) (termination of a chapter 7 trustee's eligibility to receive cases is not subject to judicial review under the APA). *See also Richman* v. *Straley,* 48 F.3d 1139, 1143 (10th Cir. 1995) (removal of chapter 12 and 13 trustees from eligibility to receive future cases is committed to the discretion of the United States Trustee and is not subject to review under the Due Process clause). As one court has declared, ''§ 586 'fairly exudes deference to the [United States Trustee], and appears to [the court] to foreclose the application of any meaningful judicial standard of review.' '' *Shaltry* v. *United States,* 182 B.R. 836, 842 (D. Ariz.) (quoting in part *Webster* v. *Doe* 486 U.S. 592, 600 (1988)), *aff'd,* 1995 WL 866862 (9th Cir, 1995). *Cf. North Dakota ex rel. Bd of Univ. and School Lands* v. *Yeutter,* 914 F.2d 1031, 1035 (8th Cir. 1990), *cert. denied,* 500 U.S. 952 (1991) (statute authorizing an agency to waive eligibility requirement for participation in a soil conservation program committed to agency discretion); *Scalise* v. *Thornburgh,* 891 F.2d 640, 648–49 (7th Cir. 1989), *cert. denied,* 494 U.S. 1083(1990) (statute authorizing Attorney General ''to make regulations for the proper implementation of * * * treaties'' not subject to review); *First Family Mortgage Corp. of Florida* v. *Earnest,* 851 F.2d 843, 845 (6th Cir. 1988) (statute authorizing VA Administrator to make refunds at his option provided no standards for review); *Schneider* v. *Richardson,* 441 F.2d 1320, 1321 & n.2 (6th Cir.), *cert. denied,* 404 U.S. 872 (1971) (statute authorizing an agency to prescribe maximum fees by regulation committed to agency discretion).

In *Carlucci* v. *Doe,* 488 U.S. 93, 99 (1988), the Supreme Court held that a statute granting a public official the power to appoint an individual also confers the power to terminate that individual unless the statute expressly provides otherwise. The Court held that ''as a matter of statutory interpretation [] absent a 'specific provision to the contrary, the power of removal from office is incident to the power of appointment.' '' *Carlucci* v. *Doe,* 488 U.S. at 99 (Secretary of Defense had power to terminate employee under provision of National Security Agency Act of 1959 that mentioned only appointment) (quoting in part *Keim* v. *United States,* 177 U.S. 290, 293 (1900)). *Accord Joelson* v. *United States,* 86 F.3d at 1422 (holding that the Program's power to appoint chapter 7 trustees to rotating panels gives it the power to remove them from panels); *Richman* v. *United States,* 48 F.3d at 1144 (relying upon *Carlucci* to hold that the power to appoint chapter 12 and 13 standing trustees includes the power to stop appointing them to future cases). Given the power to appoint trustees to future cases exists under section 586, that power carriers with it the power to cease assigning future cases to trustees because no provision in title 28 expressly precludes such action.

2. A number of comments suggested that the rule violates trustees' due process rights. This is incorrect. Trustees have no right to be appointed to future cases. Neither section 586 nor any provision of the Bankruptcy Code creates a government entitlement program that guarantees trustees any right to future cases.

The United States courts of appeals have consistently reached this conclusion. *See Joelson* v. *United States,* 86 F.3d at 1415–18 (no right or expectation to future cases); *Richman* v. *Straley,* 48 F.3d at 1143 (removal of chapter 12 and 13 trustees from eligibility to receive future cases is committed to the discretion of the United States Trustee and is not subject to review under the Due Process clause); *Shaltry* v. *United States,* 182 B.R. at 842 (D. Ariz.) (same), *aff'd,* 1995 WL 866862 (9th Cir. 1995).

3. A number of comments suggested that the proposed rule created a review process that took too long to complete. The Program recognizes that prompt final agency action benefits creditors, debtors, and trustees. Therefore, the final rule has been significantly streamlined to mandate that review shall be completed within 45 days of receipt by the Director of a trustee's request for review. The rule achieves this reduction by (a) reducing the time for, and the scope of, the United States Trustee's response to the trustee's request for review, (b) deleting the trustee's reply, and (c) making optional the use of a reviewing official, who was to have been a Program employee who had 30 days in every case to prepare and submit a report to the Director before the Director could issue a final decision on a trustee's request for review.

Under the final rule, a United States Trustee must provide an affected trustee with a statement of the reasons for a suspension or termination and supporting materials in a notice of suspension or termination that is to be sent to the trustee by overnight courier. The trustee then has 20 days to file a request for review. That request for review describes why the trustee disagrees with the United States Trustee's decision, and is accompanied by the documents and materials the trustee wishes the Director to consider.

Under the proposed rule, the United States Trustee then had 20 calendar days to respond to the trustee's position and the United States Trustee was free to provide the Director with all material the United States Trustee wished the Director to consider. Because the United States Trustee could submit material that might address matters not initially raised in the notice of suspension or termination, or in the trustee's request for review, the trustee was given 10 days to provide a response.

