



USAID | **BOSNIA-HERZEGOVINA**
FROM THE AMERICAN PEOPLE

EXAMINATION SYLLABUS

QUESTIONS AND ANSWERS FOR TRUSTEE CERTIFICATION

USAID FOSTERING AN INVESTMENT AND LENDER-FRIENDLY
ENVIRONMENT (FILE)

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USAID FOSTERING AN INVESTMENT AND LENDER-FRIENDLY ENVIRONMENT (FILE)

A significant activity of the FILE Project's Bankruptcy Law Team ("BLT") is that of assisting the relevant entities in the task of training, examining and "certifying" bankruptcy trustees.

A cadre of competent bankruptcy trustees, having the skills and the orientation appropriate for modern bankruptcy systems is a *sine qua non* for bankruptcy implementation in BiH.

The New Bankruptcy Law(s) ["NBL"] require "certification" by examination to qualify as a Trustee. NBL Art. 23(2). At this time only a set of "provisional" trustees appointed by each of the relevant Ministries is in office. Plans for the actual "certification" examinations are incomplete; and the responsible parties in both entities have sought our specific assistance in devising an examination we deem appropriate to support our Pilot Case program and longer-term bankruptcy implementation objectives.

A regulation concerning the "certification" examination process was promulgated in the R. S. (O. G., No. 6/03). The FBiH has not yet promulgated a formal regulation. The Regulation in the R. S. enumerates numerous laws on which trustee candidates should be tested, including specifically the NBL. The Regulation also names a Board of Examiners and calls upon them to conduct oral examinations.

However, the Regulation does not indicate which of the laws enumerated (or parts of those laws) should have greater or lesser relevance to the examination of the prospective bankruptcy trustees or give the Examiners guidance on which they can devise their questions, without doing much detailed work, or making the examination process overly subjective and arbitrary.

The Chairman of the R. S. Board of Examiners has requested our help, specifically, in devising examination questions. We have been similarly informed by the Ministry in the FBiH that they would appreciate our guidance on the "certification" examination process, and most likely would use whatever specific questions we thought appropriate.

Set forth below is an "Examination Syllabus" of specific Questions and Answers, which, after obtaining appropriate local partner feedback, is intended to be used for the examination of trustee candidates. These questions can be presented to the candidates in an oral or written (preferred) examination format. The emphasis in their subject matter is on the provisions of the NBL with which a Trustee must have familiarity to perform his role in a modern bankruptcy system.

QUESTIONS AND ANSWERS FOR TRUSTEES

Question 1: Generally speaking, what are the two kinds of bankruptcy proceedings?

ANSWER: Liquidations and reorganizations.

Question 2: Generally speaking, which of the two is the more usual or ordinary bankruptcy proceeding?

ANSWER: A liquidation.

Question 3: Generally speaking, explain the distinction between liquidations and reorganizations as conducted in bankruptcy proceedings under the new Bankruptcy Law?

ANSWER: In a liquidation the debtor's assets are sold off to buyers or distributed to creditors (some, perhaps, on a going-concern basis), the amounts received are distributed among creditors (whose claims have not otherwise been taken care of), and the debtor's prior existence and ownership is ended (although a new company doing the same or a similar business, but with different ownership, may take its place).

In a reorganization the debtor's business is continued as a going-concern (with, perhaps, some substantial changes) and creditors claims are satisfied in accordance with some negotiated settlement in which the debtor keeps some or all of his equity.

Question 4: Is a liquidation under the new Liquidation Law appropriate for the liquidation of a bankrupt company?

ANSWER: No.

Question 5: Explain the purpose of and the procedure followed under the new Liquidation Law?

ANSWER: Where a company is not insolvent but needs to be liquidated to effect a full settlement with all its creditors a court may consider a proposal for a liquidation proceeding. (Liq. Law, Arts. 1, 4) The court may then appoint a Liquidating Trustee who takes over the company's property, realizes on it, makes distributions to the creditors, and gives the surplus to the company's owners. (Liq. Law Arts. 1, 4, 6)

Question 6: What should a Liquidating Trustee appointed under the new Liquidation Law do if he discovers that the company in liquidation is insolvent?

ANSWER: The Liquidating Trustee is obligated to present a proposal for the opening of a bankruptcy proceeding within 15 days. (Liq. Law Art. 9)

Question 7: Aside from the possibility of “reorganization” under sections 142 – 194 of the New Bankruptcy Law, identify the six phases of a bankruptcy proceeding with which a Trustee (or interim bankruptcy trustee) must concern himself?

