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德汇美国破产法问答（系列之三） Dorsey U.S. Bankruptcy Law Q&A Series Three

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希望我们的美国破产法问答系列一和系列二"如何应对美国客户申请第 11 章破产保护"的文章对您有所裨益。本文为该系列第三篇文章，将针对破产程序初期的相关问题，包括债务人必须进行哪些披露、债务人在破产案件启动时通常会寻求的救济，以及"关键供应商"获得赔偿问题进行讲解。

We hope that you enjoyed Series One and Two of our U.S. Bankruptcy Law Q&As regarding what to do when a customer files for Chapter 11 bankruptcy protection. This Series Three will address questions relating to the early stages of the bankruptcy process, including what disclosures debtors must make, what relief debtors will generally seek at the outset of the case, and how "critical vendors" are treated.

1. 问题一：债务人在破产案件中必须披露哪些信息以及债权人如何获得债务人财务状况信息?

Question: What information is the debtor required to disclose in its bankruptcy case and how can a creditor obtain information about the financial status of the debtor?

披露是破产程序的一大标志。债务人必须随第 11 章申请一起，提交其最大无担保债权人名单，并提供其资产和负债的估值。案件初期阶段，尽管债务人通常得以获准延长提交期限，但债务人必须提交详细的明细表和财务事务声明。明细表必须包括所有已知债权人和股本证券持有人的名单（注明债权金额与类型）、待履行合同及未到期租约，及任何类型或性质的资产。财务事务声明要求披露的信息包括：申请破产前发生的转让及所有未决诉讼。第 11 章案件进行期间，债务人必须每月提交经营报告，列明案件期间每个月的所有收支情况。

Disclosure is the hallmark of the bankruptcy process. Along with the Chapter 11 petition,

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debtors must file a list of their largest unsecured creditors and provide estimates of their assets and liabilities. Early in the case, a debtor must file detailed schedules and a statement of financial affairs, though debtors often obtain extensions of time to file such documents. The schedules include, among other things, lists of all known creditors and equity security holders (along with amounts and types of claims), executory contracts and unexpired leases, and assets of any type or nature. The statement of financial affairs requires disclosure of, among other things, transfers made in the lead up to the bankruptcy filing and all pending litigation. During the course of a Chapter 11 case, debtors are required to file monthly operating reports detailing all receipts and disbursements during each month of the case.

所有该等文件均可通过"法院电子档案公众查询系统"（PACER）在线查询，PACER 就每一浏览页收取费用。美国律师事务所通常会注册 PACER 账号。在大型案件中，债务人会聘请第三方服务提供商为此专设一个网站，在该网站上免费公开该等信息。鉴于该等破产申请往往涉及大量文件，最有效的做法是咨询美国破产法律师，以获取并分析相关信息，并跟进破产案件进程。

All of these documents are available online through Public Access to Court Electronic Records (PACER), which charges a fee for each page viewed. A U.S. law firm typically has a PACER subscription. In very large cases, debtors may hire a third party service provider to make such information available for free on a website specifically dedicated for this purpose. Given the often voluminous nature of these filings, it is most efficient to consult with a U.S. bankruptcy attorney to obtain and analyze the relevant information and monitor the bankruptcy case as it proceeds.

2. 问题二：债务人在案件初始阶段，会寻求何种救济？供应商可以如何保护自己？

Question: What relief will the debtor seek at the very beginning of the case and how can a supplier protect itself?

提交第 11 章申请后，大多数债务人会马上提交各类"首日动议"，以获准破产法院的批准来采取那些对维持债务人经营所必要的，但没有破产法院同意就不可采取的若干行动。首日动议一般包括：请求支付特定破产前债务（例如，对关键和/或外国供应商、雇员的债务及保险金），获得破产后融资，以及使用原本受限于担保权益的现金抵押。因此，有必要咨询美国破产法律师，以确定该等动议是否会、以及会如何影响您在破产案件中的权利。

Soon after filing a Chapter 11 petition, most debtors file a variety of "first day motions" to obtain permission to take certain actions necessary to keep the debtor's business going that cannot be taken absent permission from the bankruptcy court. First day motions usually include requests to pay certain pre-bankruptcy debts (such as critical and/or foreign vendors, employees, and insurance premiums), to obtain post-bankruptcy financing, and to use cash collateral that is otherwise subject to a secured interest. It would be worthwhile to consult with a U.S. bankruptcy attorney to determine whether and how such motions may impact your rights in the bankruptcy case.

3. 问题三：被债务人认定为“关键供应商”对供应商有何影响?

Question: What is the impact of the debtor recognizing a supplier as a “critical vendor”?