The final rule reduces the United States Trustee's time to respond to a trustee's request for review to 15 days. Under the final rule, the United States Trustee may now respond only to matters raised in the trustee's request for review. Unlike the proposed rule, the final rule makes clear that the United States Trustee cannot raise new matters, the 10 day reply period for the trustee has been deleted as unnecessary. These changes reduce the time to reach a final decision by at least 15 days.

At least 20 additional days have been saved by giving the Director the option whether to use a reviewing official in a particular case. Under the proposed rule, the reviewing official was to have been a Program employee who would have acted as the Director's point of contact with the trustee and the United States Trustee and who would have prepared a report that the Director would use in deciding the request for review. The reviewing official had 30 days to prepare the report under the proposed rule. In addition, a number of days would have been expended in selecting a reviewing official and having the reviewing official transmit the trustee's materials to the United States Trustee. The Director then had an additional 20 days to reach a final decision.

The final rule gives the Director the option of using a reviewing official on a case by case basis. This allows the Director to reach his final decision more promptly without having to wait for a report from a reviewing official in every case.

Because he will no longer have a report before beginning his determination in every case, the Director's time to reach a final decision has been increased from 20 to 30 days. This produces a net savings of 20 days over the proposed rule because the reviewing official and the Director had a combination period of 50 days to conduct a review, and the final rule gives the Director only 30.

In addition, the final rule eliminates the delay that arose under the proposed rule while a reviewing official was selected and the delay that resulted from the reviewing official having to transmit materials. These changes respond to comments expressing concerns about those time delays.

The final rule also shortens the review process by deleting the ability of a reviewing official to grant extensions. Under the proposed rule, the reviewing official had discretion to extend the United States Trustee's or the trustee's time for response to a date certain. Comments expressed concern this provision could significantly lengthen the review process. The Program revised the final rule to respond to those concerns. The final rule provides that the Director will issue a final decision no later than 45 days from receipt of a trustee's request for review. The rule does, however, allow the trustee and the United States Trustee to jointly agree that the time for final agency action should be extended. Time might be extended, for example, to enable the Director to conduct a face to face meeting.

4. Comments suggested the proposed rule did not require notice before adverse action is taken and did not provide adequate interim relief during the review process. The final rule addresses these concerns. Subsection (c) of the final rule provides that suspensions and terminations will not become effective, and trustees will continue to receive cases, until a trustee's time to seek administrative review from the Director has expired or, if such review is sought, until the Director issues a final written decision; the proposed rule had suggested making suspensions and terminations effective upon the date specified in the notice of suspension or termination, which could have been a date earlier than the completion of the review process. In order to protect the integrity of the system and thereby the debtors and creditors it serves, the final rule provides that a United States Trustee may issue an interim directive suspending case assignments during the review process if the United States Trustee determines that a trustee is placing estate assets at risk, ineligible to serve as a trustee, or has engaged in fraudulent, illegal or other gross misconduct. A trustee may seek a stay of an interim directive from the Director upon filing a timely request for review.

5. One comment questioned whether a trustee must institute the review process to obtain a stay of a suspension or termination. Under the final rule, a termination or suspension will not take effect until the time to seek review has expired. If a trustee does not seek review, the suspension or termination decision will become final and unappealable and not subject to further agency action or judicial review. It a trustee does seek review, a suspension or termination will not take effect until the Director issues a final decision. Upon issuing a notice of suspension or termination, a United States Trustee may issue an interim directive ceasing the assignment of cases to the trustee during the review process if the United States Trustee specifically finds that one of the criteria in section (d) (1) through (4) of the rule are met. The trustee may seek a stay of an interim directive but needs to submit a timely request for administrative review to do so. The final rule authorizes the Director to stay an interim directive.

6. One comment suggested that the rule does not provide for the creation of an official record for judicial review. This is incorrect. The United States Trustee's notice of termination, the trustee's request for review, the United States Trustee's response, the Director's final determination, and the documents and materials provided by the participants with those submissions constitute the agency record for purposes of subsequent judicial review.

7. Comments suggested the rule places an improper burden of proof upon the trustee. This is incorrect. Although the trustee must affirmatively seek review, the rule requires the Director to determine whether a decision not to assign cases in the future is an appropriate exercise of a United States Trustee's discretion and whether that decision is supported by the record before the Director. Neither party bears the burden of proof in convincing the Director whether the applicable standard is met. To the extent a burden fell upon any party, it would fall upon the United States Trustee whose decision must constitute an appropriate exercise of discretion and must be supported to the record.

8. Comments suggested the rule suffers from the absence of review by a neutral party, an on the record hearing, mandatory discovery, or the requirements of sworn testimony. The Program does not view this as a weakness. Indeed, such procedures would significantly lengthen the time it would take to determine a request for review. The final rule allows the parties to provide whatever material they think is appropriate.