ANSWER: (1) provisional administration (also called “preliminary proceeding”) (NBL Arts. 14-21, 43), (2) opening of the proceeding (NBL Arts. 44-64), (3) taking over and safeguarding of the bankruptcy estate (NBL Arts. 88-100), (4) realization of the assets (and partial distribution to creditors with separate rights) (NBL Arts. 101-109), (5) settlement of the claims (NBL Arts. 110-124), and (6) conclusion of the proceedings (NBL Arts. 128-150).

Question 8: How many “institutions of the bankruptcy proceeding” are there? Identify them? What statutory provision first names them?

ANSWER: Five; “(1) bankruptcy judge, (2) bankruptcy trustee, (3) interim bankruptcy trustee, (4) Creditors’ Assembly, (5) interim Board of Creditors, and (6) Board of Creditors; Art. 3 New Bankruptcy Law. (See also NBL Arts. 21 – 29)

Question 9: Explain the distinction between an “interim bankruptcy trustee” and a Trustee?

ANSWER: An “interim bankruptcy trustee” may be appointed to assist the court during the period of provisional administration. Such a person only has limited duties and need not be qualified to serve as a Trustee. A Trustee has responsibility for supervising the debtor during the main part of the proceeding and carrying the bankruptcy liquidation, or other resolution, through to the end after the provisional administration.

Question 10: How and when is an “interim bankruptcy trustee” appointed?

ANSWER: Upon receipt of an “acceptable proposal for the initiation of a bankruptcy proceeding” the bankruptcy judge may appoint an interim bankruptcy trustee to help the court ascertain, “without delay,” whether there is sufficient cause for “opening” the bankruptcy, and to perform other duties necessary to preserving the estate (including, possibly, operating the debtor’s business). (NBL Art 14).

Question 11: What constitutes an “acceptable proposal for the initiation of a bankruptcy proceeding”?

ANSWER: A written proposal submitted by a creditor, with documentation verifying the creditor’s claim and the debtor’s probable inability to pay it, and a deposit to cover the costs of the proceeding (NBL Art. 4(1)) – Or, a written proposal submitted by a debtor showing its inability or threatened inability to

pay its debts and that assets will be available to pay the proceeding's costs. (NBL Arts. 4(2), 6(4))

Also, the debtor must be an individual or legal entity (NBL Art. 5(1)), not a municipality or other public entity (NBL Art. 5(2)) (and if it is a military equipment company the Minister of Defense must have approved the proposal (NBL Art. 5(3))). The court to which the proposal is submitted must be the one where the debtor's center of business activities or residence is located. (NBL Art 7(1)).

Question 12: What are the six principal duties of the interim bankruptcy trustee during the period of provisional administration?

ANSWER: (1) Ensure and take care of the property of the debtor, (2) investigate whether the property is sufficient to cover the costs of the proceeding and (3) whether there is cause for opening the proceeding and (4) report his finding to the court within 30 days of his appointment, (5) assess whether the business activities of the debtor can continue, entirely or partially, and (6) render accounts and submit a report to the judge on his work during the period of provisional administration. (NBL Art. 16)

Question 13: Under what circumstances may the "interim bankruptcy trustee" continue the business activities of the debtor?

ANSWER: Where that does not harm the debtor or the bankruptcy estate. (NBL Arts. 15(4), 16(3))

Question 14: When the "interim bankruptcy trustee" makes a decision about whether to continue the debtor's business activities, what is the involvement of the debtor?

ANSWER: The debtor does not need to be involved in the decision, but the interim trustee may take account of the debtor's opinion, his ability and integrity, and his willingness to cooperate. (See Art. 15(4))

Question 15: What is the effect of the submission of a proposal for the opening of a bankruptcy proceeding on the debtor's existing contractual relations?

ANSWER: The debtor's contractual partners cannot revoke their on-going obligations and, except for labor claims, unless a special agreement is made with the "interim bankruptcy trustee" the claims arising on behalf of the other contracting party are treated as "bankruptcy claims. (Art. 16)

Question 16: Explain the distinction between "bankruptcy claims" and "provisional administration" claims?

ANSWER: Bankruptcy claims are the ones which existed against the debtor when the bankruptcy proceeding started (plus some others specified in the law). These claims are only entitled to a share in the assets realized from the

bankruptcy estate after higher ranking claims are paid. Provisional administration claims are those which arise against the debtor after the submission of the proposal for the bankruptcy. These are higher ranking claims, entitled to be paid, first.

Question 17: Which labor claims are simply “bankruptcy claims” and which are the responsibility of the “interim bankruptcy trustee”?

ANSWER: Claims for past compensation resulting from labor relations are bankruptcy claims. Claims for continuing compensation for employees still employed are provisional administration claims. (The “interim bankruptcy trustee” may seek to redefine these claims through a loan.) (NBL Art. 17(3))

Question 18: What provisional administration claims are the responsibility of the “interim bankruptcy trustee”?

