

SDNY Amends Guidelines for Prepackaged Chapter 11 Cases

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On January 22, 2024, the chief judge of the U.S. Bankruptcy Court for the Southern District of New York entered General Order M-621 adopting amended procedural guidelines governing prepackaged Chapter 11 cases.

The guidelines provide a comprehensive framework for the administration of prepackaged Chapter 11 cases in the district. Among other things, they recognize and address “Rapid Prepackaged Chapter 11 Case[s],” defined as cases “where the Debtor seeks confirmation of the plan to be granted between one (1) and fourteen (14) days after the petition date.”

The new guidelines, albeit advisory only, provide bankruptcy practitioners guidance on practical matters pertaining to prepacks that often are addressed only indirectly or in piecemeal fashion by the Bankruptcy Code, Bankruptcy Rules and/or local rules. These guidelines will facilitate use of prepacks as a tool that can greatly reduce the time, expense (including professional and U.S. Trustee fees) and risks of a Chapter 11 case.

Prepacks

In a traditional Chapter 11 case, votes on a Chapter 11 plan are solicited after the start of the case. In contrast, a prepackaged case involves the prepetition negotiation and solicitation of votes on a proposed plan. Once that process is complete, and assuming the debtor obtains sufficient votes, it then files for Chapter 11 and asks the bankruptcy court to confirm the plan.

While it is not unusual for a debtor to emerge from Chapter 11 within 30-60 days after filing a prepack, some debtors have completed the process in substantially less time.¹ Of course, the prepack process does not begin with the petition date. For example, after prepetition negotiations, the prepetition solicitation periods in most prepacks are longer than the period required by the Bankruptcy Rules generally or by the letter of the Rules pertaining to prepacks. Nevertheless, they can greatly reduce the cost and risk of the Chapter 11 process by limiting the debtor’s time in bankruptcy itself.

Although Congress clearly contemplated prepackaged bankruptcies (for example, in Sections 1125(g) and 1126(b) of the Bankruptcy Code, which govern the prepetition solicitation of plans and associated disclosure requirements), a truly comprehensive framework for their administration — especially one that adequately accounts for the industry trend toward rapid prepacks — has been lacking.

Historically, the Bankruptcy Court for the Southern District of New York has led in providing guidance on prepackaged bankruptcy cases. It first promulgated formal guidelines for prepackaged cases in 1999, which it amended in 2009 and later again in 2013. The new SDNY guidelines continue to reflect the evolving nature of such cases.

The Guidelines

Most notably, the new guidelines recognize the concept of a “Rapid Prepackaged Chapter 11 Case” and provide a road map for the conduct of such cases, including with respect to limitations on the types of issues to be raised and the type of notice to be provided.

¹ See *Blue Bird Body Company* (confirmed in 2006 approximately 32 hours after filing), *Roust Corp.* (confirmed in 2017 less than seven days after filing), *Sungard Availability Servs. Cap.* (confirmed in 2019 approximately 19 hours after filing), and *Belk Inc.* (confirmed in 2021 approximately 12 hours after filing). Such rapid prepacks are not free from academic debate. Compare LoPucki, Lynn M., Chapter 11’s *Descent Into Lawlessness*, 96 *American Bankruptcy Law Journal* (June 2022), UCLA School of Law, Law-Econ Research Paper No. 21-12, and Rasmussen, Robert K. and Zur, Roye, *The Beauty of Belk* (September 5, 2023). *American Bankruptcy Law Journal* (2023).

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The guidelines also provide that:

- In all prepackaged Chapter 11 cases, the hearings on approval of the disclosure statement and/or compliance with Sections 1125(g) and 1126(b) of the Code and confirmation of the plan will be scheduled and held together.
- Consistent with Section 341(e) of the Bankruptcy Code, an official creditors' committee typically will not be appointed.
- The debtor is free not to set a bar date and seek to conditionally dispense with filing otherwise required schedules and statements.

The guidelines also describe anticipated "first day" motions and contain provisions on the retention and compensation of professionals. Lastly, they provide instructions governing the content of the scheduling motion expected to be filed and considered at the start of the prepackaged case, including specialized requirements applicable only to Rapid Prepackaged Chapter 11 Cases.

Summary of Changes

Contents of Scheduling Motion

For all prepackaged bankruptcy cases, the scheduling motion will:

- Seek plan confirmation and disclosure statement hearings to be combined whenever practicable.
- Describe the debtor's compliance with applicable notice requirements.
- Request the court under 28 U.S.C. § 156(c) and Bankruptcy Rule 2002(a)-(b) to deem the prepetition noticing and ballot agent to be the Clerk of the Court's agent for such purposes and seek retroactive approval of such notice.
- Disclose all written but as yet unfiled (as prepetition) objections to the debtor's disclosure, solicitation or confirmation request and schedule a prompt conference with the court regarding any expected discovery issues.