Section (h) of the rule authorizes the Director to request additional information, which could include a face to face meeting. This allows the Director, or his designee, to conduct a face to face meeting with the trustee and the United States Trustee if the Director determines that there is a genuine dispute over facts material to the Director's determination. The level of formality and complexity of a meeting in a particular case will turn upon the nature of the factual dispute presented. In some cases a meeting could involve a trustee appearing with a representative, submitting documentary evidence, presenting witnesses, and confronting any witnesses the agency presents. *See generally* 28 CFR 67.313 (authorizing a similar meeting in the debarment context but only if the government first determines a dispute of material fact exists). In the Program's experience, the facts underlying termination or suspension decisions are rarely in dispute. Instead, most requests for review involve a disagreement whether the facts support such action. In those cases, as in the debarment context, a meeting likely would not take place. The Program thus believes that final rule strikes an appropriate balance between the need for an effective and an efficient review process.

The final rule enables the Program to reach a final decision whether to suspend or terminate the assignment of future cases promptly so a trustee can test that decision, if appropriate, in subsequent judicial review under the Administration Procedure Act. This process makes possible ultimate review by a United Stats district court, a United States court of appeals, and potentially by the United States Supreme Court. Each is a neutral party.

The final rule merely creates a mechanism by which the agency can determine the appropriateness of its decision before that decision can be tested through subsequent judicial review if the trustee wishes to obtain judicial review under the APA. The final rule gives a trustee significant input into that final decision, but it is entirely appropriate for the Director, as the head of the Program, to render a final decision.

Other regulators use precisely this process. Agency commissions, boards, and heads routinely act as the ultimate decision-maker on what action an

agency should take. Agencies do not delegate the agency's decision making to a third party outside the agency. While various agencies use differing procedures to gather the data for, or make recommendations to, the ultimate decision-maker, in every relevant instance, the agency decides for itself what is the appropriate decision to make.

The proposed rule called for the creation of a reviewing official who was to have been a Program employee who would have reviewed the materials provided by the participants and recommend whether the Director should affirm, modify, or reverse the United States Trustee's suspension or termination. A number of comments criticized the reviewing official position for lack of independence because it was to have been staffed by a Program employee. These criticisms failed to recognize the significance of the fact that the reviewing official reports directly to the Director, not to the United States Trustee who made the initial determination. The Director is the head of the Program and acts under independent authority delegated by the Attorney General. The Director is not directed or supervised by a United States Trustee. Consequently, the Director has the ability to decide whether a United States Trustee's suspension or termination decision is one that the agency should implement. In making that determination, the Director bears a heavy responsibility. He must independently decide whether the United States Trustee's decision is appropriate and is supported by the record.

In response to these comments, the final rule has been revised to allow, rather than to require, the Director to select a reviewing official who was neither involved in the United States Trustee's decision nor employed by the Program in the United States Trustee's region. In addition, nothing in the final rule prohibits the Director from calling upon his staff to assist him in reaching his determination. This does not represent a change from the proposed rule.

The final rule creates strong institutional incentives for the Director to reach an independent determination because his decision shall be subject to judicial review. The final rule enables the Director to reach his decision after considering all materials the participants which to submit. As discussed above, the final rule makes it optional for the Director to employ a reviewing official in a particular case. This was done in order to respond to requests that the final rule reduce the time it takes for the Director to reach a final decision on a request for review. Under the final rule, however, the director retains the same power he had under the proposed rule to independently determine whether a United States Trustee's decision constitutes an appropriate exercise of discretion and is supported by the record. Making optional the reviewing official, who simply advised the Director under the proposed rule, does not diminish the Director's responsibility to exercise independent judgment in making this final determination, nor does it dilute the trustee's ability to obtain independent review by the Director.

The procedure set forth in the rule meets accepted notions of federal administrative law. The Director's review under the final rule constitutes ''an informal adjudication.'' *Zotos International, Inc.* v. *Young,* 830 F.2d 350, 353 (D.C. Cir. 1987). ''[Although] [t]he Administrative Procedure Act does not use the term 'informal adjudication[,]' [courts use it as] a residual category [to describe] 'all agency actions that are not rule making and that [are not expressly required by statute to] be conducted through 'on the record' hearings.'' *United States* v. *Article of Device * * * Diapulse,* 768 F.2d 826, 829 n.4 (7th Cir. 1985), (quoting in part, *Izzaak Walton League of America* v. *Marsh,* 655 F.2d 346, 361 n.37 (D.C. Cir. 1981)).

''[N]o procedures are specified'' in the APA for conducting informal adjudications. *Zotos,* 830 F.2d at 353. The Supreme Court held in *PBGC* v. *LTV Corp.,* 496 U.S. 633 (1990) that an agency need not conduct an informal adjudication as a formal, on the record, hearing with full discovery or sworn witnesses.

To the contrary, section 554 of the Administrative Procedure Act requires an on the record adjudication only in a case where an adjudication is required by statute to be determined on the record. Neither section 586 of title 28 nor any other provision of the United States Code requires the United States Trustee to reach a decision whether to suspend or terminate future case assignments in an on the record evidentiary hearing. Thus, the Program may conduct this decision-making process in the manner it determines is the best way to enable it to reach final agency action. This rule implements the procedures the Program determines to be most appropriate. Similarly, the Bankruptcy Administrator program does not allow for review by a neutral party, evidentiary hearings, sworn testimony, or discovery.