ANSWER: Claims based on his own actions or those of the debtor if done with his approval (for example, those arising in connection with the continuation of the debtor’s business), but not tax or other public duties. and if there are not enough assets to pay these claims, the interim bankruptcy trustee can be personally responsible for them. (NBL Art. 16(4))

Question 19: When is the “interim bankruptcy trustee” discharged of his duties?

ANSWER: When the court orders the “opening” of the proceeding (NBL Art. 21 (1)); or orders an end to the provisional administration for another reason and the “interim bankruptcy trustee” covers the provisional administration liabilities incurred by himself or the debtor or provides security to pay them. (NBL Art. 21(3))

Question 20: For what obligations may an “interim bankruptcy trustee” still be responsible even after his “discharge” and the “opening” of the proceeding?

ANSWER: “Provisional administration claims” arising from his or the debtor’s actions during the provisional administration period where the relevant creditor is still unpaid at the “opening” of the case and the successor Trustee is unable to cover the liability in accordance with NBL Art. 21(2).

Question 21: When and for what reasons will the court order the “opening” of the bankruptcy proceeding”?

ANSWER: If after a scheduled hearing the bankruptcy judge finds that (1) the proposal is acceptable, (2) there is reason for the bankruptcy (i.e., the debtor is unable to make payments (NBL Art. 6(1))), and (3) the property of the debtor is sufficient or an interested party has advanced an amount sufficient to pay the costs of the proceeding. (NBL Art 43 (4)). Also, the judge may order a “direct” opening of the proceeding without a hearing if the proposal is

submitted by a debtor or Liquidator or a creditor holding an execution order which has been unsatisfied for 60 days.

Question 22: When a Liquidating Trustee appointed under the new Liquidation Law presents a proposal for the opening of a bankruptcy proceeding, what may or should the court do?

ANSWER: The court may directly order the opening of the bankruptcy proceeding. (NBL Art. 44(1))

Question 23: Who appoints the Trustee and when is he appointed?

ANSWER: When the court orders the opening of the proceeding. (NBL Art. 22 (3) The name and address of the Trustee are stated in the decision which announces the opening of the case. (NBL Art. 45(2))

Question 24: May a “Liquidating Trustee” previously appointed under the Liquidation Law be appointed as Trustee?

ANSWER: Yes. (If he otherwise qualifies to serve as a Trustee.) (See NBL Art. 23).

Question 25: May an “interim bankruptcy trustee” be continued in the job of Trustee?

ANSWER: Yes. (If he otherwise qualifies to serve as a Trustee.) (NBL Art. 21 (1)).

Question 26: Who is eligible to be appointed Trustee?

ANSWER: A physical person who has been certified by examination, or named as a “provisional” trustee on the Minister’s list; and who is not exempted by a family or business relationship with the court or the debtor, by being a creditor or competitor of the debtor, by having been an employee, officer, or agent of the debtor, or by being in an institution for the representation of debtors. (NBL Art. 23)

Question 27: Under what circumstances may someone other than the Trustee first appointed by the judge, become the Trustee?

ANSWER: Another bankruptcy trustee can be elected at the first creditors’ assembly after the Trustee’s appointment, if proposed by at least five creditors holding at least one fifth of the claims – the judge needs to appoint this elected trustee unless he is biased, “inappropriate,” or not qualified to serve as a trustee. (NBL Art. 28(5)) Also, the judge can relieve the Trustee first appointed and appoint another one whenever “an important reason is present.” (NBL Art. 27)

Question 28: Distinguish between the duties of the “interim bankruptcy trustee” and those of the Trustee?

ANSWER: The interim bankruptcy trustee does not realize or distribute the assets of the debtor, and does not settle the claims of the creditors. These are principal duties of the Trustee.

Question 29: Aside from the appointment of the trustee What are the 5 principal occurrences which follow when the court orders the “opening” of the proceeding?

ANSWER:

1. The decision on “opening” is proclaimed on the court notice board and by publication in the Official Gazette; by personally delivering copies to the debtor and submitter of the proposal (in person) and sending copies to creditors and those against whom the debtor has claims
2. Entries are made in public registers wherein the debtor has property of record.
3. Hearing date(s) is/are set for the “Trustee’s Reporting Hearing” and the “Creditors’ Investigation Hearing.”
4. Within 30 days creditors are summoned to register their claims with the court (in accordance with NBL Art. 110) and inform the Trustee of any rights of security they claim (NBL Art 46 (1) (2)).
5. Persons with liabilities toward the debtor are summoned to execute those claims to the Trustee.

Question 30: What is the effect of the “opening” of the proceeding on the debtor’s right to administer and dispose of property?

