

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 97-60

September 10, 1997

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: Richard A. Siegel, Acting Associate General Counsel

SUBJECT: Guidelines for Applying Impact Analysis Where a  
Respondent Has Filed for Bankruptcy

Recommendations of the Impact Analysis Compliance Subgroup are currently pending consideration by the General Counsel, and are designed to establish a system for implementing impact analysis for all of your compliance work. The Subgroup also developed some guidelines which are set forth herein with respect to the application of impact analysis to cases in which a respondent has filed for bankruptcy. They are designed to guide the Regions in identifying those steps that should generally be followed in situations where a respondent has filed for bankruptcy.<sup>1</sup> We are issuing this memorandum now, while other aspects of the implementation of impact analysis to compliance work are still under consideration, since the provisions of the memorandum would be applicable regardless of the final determinations on the implementation issues.

As a general rule, the filing of a bankruptcy petition in a pending unfair labor practice case requires that high priority be given to promptly analyzing the elements of the potential remedies involved (e.g., backpay, reinstatement, bargaining order, etc.), and the likelihood of obtaining meaningful relief through, or following the conclusion of, the bankruptcy case. (See Compliance Manual 10610, *et seq.*). If there appears to be a reasonable possibility of obtaining compliance with bargaining order or reinstatement obligations (for example, in a Chapter 11 reorganization case), or of securing payment of a significant amount of backpay, the case should be classified as Category III, at least until such time as the Region has taken all appropriate steps to protect the Board's interests.<sup>2</sup>

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- <sup>1</sup> In developing these guidelines, it was recognized that cases involving bankruptcy have often been automatically accorded a lower priority than their importance might otherwise justify. The following guidelines were developed with the intent of insuring that each bankruptcy case is accorded the correct priority based upon the particular circumstances that pertain.
  - <sup>2</sup> If the Region determines, following any necessary investigation, that it is unlikely that a meaningful remedy can be obtained, the case should be re-classified as Category I or II, as appropriate.

Accordingly, Regional analysis regarding the classification of cases in which bankruptcy petitions have been filed will normally consider at least the following factors:

1. The type and stage of the bankruptcy proceedings. A Chapter 11 reorganization will often provide a vehicle for obtaining meaningful remedies for violations of the Act. Thus, at least initially, such cases should be accorded a high priority. Generally, the further along the bankruptcy proceeding is, the higher the impact analysis classification should be, since immediate action and liquidation of the potential remedies may be required to protect the Board's interests.

2. The amount of money at stake and the probability of a distribution from the bankruptcy estate, or of obtaining post-bankruptcy compliance. While the ultimate monetary recovery from an entity or individual in bankruptcy may be lower than one not in bankruptcy, the tendency to automatically place bankruptcy cases in a lower category should be avoided. This is because a delay in processing a Board case in which a bankruptcy petition has been filed will likely have a greater negative impact on the chance of recovery than in a non-bankruptcy case. In assessing the possibilities of obtaining substantial remedial action from individuals or entities that have filed for bankruptcy, Regions should make liberal use of the discovery rights available to creditors under Bankruptcy Rule 2004, particularly in situations in which a Region has unanswered questions or doubts concerning the accuracy of the debtor's financial schedules.<sup>3</sup> These discovery rights may also be utilized as a mechanism to explore the

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<sup>3</sup> Financial schedules should be carefully examined, even where the bankruptcy court or trustee initially notices the filing as a "no asset" case. In many jurisdictions such "status" is conferred on a bankruptcy case based on nothing more than the petitioner's having checked a box on the petition form indicating that the debtor has no assets. Such assertions should not be accepted as true on their face. In all cases, the Region should promptly file with the bankruptcy court and serve on the debtor (and the trustee where one has been appointed) a Request for Notice of All Proceedings, and in Chapter 11 cases, a Request for a Disclosure Statement and Plan of Reorganization. (See Compliance Manual 10610.2 (d)). Only by such filing(s) can the Board ensure that it will be added to the Court's "matrix" and receive timely notification of all case related activity.

Additionally, in the following circumstances, a formal claim should be filed on behalf of the Board, even if the case is initially noticed as a "no asset" case: (1) if the Region believes that the amount(s) and/or priority(ies) of the Board's claim have not been correctly set forth in the bankruptcy petition and accompanying schedules; (2) if the Region believes that the bankruptcy estate in fact possesses resources from which a recovery may be possible; or, (3) if it appears that the Board may wish to initiate a nondischargeability action pursuant to §727 or §523 of the Bankruptcy Code, in a case involving an individual debtor (see discussion below).

possibility of identifying other entities or individuals that may be held derivatively liable for compliance with Board Orders.<sup>4</sup>

3. The stage of the Board's proceedings. If questions of liability, or of the amount of monetary remedies have not yet been resolved, Regions should take all steps necessary to expeditiously resolve such issues (by stipulation, by issuance of a compliance specification or by Board decision) prior to the bankruptcy court's consideration of a plan of reorganization or liquidation. In such circumstances, particularly where there is a chance of obtaining meaningful remedial action, cases should be accorded a higher priority.

4. The priority of the Board's claim. The Board's claim will either have an administrative priority (11 U.S.C. 507(a)(1)), a wage and benefit priority (11 U.S.C. 507(a)(3) or (4)), be a secured claim, be a general unsecured claim, or be a combination of these alternatives. If the Board's claim is secured or has a significant chance of securing priority treatment, the chances of a significant distribution are improved, and will militate toward a higher impact analysis classification.

In sum, the totality of the circumstances must be carefully examined in determining the appropriate classification of cases in which respondents have filed bankruptcy. For example, if a respondent is reorganizing, with a real chance of employees obtaining reinstatement and/or a reasonable monetary distribution, a Category III designation is clearly appropriate, at least until such time as all actions required to perfect and protect the Board's interests have been completed. Similarly, if there appears to be a likelihood of establishing the derivative liability of a party not in bankruptcy, or of prevailing in a non-dischargeability action against an individual debtor in bankruptcy, the case should be accorded a high priority. On the other hand, if after an appropriate investigation, it is determined that a respondent is being liquidated with little or no assets available for distribution and there appears to be no other individuals or entities that may be held derivatively liable, there is no chance of reinstatement, and the Board's claim has no priority, a Category I classification would be suitable.

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<sup>4</sup> Where a Respondent is an individual, Regions should also be alert to the possibility of obtaining a nondischargeability order pursuant to §727 or §523 of the Bankruptcy Code (thereby allowing the Board to pursue its remedies outside the purview of the bankruptcy case), and should consider and explore such possibilities in the course of their post-bankruptcy filing investigations. See Memorandum OM 97-37 (May 20, 1997). Because the deadline for filing nondischargeability actions is usually quite short (ordinarily 60 days from the close of the §341 creditors meeting), cases where such action may be appropriate should be classified as Category III.

Questions concerning the implementation of these guidelines or requests for assistance should be directed to the Contempt Litigation and Compliance Branch, or the Special Litigation Branch, as applicable (please see Memorandum GC 97-3 for the delineation of responsibility between these two offices) or to the Assistant General Counsel for your District.

R.A.S.

cc: NLRBU

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