The Program has modified the final rule in one major way to assist trustees in presenting relevant material to the Director for consideration. The final rule allows a trustee to ask that specific documents in the United States Trustee's possession be included in the record. This will enable trustees to rely upon documents they believe to be relevant but which are under the United States Trustee's control.

9. Comments suggested that the Program should adopt the procedures used for debarments for participation in government contracting or government entitlements. These suggestions fail to appreciate the differences between debarment and a cessation of assignment of future cases to trustees, which are fundamental. First, debarment involves government contracting and government entitlements. Trustees have no contract with the government. Receiving future cases is not a government entitlement program.

Moreover, courts have indicated that a debarment, which has severe government-wide consequences, may implicate a constitutionally protected interest. *See, e.g., ATL, Inc.* v. *United States,* 736 F.2d 677, 683 (Fed. Cir. 1984); *Transco Security, Inc.* v. *Freeman,* 639 F.2d 318, 321 (6th Cir. 1981); *Old Dominion Dairy* v. *Secretary of Defense,* 631 F.2d 953, 966 (D.C. Cir.), *cert. denied,* 454 U.S. 820 (1981). In contrast, a trustee has no constitutional interest in being assigned future cases. *Joelson* v. *United States,* 86 F.3d at 1415–18; *Richman* v. *Straley,* 48 F.3d at 1143; *Shaltry* v. *United States,* 182 B.R. at 842 (D. Ariz.) (same), *aff'd,* 1995 WL 866862 (9th Cir. 1995).

A debarment is far more significant than mere case cessation because it can have dramatic, government-wide, consequences. As a matter of federal law, someone who has been debarred in a government contracting proceeding cannot bid on any government contract from any agency. The Department of Justice's debarment procedures for debarment from nonprocurement programs, 28 CFR part 67, which one comment specifically cited, provides that ''[a] person who is debarred or suspended [under the rule] shall be excluded from Federal financial and nonfinancial assistance under Federal programs and activities.'' 28 CFR 67.100. Indeed, ''debarment or suspension of a participant in a program by one agency shall have government wide effect.'' *Id.* In many instances a debarment has even greater significance because some states refuse to contract with persons who have been debarred by an agency of the federal government.

A cessation of future case assignments to a trustee has no such effects. Unlike a debarment, it does not prevent a trustee from applying for or participating in any other program administered by the Department of Justice or any other part of the United States government. As discussed previously, it does not even affect their ability to administer existing cases.

Indeed, the entire purpose of debarment is fundamentally different from termination of case assignments. Debarments protect the federal government from those who have committed serious wrongdoing. *See* 28 CFR 67.115(b) (Department of Justice's debarment procedures). In contrast, suspensions and terminations of future case assignments foster an efficient system of case administration and ensure that debtors and creditors, the intended beneficiaries of the bankruptcy system, receive the best service from trustees that is possible.

Thus, we doubt the comments seriously intended to suggest that the Department of Justice should adopt a rule that would debar trustees from all government contracting and entitlement programs if they are terminated from future case assignment. Nor do we believe trustees want to be subject to government contracting rules in seeking future case assignments. Certainly, this final rule has no such effect. Consequently, the Program declines to implement more costly and time consuming debarment-type procedures in this rule.

Notwithstanding the fundamental differences that exist between the effect of a debarment and a cessation of future case assignments, the final rule adopts procedures that embody many of the concepts that underlie the Department's debarment procedures. Both allow the Department, as opposed to a third party, to reach a final decision. Both favor quick, informal dispute resolution instead of overly formalized, litigation-type procedures. See 28 CFR 67.310 (''Department of Justice shall process debarment actions as informally as practicable''). Neither authorize discovery. Both enable the Department to conduct face to face proceedings if disputed issues of material fact exist.

10. One comment suggested that a cessation of future cases places a stigma of incompetence or wrongdoing on trustees. It certainly places no stigma in any constitutional sense. Nor does the Program cease case assignments in order to stigmatize trustees. There are many reasons why a trustee may stop receiving cases in the future. The decline in volume of cases may demand it, or the existence of candidates who can better represent debtors or creditors may result in a cessation of cases. None of these instances involve the imposition of a sanction or a finding of wrongdoing in any criminal sense.

In addition, many trustees are engaged in other professions or occupations in addition to administering bankruptcy cases so cessation of case assignments does not prevent them from engaging in their other jobs. No one seriously suggests that a businessperson in the private sector is impermissibly stigmatized simply because a client stops using their product or services. Nor can any businessperson sue to force a client to use their services forever. The same is true for trustees.

11. One comment, submitted by a trustee, seemed to suggest that the reviewing official that was suggested by the proposed rule should not review suspensions and terminations because the official was not located within the region where the trustee worked and would ignore local customs and policies. The final rule has made the position of reviewing official optional in order to shorten the time necessary for the Program to decide a trustee's request for review. If a trustee who files a request for review believes local customs and policies are relevant, that trustee would be free to raise those matters, and such contentions would be considered by the Director in reaching a final determination.

12. One comment suggested that the proposed rule allowed no input by experts. This is not correct. A trustee seeking review is free to provide whatever materials he or she wishes the Director to consider in reaching a determination.