如上所述，在第 11 章破产案件中经常提出的首日动议中，包括了寻求法院的批准以向债务人视为“关键”供应商的供应商支付破产前的债务。关键供应商对债务人之后的经营（例如，重要部件、零件或设备的供应商）至关重要，尽管债务人提出破产申请，但债务人仍有意继续与之保持合同或业务关系。若未获得就破产前债务向该等关键供应商付款的批准，那么，在破产重组计划（该重组计划未必允许对该等债务进行全额清偿）得到确认之前，该等债务无法得到偿付。

As noted above, among the first day motions frequently filed in Chapter 11 case are those seeking authority to pay the pre-bankruptcy claims of vendors that the debtor deems to be “critical.” Critical vendors are those that are essential to the debtor’s operations going forward (such as suppliers of important components, parts, or equipment) and with whom the debtor desires to have a continuing contractual or business relationship notwithstanding its bankruptcy filing. Absent authority to pay such critical vendors on account of their pre-bankruptcy claims, no payment would be made on account of such claims until a plan is confirmed which may not provide for payment in full to such claims.

获得批准向关键供应商付款的债务人，通常具有相当大的自由裁量权，根据其商业判断确定哪些供应商符合关键供应商的资格可以获得偿付，以及具体偿付金额。此外，债务人获得批准向关键供应商付款的情况下，债务人通常被明确准许，以供应商同意按照破产申请前债务人与供应商之间适用的相同或更优的条款继续开展业务为前提条件，向关键供应商付款。

Debtors obtaining authority to pay critical vendors are generally given broad discretion to use their business judgment to determine which vendors qualify as critical for purposes of payment and how much to pay them. Moreover, to the extent debtors are given the authority to pay critical vendors, they are often expressly permitted to condition payments to critical vendors on those vendors agreeing to proceed according to terms as good as or better than those that applied to the relationship between the debtor and the vendor prior to the bankruptcy filing.

4. 问题四：什么是债权人“341 会议”，供应商是否应当参加?

Question: What is the “Section 341 meeting” of creditors and should suppliers attend?

债权人 341 会议涉及，就债务人的主要资产、债务和重组意图，通过债务人代表对已宣誓债务人进行盘问。第 11 章案件中，由美国联邦破产受托人办公室（隶属于美国司法部）代表主持召开会议，并主导提问。债权人可自由出席会议，并被允许对债务人的财务状况进行盘问。审理破产案件的法官不出席该等会议，该等会议也不会在法庭进行。

The Section 341 meeting of creditors involves an examination of the debtor under oath, through its representatives, regarding the debtor's primary assets, liabilities, and intentions regarding reorganization. In Chapter 11 cases, the meeting is conducted, and the bulk of the questioning is done, by a representative of the Office of the U.S. Trustee (a branch of the U.S. Department of Justice). Creditors are welcome to attend the meeting and are permitted to examine the debtor regarding its finances as well. The judge in the bankruptcy case is not present at these meetings and they are not conducted in a courtroom.

债权人会议必须于提交破产申请之后的 21 至 40 日之间召开，尽管美国联邦破产受托人办公室可以延期会议。供应商应考虑让其美国破产法律顾问出席会议，这样既可以更好地了解案件进展，又可以在需要时对已宣誓债务人进行盘问。

The meeting of creditors must occur between 21 and 40 days after the filing of the bankruptcy petition, although the U.S. Trustee's office may adjourn the meeting. Suppliers should consider having their U.S. bankruptcy counsel attend the meeting, both to get a better sense of where the case is headed and to examine the debtor under oath, if desired.

5. 问题五：如果供应商认为债务人是出于恶意或基于其他原因提交破产申请的，供应商是否可以寻求驳回破产申请?

Question: Can a supplier seek to dismiss the bankruptcy case if it believes it was filed in bad faith or other grounds for doing so?

第 11 章破产案可能因各种原因被驳回，包括出于"恶意"提交破产申请。破产法院在考虑第 11 章破产案件是否出于恶意被申请时，会基于总体情况作出综合判断——债务人是否确实需要得到第 11 章的保护，以及有意借助破产法提供的实质性利益实现其财务重组。实践中，在第 11 章破产案件起始阶段，破产法院倾向于谨慎驳回案件，通常会继续观察是否有其他驳回依据，例如，未能遵守法庭命令，或者未及时提供信息或出席会议。

A Chapter 11 bankruptcy case may be dismissed for a variety of reasons, including that the case was filed in "bad faith." When considering whether a Chapter 11 case is filed in bad faith, the bankruptcy court will look at the totality of the circumstances and decide whether the debtor actually needs Chapter 11 protection and intends to use the substantial benefits afforded by bankruptcy law to reorganize its financial affairs. In practice, bankruptcy courts tend to be cautious to dismiss a Chapter 11 case at the outset and usually wait to see whether there are other bases for dismissal, such as failure to comply with a court order or failure to timely provide information or attend meetings.

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请您密切关注本系列的第四篇文章，该文章将解答关于如何提交索赔请求以及如何解决第 11 章破产案件的问题。

Please keep an eye out for Series Four which will address questions relating to how claims are filed and dealt with in a Chapter 11 bankruptcy case.

德汇律师事务所是一家拥有超过百年历史的国际律师事务所，在美国、加拿大、欧洲和亚洲（包括北京、上海和香港）设有 21 家办公室。德汇为各行各业的企业提供全方位法律服务，并被《钱伯斯美国》评选为"领先律师事务所"以及被 U.S. News 评选为"最佳律师事务所"。

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