

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re</i>	:	Chapter 11
	:	
EXIDE TECHNOLOGIES, <i>et al.</i>	:	Case Number 02-11125 (JCA)
	:	
	:	Jointly Administered
Debtors	:	Hearing Date: TBD
		Objection Deadline: 5/17/2002 at 4:00 p.m.

**UNITED STATES TRUSTEE’S LIMITED OBJECTION TO DEBTORS’ MOTION
UNDER 11 U.S.C. § 345 FOR ORDER WAIVING INVESTMENT AND
DEPOSIT REQUIREMENTS AND FOR OTHER RELIEF (D.I.6)**

In support of his Limited Objection to the Debtors’ Motion Under 11 U.S.C. § 345 for an Order Waiving Investment and Deposit Requirements and for Other Relief (the “Motion”), Donald F. Walton, the Acting United States Trustee for Region 3 (“UST”), by and through his undersigned counsel, avers:

1. This Court has jurisdiction to hear the above-referenced Limited Objection.
2. Pursuant to 28 U.S.C. § 586, the UST is charged with the administrative oversight of cases commenced pursuant to Title 11 of the United States Bankruptcy Code. This duty is part of the UST’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has “public interest standing” under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the UST as a “watchdog”).
3. Pursuant to 11 U.S.C. § 307, the UST has standing to be heard with regard to the above-referenced Limited Objection.

4. By their Motion, the Debtors seek a waiver of the provisions of 11 U.S.C. § 345(b)^{1/} governing the deposit and investment of estate funds. The phrase “unless the court for cause orders otherwise” was added to 11 U.S.C. § 345(b) in 1994 to overrule the Third Circuit’s decision in *In re Columbia Gas Sys. Inc.*, *supra*, which held that the deposit and investment requirements of 11 U.S.C. § 345(b) are mandatory and must be applied as written. The legislative history of the amendment indicates that:

Section 345 of the Code governs investments of the funds of bankrupt estates. The purpose is to make sure that the funds of a bankrupt that are obligated to creditors are invested prudently and safely with the eventual goal of being able to satisfy all claims against the bankrupt estate. Under current law, all investments are required to be FDIC insured, collateralized or bonded. While this requirement is wise in the case of a smaller debtor *with limited funds that cannot afford a risky investment to be lost*, it can work to needlessly handcuff larger, more sophisticated debtors. This section would amend the Code to allow the courts to approve investments other than those permitted by section 345(b) *for just cause*, thereby overruling *In re Columbia Gas Systems, Inc.*, 1994 WL 463514 (3rd Cir. (Del.)).

^{1/} Section 345(b) provides that:

(b) Except with respect to a deposit or investment that is insured or guaranteed by the United States or by a department, agency, or instrumentality of the United States or backed by the full faith and credit of the United States, the trustee shall require from an entity with which such money is deposited or invested--

(1) a bond--

(A) in favor of the United States;

(B) secured by the undertaking of a corporate surety approved by the United States trustee for the district in which the case is pending; and

(C) conditioned on--

(i) a proper accounting for all money so deposited or invested and for any return on such money;

(ii) prompt repayment of such money and return; and

(iii) faithful performance of duties as a depository; or

(2) the deposit of securities of the kind specified in section 9303 of title 31; unless the court for cause orders otherwise.

H.R. Rep. 103-834, 103rd Cong. 2nd Sess. 24 (October 4, 1994); 140 Cong. Rec. H10767 (October 4, 1994) (emphasis added). Thus, the 1994 amendment to 11 U.S.C. § 345(b) grants the court discretion to allow a debtor-in-possession or trustee to pursue a riskier investment strategy.

5. In seeking a waiver of Section 345(b)'s requirements, the Debtors propose to forgo the protections of a safe return and insured balances. Those protections are imposed to protect the creditors of the Debtors' estates. Accordingly, before the Court authorizes the Debtors to forgo such protections, it must ensure first that the Debtors have demonstrated "cause" for doing so, and second that the Debtors' proposed investment strategy is clearly articulated, is appropriate to the circumstances of the case and does not expose the creditors of the estate to the risk of financial losses over and above those already resulting from the Debtors' bankruptcy.

6. Since the 1994 amendment of 11 U.S.C. § 345(b), no court in the Third Circuit has published an opinion construing the amendment. Indeed, the only published opinion addressing the 1994 amendment is *In re Service Merchandise Company*, 240 B.R. 894 (Bankr. M.D. Tenn. 1999). In *Service Merchandise*, the court took guidance from the legislative history of the amendment and then listed ten factors to be considered in a "totality of the circumstances" inquiry. Those factors are set forth at length in the Motion.