Additional requirements for Rapid Prepackaged Chapter 11 Cases only:

- Disclose intention to have case treated as Rapid Prepackaged Chapter 11 Case, with plan confirmation to be sought between one and 14 days after petition date.

- Generally, only accepting class(es) are impaired under the plan (*i.e.*, generally, no cram down).
- No nonconsensual third-party releases (as would result in impairment).
- No contract or lease rejections (unless the rejection claim is unimpaired).
- Disclose whether the debtor intends to reject, assume, or assume and assign, any executory contracts or unexpired leases, and propose timetable for hearing.
- Describe "cause" supporting any request to shorten any post-petition notice period under Bankruptcy Rule 9006(c) and/or form of disclosure to unimpaired parties.

See below for a chart summarizing the required contents and changes.

Due Process Order

The new guidelines attempt to strike a balance between the impact of a prepackaged bankruptcy case on parties deemed "unimpaired" under a plan with the need to promptly resolve issues that may be critical to the case's success.

Accordingly, the guidelines enable debtors to request a "Due Process Order" in the scheduling motion, a concept introduced by the court presiding over the *Belk Inc.* case. The Due Process Order schedules the court's timely consideration of issues affecting parties, such as landlords, that did not receive prepetition notice in compliance with due process and the Bankruptcy Rules while expressly preserving such parties' rights even if the plan becomes effective before the court issues a ruling on the matter.

Takeaways

The new guidelines will enhance the level of predictability for companies considering a prepackaged bankruptcy and reinforce the Southern District of New York's position as a preferred venue for achieving expedited Chapter 11 cases.

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Key Changes

Provision	Prior Guidelines	Amended Guidelines
Solicitation III(A)(1)(i)	Represent that proper solicitation was completed prepetition	In addition, must provide support for such representation
Plan Acceptance III(A)(1)(v)	Represent that requisite acceptances of plan have been obtained	No material changes
Cram Down III(A)(1)(v)	For any class that has not accepted (or is deemed not to have accepted) the plan, represent that the debtor is requesting to cram down such class	No material changes except cram down generally unavailable in Rapid Prepackaged Chapter 11 Cases
Hearings III(A)(1)(vi)	Request order scheduling plan confirmation hearing and disclosure statement hearing for within 90 days following the petition date	Plan confirmation and disclosure statement hearing shall be combined whenever practicable, even in a Rapid Prepackaged Chapter 11 Case

New Provisions

For All Prepackaged Chapter 11 Cases

Agent III(A)(1)(ii)	Request that court deem prepetition noticing and ballot agent retroactively to be the Clerk of the Court's agent
Notice Compliance III(A)(1)(iii)	Describe and include certification regarding debtor's compliance with Bankruptcy Rule 3018(b) (<i>e.g.</i> , establishment of record date, transmittal of disclosure statement/solicitation materials and plan) and related notice requirements. Disclose whether debtor seeks order shortening or modifying any notice requirements, including under Bankruptcy Rule 9006(c), and provide support therefor.
Nontraditional Prepack III(A)(1)(iv)	Disclose if any of the following apply: (i) the voting deadline has not yet expired, (ii) the debtor seeks to cram down one or more parties or (iii) votes were solicited prepetition from some but not all parties
Objections III(A)(1)(vii)	Disclose any written but unfiled (as prepetition) objections to the debtor's solicitation and confirmation of the plan. Request prompt discovery conference to address any potential associated discovery issues.
Bar Date/Due Process III(A)(1)(viii)	Disclose whether debtor will be seeking entry of a bar date order or a "Due Process Order"
Securities Laws III(A)(1)(ix)	Disclose whether and how debtor intends to seek a declaration in confirmation order regarding good faith solicitation and exemption under Bankruptcy Code Section 1125(e) and/or (g)

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New Provisions (continued)	
For Rapid Prepackaged Chapter 11 Cases Only	
Rapid Case III(A)(2)(i)	Disclose that debtor seeks to have case treated as a Rapid Prepackaged Chapter 11 Case
Modified Notice III(A)(2)(ii)	Provide support for any request to shorten and/or limit notice (guidelines do not assume that Rapid Prepackaged Chapter 11 Cases must be limited to emergencies)
Assumption/Assignment III(A)(2)(iii)	Disclose whether debtor intends to reject, assume, or assume and assign, any executory contracts or unexpired leases, and propose a timetable for notice and a hearing, or whether debtor intends for them to “ride through”
Post-Confirmation Matters III(A)(2)(iv)	Disclose whether debtor anticipates need to leave case open for post-confirmation matters other than final fee applications
Confirmation Requirements III(A)(2)(v)	Provide support for the plan’s feasibility and any other confirmation requirements that might implicate unimpaired parties receiving shortened notice under Scheduling Motion