13. One comment suggested the rule is ineffective without meaningful judicial review before the bankruptcy court. This is not true. The final rule creates final agency action that is subject to judicial review under the Administrative Procedure Act. There are serious constitutional questions about a system that would allow bankruptcy judges, who are not Article III judges, to review an agency's decision to cease the assignment of future bankruptcy cases to trustees. The Program also recognizes that United States district courts have far more familiarity with review of final agency actions than do bankruptcy courts. We further note that the Judicial Branch's own system by which Bankruptcy Administrators suspend and terminate trustees does not provide for any court review, bankruptcy or otherwise, of a Bankruptcy Administrator's decision.

Moreover, engrafting bankruptcy court review onto the post-termination judicial review process would do nothing more than delay final judicial determination of trustee suspension and termination decisions. This is so because a bankruptcy court decision could be appealed to a district court, which would review the agency's action and record using a *de novo* standard of review, and thence review could be had in the courts of appeals under the same standard. In sum, the Program sees no advantage to be gained and many disadvantages that would result from bankruptcy court involvement.

14. One comment asked whether the rule applies to all adverse actions or just formal suspensions and terminations. The rule applies to any decision by a United States Trustee to actually stop assigning cases to a trustee. It does not apply to other regulatory actions such as providing the trustee with an unfavorable review, a letter of warning or reprimand, or other actions that fall short of ceasing the assignment of cases.

15. One comment suggested that the United States Trustee Program should use a progressive system of discipline. The Program does this. This suggestion falls outside the intended scope of this rule, however, because this rule applies only to decisions to suspend or terminate the assignment of future cases to trustees. It does not apply to disciplinary actions that fall short of case cessation.

16. One comment suggested the rule compromises trustee independence. The rule neither enlarges nor reduces permissible trustee independence. Instead, it establishes a procedure by which a trustee can obtain a final determination by the Program whether a United States Trustee's decision to cease the assignment of future cases is an appropriate exercise of the United States Trustee's discretion and is supported by the record. If anything, the final rule will give trustees greater independence because it gives them a formal procedure for obtaining a final agency determination and allows them thereafter to obtain judicial review under the Administrative Procedures Act, two thing they lacked prior to the implementation of the rule.

17. One comment suggested the rule violated 11 U.S.C. 324. This is incorrect. Section 324 established a judicial procedure for removing a trustee from one or more specific cases that have been previously assigned to a trustee. Section 324 is not relevant to this rule because the rule only pertains to future case assignments and does not stop a trustee from continuing to administer present cases.

18. One comment suggested the rule suffers form a lack of objective standards or criteria. The Program does not believe this to be the case. Section (a) of the final rule sets forth a non-exhaustive list of 14 criteria that a United States Trustee may employ in deciding whether to suspend or terminate the assignment of future cases to trustees. The final rule has revised the language of section (i) slightly due to the elimination of the mandatory use of a reviewing official. The language in the final rule makes clear that the standard the Director will employ in deciding a request for review is ''whether the Untied States Trustee's decision is supported by the record and the action is an appropriate exercise of the United States Trustee's discretion.'' The quoted language creates a standard which would enable a court to review the Program's final action under the Administrative Procedure Act.

19. One comment suggested the rule should apply a reasonable man standard. The comment did not suggest specific language. The Program believes that section (i) sets forth an appropriate standard.

20. Various comment questioned the breadth and reasonableness of the factors set forth in section (a) (2), (4), (5), (6), (7), (11), (12), (13), and (14). These comments are not well taken for the reasons that follow.

Before addressing the specific comments, it is appropriate to note that the rule does not require termination or suspension for a single or isolated violation of any one of these factors. Section (a)(6) provides, for example, that a trustee ''display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee and the general public.'' Trustees are service providers and are important participants in the federal bankruptcy system. They often are the only person a debtor sees as a representative of that system. It is important they interact appropriately with the other participants in the bankruptcy system. This provision does not mean, however, the at a United states Trustee would appropriately exercise discretion by terminating a trustee for a single isolated instance of mere discourtesy. That will depend on the circumstances and the record. In some cases, one egregious act might warrant a suspension or termination. For example, a single instance of using racial slurs against a debtor might, given the specific facts and circumstances, justify a suspension or a termination. So too might a single instance of assault. On the other hand, multiple instances of discourtesy also might justify suspension or termination. The factors set forth in section (a) simply constitute a non-exhaustive list of reasons that might form a basis for suspension or termination. In many cases the reasons for the United States Trustee's decision may involve a combination of factors. In every request for review, the Director will decide whether the suspension or termination constituted an appropriate exercise of the United States Trustee's discretion and is supported by the record.

Section (a)(2) addresses trustees who fail to ''perform duties in a timely and consistently satisfactory manner.'' Some comments questioned the appropriateness of this factor. First, depending upon the conduct at issue, it is wholly appropriate to suspend or terminate a trustee who cannot perform his or her trustee duties in a timely and consistently satisfactory manner. To decide otherwise would be to place the interests of debtors and creditors at serious risk. Moreover, one of the qualifications to be appointed to act as a trustee is the physical and mental capacity to ''perform a trustee's duties.'' 28 CFR 58.3(b)(2).