7. While the UST does not urge the Court to adopt the *Service Merchandise* rationale, the allegations of the Motion, even if proven, may not be sufficient to demonstrate "cause" under the liberal standard adopted in *Service Merchandise*, or that the Debtors' own investment strategy is more appropriate to the Debtors' circumstances than the strategy imposed by Section 345(b).

(a) Looking to the legislative history of the 1994 amendment for guidance, the Motion does not suggest that the Debtors have sufficient funds that they – and the creditors and shareholders for whom they serve as fiduciaries – can afford a risky investment to be lost. The Debtors are in Chapter 11 bankruptcy precisely *because* their funds and liquidity are limited and *because* they cannot afford further losses.

(b) Similarly, the Motion does not indicate how the Debtors will be inconvenienced, let alone “needlessly handcuffed,” by obeying Section 345(b)’s insurance, collateralization or bonding requirements,^{2/} at least insofar as concerns some or all of their U.S. based deposit accounts.^{3/}

(c) Although the Debtors have a cash management system which concentrates funds and moves excess funds to investment accounts in accordance with proposed or existing investment guidelines, a system of *managing* funds is not a substitute for *safeguarding* them. Before considering a waiver of the requirements of Section 345(b), the Court should satisfy itself that the Debtors’ cash management system and investment guidelines will adequately safeguard the estate’s funds.

^{2/} One of the most common methods of safeguarding estate funds is to require any institution holding such funds to collateralize all debtor accounts that are not fully insured by the FDIC (FDIC insurance is limited to \$100,000 per depositor per institution). Collateralization is accomplished by way of an agreement among the debtor, the depository institution and the UST. Arrangements are frequently made to collateralize existing accounts, thereby avoiding the inconvenience of opening new accounts. Indeed, a number of banks are eager to hold the deposits of debtors-in-possession and to comply with collateralization requirements.

^{3/} Some of the Debtors’ funds may be in foreign accounts and may be necessary for the Debtors to conduct business efficiently in foreign countries. However, to the extent funds in foreign bank accounts exceed amounts required as transaction balances, prudence would dictate that such excess funds should be repatriated to U.S. bank accounts.

8. The Motion does not set forth sufficient information from which the *Service Merchandise* test could be applied. Rather than address whether any of the *Service Merchandise* factors support the requested waiver, the Motion only cites recent Delaware cases in which similar motions were granted, frequently without contest.

9. At best, the Motion suggests that granting a Section 345(b) waiver would make the Debtors' financial operations more convenient. "Convenience," however, is not the same as "cause."

10. The Motion does not provide information as to whether the Debtors' proposed investment guidelines are already in place, what internal controls have been or will be implemented to ensure that those guidelines are followed and which individuals will be responsible for the Debtors' investment decisions. Because the Court is being asked to allow the Debtors to replace the safety and certainty of investments pursuant to 11 U.S.C. § 345(b) with the Debtors' own investment guidelines and strategy, the Court should require that the above details be spread upon the record before considering the requested waiver.

11. This Court may exercise its discretion to waive the requirements under 11 U.S.C. §345(b) for cause. However, "it is vital that the often paltry cash from a bankruptcy be preserved with an absolute minimum of risk that any of it will be lost before distribution." T.H. Coleman, E.C. White, "Money and Bankruptcy: Permissible Cash Investments," 21 CAL. BANKR. J. 279 (1993). The UST respectfully submits that until additional information concerning the Debtors cash management system and investment guidelines is spread upon the record, the Debtors have not pleaded sufficient cause for waiver of Section 345(b)'s investment requirements or a basis for being permitted to expose the estate's funds to any increased risk. The Court should therefore

delay consideration of the Motion until such information has been provided and the Court is satisfied that the Debtors' cash management system and investment guidelines prove a satisfactory substitute for the requirements of 11 U.S.C. § 345(b).

12. The UST leaves the Debtors to their burdens of proof and reserves all discovery rights.

WHEREFORE the UST requests that this Court issue an order granting such relief as the Court deems appropriate.

Respectfully submitted,

DONALD F. WALTON
ACTING UNITED STATES TRUSTEE, REGION 3

Dated: May 17, 2002

BY: /s/ Mark S. Kenney
Mark S. Kenney, Esquire
Trial Attorney
J. Caleb Boggs Federal Building
844 King Street, Suite 2313, Lockbox 35
Wilmington, DE 19801
(302) 573-6491
(302) 573-6497 (Fax)