ANSWER: Those rights are transferred to the Trustee (NBL Art. 51)

Question 31: If an obligor of the debtor makes a payment on the obligation directly to the debtor after the “opening” of proceedings, what is the effect of the payment on the payer’s liability?

ANSWER: The payer remains liable to pay the debt to the Trustee unless the payer did not know of the “opening” of the case at the time he made the payment. (NBL Art. 53)

Questions 32 through 34: Describe what happens to the following claims and rights upon the opening of a proceeding?

Question 32: Claims the debtor holds as a member of a corporation or a partnership with a third party?

ANSWER: The legal relationship is dissolved outside the bankruptcy and the Trustee may seek preferential satisfaction of the share due the debtor upon dissolution. (NBL Art. 54)

Question 33: Claims for or against the debtor that are in litigation?

ANSWER: On the “opening” of the case all litigation that effects the bankruptcy estate is suspended; If the dispute involves a claim where the debtor is plaintiff the Trustee and opposing party may continue the dispute as before; Disputes over claims against the debtor for separate satisfaction of a secured claim or which seek to separate assets from the bankruptcy estate may be continued by either the Trustee or the opposing party, but other claims against the debtor are stayed until the examination hearing; Other disputes over claims against the debtor can be continued by the creditor only if the Trustee disputes them at the examination hearing (such claims are ordinarily bankruptcy claims). (NBL Art. 55)

Question 34: Claims on which the creditor already executed and obtained a right of separate settlement or other right over the property of the debtor?

ANSWER: If the creditor obtained the coercive execution right within 60 days prior to the submission of the bankruptcy proposal, the creditor’s property right is ineffective (not “perfected” in bankruptcy) and the property may be taken into the bankruptcy estate. (NBL Art. 57)

Question 35: When a creditor has a perfected right to separate settlement over property held by the debtor at the “opening” of the proceeding, what may the separate settlement creditor do to execute on the property?

ANSWER: After the “opening” of the bankruptcy they may initiate execution proceedings under the general rules of execution proceedings, or, any on-going execution proceedings that were suspended at the “opening” of the bankruptcy may be resumed and carried out by the execution court. (NBL Art. 58(4)).

Question 36: If the Trustee wishes to retain in the estate for a time property over which a creditor has a perfected right to separate settlement (as, for example, when the Trustee needs the property to operate the debtor’s business or wants to sell that property together with other properties as a unit to obtain a better recovery), what, if anything, can he do to prevent the separate settlement creditor from executing on the property prematurely?

ANSWER: The Trustee may ask the court to suspend the execution proceedings in return for his promise to protect the separate settlement creditor’s property interest. The Trustee may be required to guarantee that the creditor will suffer no loss because the execution is delayed. (NBL Art. 58(5))

Question 37: When the Trustee first takes possession of the debtor enterprise, what is he supposed to do about the debtor's on-going business activities?

ANSWER: The Trustee should continue the business activities until the reporting hearing, if possible, if that does not damage the bankruptcy creditors. (NBL Art. 25(1))

Question 38: When the Trustee is first appointed there are six other things he should or can do, aside from simply taking possession of the debtor's property and continuing the debtor's on-going business activities (if appropriate). Name these six rights and responsibilities?

ANSWER: The Trustee is authorized and obligated to take possession of the property included in the bankruptcy estate, without delay, (2) to manage and safeguard it, (3) to receive property intended for the debtor, including goods received in the ordinary course of business, (4) request that items and business documentation still in the hands of the debtor (or third persons) be delivered to him and ask the court to require such turnovers by executive orders, (5) to submit to the court within 45 days a detailed listing of the properties in the bankruptcy estate showing their respective book value and the amount expected to be realized from their sale, (6) to compile a list of creditors, (7) to keep business ledgers and prepare an initial balance as of the day the procedure was initiated, (8) to submit reports to the responsible bodies ... , (9) request to receive and open the debtor's mail. (NBL Arts. 25, 61).

Question 39: Is the Trustee required to obtain insurance?

ANSWER: Yes. But the judge can free the Trustee of that obligation in justified cases. (NBL Art. 26(2))

Question 40: Can the Trustee be held personally responsible for losses or penalized?

ANSWER: Yes. If the Trustee consciously breaches his obligations under the law he is obligated to compensate for the damage caused to participants in the bankruptcy proceeding. (NBL Art. 26(1)) Also, the judge may impose a fine on the Trustee. (NBL Art 27)

Question 41: Under whose supervision does the Trustee perform his duties?

ANSWER: The judge has general supervision over the Trustee. (Art. 27) The Board of Creditors also must "support and supervise" the Trustee in his management, may request that he submit reports and render accounts to them, and may subject him to direct controls; and he may not undertake important legal actions without the approval of the Board of Creditors (or creditors' assembly, if no Board of Creditors has been established). (Art. 29(5)(6))