Section (a)(4) addresses trustees who fail to cooperate and to comply with instructions and policies of the Code, the Bankruptcy Rules, and local rules of court. Contrary to comments received, this is an appropriate factor to consider in deciding whether to suspend or terminate a trustee. Trustees are required to manage debtors' estates in accordance with applicable standards. Failure to comply with applicable law, rules, and regulations can have disastrous consequences for debtors and creditors. Depending upon the conduct at issue, it is wholly appropriate to suspend or terminate a trustee who does not comply with applicable standards.

Section (a)(5) recognizes the need to suspend or terminate trustees who engage in substandard performance of general duties and case management in comparison to other members of the chapter 7 panel or other standing trustees. Although some commentors expressed concern about using this as a basis for suspensions or terminations, the Program believes this is an important provision. It was created to reflect that a United States Trustee may consider, in making termination or suspension decisions, statistical or other evidence that a trustee is not performing at the same level of competence and efficiency as other trustees.

Section (a)(6) addresses the termination or suspension of trustees who fail to display proper temperament. Some comments expressed concern with the application of this factor. The bases for this factor has been described above. Trustees have daily contact with debtors, creditors, court personnel, courts, Program employees, and the public at large. A trustee cannot effectively represent the interests of debtors and creditors if the trustee fails to display proper temperament. This is such an important factor that it is one of the qualifications that a trustee must possess to be appointed to act as a trustee. *See* 58 CFR 58.3(b)(3) (a trustee must ''[b]e courteous and accessible to all parties. * * *''). *See also* 58 CFR 58.3(b)(4) (trustee must ''[b]e free of prejudices against any individual, entity, or group of individuals or entities which would interfere with unbiased performance of a trustee's duties.'').

Section (a)(7) is directed at trustees who fail to supervise the work of their employees. Some comments contended that inadequate supervision should not form a basis for suspension or termination or that the provision's scope was unclear. The Program rejects these suggestions. Many trustees routinely employ persons or hire professionals to assist them in the performance of their trustee duties. However, if they delegate responsibilities to professionals and employees and do not monitor those individuals or take proper precautions, this can amount to an abdication of their responsibilities. It is important to hold trustees accountable for failing to supervise those they choose to employ. In order to respond to other comments received, the Program has revised this provision slightly in the final rule to make clear that a suspension or termination may issue, in an appropriate circumstance, if a trustee fails to monitor the work of professionals or others employed by the trustee.

One comment questioned whether section (a)(11) should condone a suspension or termination that occurs because an allegation of misconduct is pending before a court or state licensing agency when such allegation calls the trustee's competence, financial responsibility or trustworthiness into question. The Program believes credible allegations that a trustee lacked honesty, competence, financial responsibility or trustworthiness could form a basis for suspension or termination in appropriate circumstances. *See generally* 28 CFR 58.3(b)(6) (which establishes certain educational or licensing requirements for chapter 7 trustees). While it is difficult to act on the basis of mere allegations, neither can the gravity of charges made against a trustee be ignored. The rule recognizes that in some instances, a United States

Trustee may conclude that a temporary suspension of cases is warranted pending the final outcome of a proceeding. Whether the decision is made to terminate the assignment of cases will depend upon the circumstances and a fair consideration of all relevant factors. At the very least, the United States Trustees' statutory responsibilities to the bankruptcy system and their roles as officers of the court and as Department of Justice officials make it entirely appropriate for them to consider such allegations before entrusting future bankruptcy estates to a particular trustee's care.

It was suggested that section (a)(12) should be deleted and trustees should not be suspended or terminated if they are unable to take assigned case. The Program agrees that an isolated conflict of interest that results in an inability to take an assigned case should not result in case cessation. Therefore, this section has been modified in the final rule to provide that a ''routine inability to accept assigned cases'' is a factor that may result in suspension or termination. If a trustee has so many other interests that he or she cannot or will not accept cases as regularly assigned it could be appropriate to suspend the trustee while those other matters or interests are resolved. If conflicts or an inability to takecases arise so frequently that a trustee cannot function effectively as a trustee, termination could be appropriate. Chapter 7 trustees function as part of a panel of chapter 7 trustees. If one trustee on the panel does not accept a fair share of case assignments, that may place an undue or unfair strain on other chapter 7 trustees. Most chapter 12 and chapter 13 standing trustees are the only standing trustee of their type in a specific geographic region, or one of only a very few. A standing trustee who does not regularly accept assignment places an undue burden on the bankruptcy system. It should be stressed, however, that the enumeration of this particular factor is not a limitation upon a United States Trustee's ability to consider other conflict questions, including those that involve an appearance of a conflict of interest.

Section (13) allows suspension or termination of case assignment if there is a change in composition of the chapter 7 panel pursuant to a system established by the United States Trustee under 28 CFR 58.1. It was questioned whether this should form the basis for case cessation. This provision merely makes clear that a United States Trustee may create a system to periodically reconstitute the whole panel, to retire a certain percentage of the panel at fixed intervals, or the like, and thereby to invite new membership.

It was suggested that section (a)(14)'s factor allowing case cessation for efficient case administration or a decline in the number of cases should be deleted from the final rule. The Program has modified this factor slightly to clarity that both efficient administration and a decline in caseload may constitute bases for case cessation. It is important to maintain an appropriate balance of expertise and number of trustees for the caseload. Otherwise, good trustees might not apply or might resign their positions. The type and number of bankruptcy filings fluctuate significantly over time and from one location to another. The Program needs the ability to respond to those fluctuations by adjusting the number of trustees accordingly.

21. It was suggested that this rule is a significant regulatory action that requires more formal review under Executive Order 12866; that the rule does not comply with the Regulatory Flexibility Act; and that the rule does not comply with the Paperwork Reduction Act. These assertions are incorrect.

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. Executive Order 12866 defines ''significant regulatory action'' as a rulemaking that is likely to have (1) an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

This rule formalizes the procedures by which trustees may obtain administrative review by the Director of suspension and termination decisions. This process will be available to all of the 1,500 or so existing trustees but only those trustees whose appointment to future cases are suspended or terminated will have any reason to invoke these procedures. We believe the number of trustees so affected to represent no more than approximately 5% of the 1,500 existing trustees (approximately 75). Further, the core group (that is all 1,500 bankruptcy trustees) do not comprise a sector of the economy as that phrase is used in Executive Order 12866.

The rule complies with the Regulatory Flexibility Act. The Director has reviewed this rule and by approving it certifies that it will not have a ''significant economic impact upon a substantial number of small entities'' as that phrase is used in the Regulatory Flexibility Act (5 U.S.C. 605(b)). Individuals serving as trustees are frequently attorneys, accountants, or other financial professionals. Some of these individuals may be associated with law or accounting firms of varying size while others may be independent. Some of these individuals may derive all or a substantial amount of their income from serving as trustees while others may derive a smaller portion of their income from such service. Even assuming that all 1,500 trustees are small entities, the number of trustees affected by suspensions and terminations is far smaller—likely less than 5%, or 75 in any year. This is not a significant number when considered against the number of existing trustees nor when considered against the number of attorneys, accountants, and other financial professionals in this country. Further, the Director has no information regarding which trustees derive a substantial amount of their income from administering bankruptcy cases and consequently whether the suspension or termination of case assignments would have a significant economic impact on them. A number of trustees engage in other full-time professions and engage in bankruptcy work part-time. Because of the variation in other activities that trustees might engage in professionally, the number of entities which might experience a significant economic impact from the suspension or termination of case assignments could be less than 75.

Additionally, it should be emphasized that this rule is intended to provide a review process for trustees whose future case assignments are suspended or terminated because of improper conduct or failure to perform adequately, although the Program also may stop assigning future cases to trustees for other reasons such as when more qualified candidates are identified or when the caseload in a judicial district declines, resulting in too many trustees for too little work. As discussed in the supplementary information, those trustees have no legal right to be appointed in future cases.

Finally, this rule also complies with the Paperwork Reduction Act. It contains no new information collection or record keeping requirements under

the Paperwork Reduction Act (44 U.S.C. 3501, et seq.). The rule will not require affected trustees to complete new forms or to retain records as that phrase is used in the Paperwork Reduction Act.

22. It was suggested that it is unfair to require trustees to bear their own costs when seeking administrative review. That provision of the rule is consistent with applicable law. It also is fair. It would be fundamentally unfair to permit a trustee to tax the estates of the debtors he or she oversees so the trustee can fund his or her attempt to secure other, unrelated, cases in the future. In seeking review, a trustee is pressing his economic self advantage. It is appropriate for the trustee to pay his own costs in pursuing those self interests.

Certifications

Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Director, Executive Office for United States Trustees, (''Director'') has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, and, accordingly, this rule has not been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Director has reviewed this rule and by approving it certifies that it will not have a significant impact on a substantial number of small entities. The only parties affected are the less than 2,000 individuals who serve as panel and standing trustees. The effect it will have on them is to formalize a procedure that enables them to obtain review by the Director of a notice by a United States Trustee to suspend or terminate the assignment of future cases to the trustee.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq*.).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 58

Bankruptcy, Trusts and trustees.

For the reasons set forth in the preamble, the Department of Justice proposes to amend 28 CFR part 58 as follows:

PART 58—REGULATIONS RELATING TO THE BANKRUPTCY REFORM ACTS OF 1978 AND 1994

1. The authority citation for Part 58 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, 586.

2. New section 58.6 is added to read as follows:

§ 58.6 Procedures for suspension and removal of panel trustees and standing trustees.

(a) A United States Trustee shall notify a panel trustee or a standing trustee in writing of any decision to suspend or terminate the assignment of cases to the trustee including, where applicable, any decision not to renew the trustee's term appointment. The notice shall state the reason(s) for the decision and should refer to, or be accompanied by copies of, pertinent materials upon which the United States Trustee has relied and any prior communications in which the United States Trustee has advised the trustee of the potential action. The notice shall be sent to the office of the trustee by overnight courier, for delivery the next business day. The reasons may include, but are in no way limited to:

(1) Failure to safeguard or to account for estate funds and assets;

(2) Failure to perform duties in a timely and consistently satisfactory manner;

(3) Failure to comply with the provisions of the Code, the Bankruptcy Rules, and local rules of court;

(4) Failure to cooperate and to comply with orders, instructions and policies of the court, the bankruptcy clerk or the United States Trustee;

(5) Substandard performance of general duties and case management in comparison to other members of the chapter 7 panel or other standing trustees;

(6) Failure to display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee and the general public;

(7) Failure to adequately monitor the work of professionals or others employed by the trustee to assist in the administration of cases;

(8) Failure to file timely, accurate reports, including interim reports, final reports, and final accounts;

(9) Failure to meet the eligibility requirements of 11 U.S.C. 321 or the qualifications set forth in 28 CFR 58.3 and 58.4 and in 11 U.S.C. 322;

(10) Failure to attend in person or appropriately conduct the 11 U.S.C. 341(a) meeting of creditors;

(11) Action by or pending before a court or state licensing agency which calls the trustee's competence, financial responsibility or trustworthiness into question;

(12) Routine inability to accept assigned cases due to conflicts of interest or to the trustee's unwillingness or incapacity to serve;

(13) Change in the composition of the chapter 7 panel pursuant to a system established by the United States Trustee under 28 CFR 58.1;

(14) A determination by the United States Trustee that the interests of efficient case administration or a decline in the number of cases warrant a reduction in the number of panel trustees or standing trustees.

(b) The notice shall advise the trustee that the decision is final and unreviewable unless the trustee requests in writing a review by the Director, Executive Office for United States Trustees, no later than 20 calendar days from the date of issuance of the United States Trustee's notice (''request for review''). In order to be timely, a request for review must be received by the Office of the Director no later than 20 calendar days from the date of the United States Trustee's notice to the trustee.

(c) A decision by a United States Trustee to suspend or terminate the assignment of cases to a trustee shall take effect upon the expiration of a trustee's time to seek review from the Director or, if the trustee timely seeks such review, upon the issuance of a final written decision by the Director.

(d) Notwithstanding paragraph (c) of this section, a United States Trustee's

decision to suspend or terminate the assignment of cases to a trustee may include, or may later by supplemented by an interim directive, by which the United States trustee may immediately discontinue assigning cases to a trustee during the review period. A United States Trustee may issue such an interim directive if the United States Trustee specifically finds that:

(1) A continued assignment of cases to the trustee places the safety of estate assets at risk ;

(2) The trustee appears to be ineligible to serve under applicable law, rule, or regulation;

(3) The trustee has engaged in conduct that appears to be dishonest, deceitful, fraudulent, or criminal in nature; or

(4) The trustee appears to have engaged in other gross misconduct that is unbefitting his or her position as trustee or violates the trustee's duties.

(e) If the United States Trustee issues an interim directive, the trustee may seek a stay of the interim directive from the Director if the trustee has timely filed a request for review under paragraph (b) of this section.

(f) The trustee's written request for review shall fully describe why the trustee disagrees with the United States Trustee's decision, and shall be accompanied by all documents and materials that the trustee wants the Director to consider in reviewing the decision. The trustee shall send a copy of the request for review, and the accompanying documents and materials, to the United States Trustee by overnight courier, for delivery the next business day. The trustee may request that specific documents in the possession of the United States Trustee be transmitted to the Director for inclusion in the record.

(g) The United States Trustee shall have 15 calendar days from the date of the trustee's request for review to submit to the Director a written response regarding the matters raised in the trustee's request for review. The United States Trustee shall provide a copy of this response to the trustee. Both copes shall be sent by overnight courier, for delivery the next business day.

(h) The Director may seek additional information from any party in the manner and to the extent the Director deems appropriate.

(i) Unless the trustee and the United States Trustee agree to a longer period of time, the Director shall issue a written decision no later than 30 calendar days from the receipt of the United States Trustee's response to the trustee's request for review. That decision shall determine whether the United States Trustee's decision is supported by the record and the action is an appropriate exercise of the United States Trustee's discretion, and shall adopt, modify or reject the United States Trustee's decision to suspend or terminate the assignment of future cases to the trustee. The Director's decision shall constitute final agency action.

(j) In reaching a determination, the Director may specify a person to act as a reviewing official. The reviewing official shall not be a person who was involved in the United States Trustee's decision or a Program employee who is located within the region of the United States Trustee who made the decision. The reviewing official's duties shall be specified by the Director on a case by case basis, and may include reviewing the record, obtaining additional information from the participants, providing the Director with written recommendations, or such other duties as the Director shall prescribe in a particular case.

(k) This rule does not authorize a trustee to seek review of any decision to increase the size of the chapter 7 panel or to appoint additional standing trustees in the district or region.

(l) A trustee who files a request for review shall bear his or her own costs and expenses, including counsel fees.

Dated: September 29, 1997.

Joseph Patchan,

Director, Executive Office for United States Trustees.

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