NEW YORK
CITY BAR

COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION

January 27, 2012

Via Electronic Mail and U.S. Mail

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Re: Comment Letter on the Proposed United States Trustee Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases

Ladies and Gentlemen:

The Committee on Bankruptcy and Corporate Reorganization (the "*Committee*") of the Association of the Bar of the City of New York appreciates the opportunity to provide this comment letter on the *Draft for Public Comment, Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases* (the "*Proposed Guidelines*") of the United States Trustee Program (the "*UST Program*").

The Association of the Bar of the City of New York is a professional organization made up of more than 23,000 members. Its Committee on Bankruptcy and Corporate Reorganization comprises 49 members, including practitioners, scholars, bankruptcy court judges and government officials who are committed to improving bankruptcy law and practice.[1] Our Committee includes many lawyers who practice regularly in bankruptcy courts throughout the country, representing debtors, creditors and other parties-in-interest in business reorganization cases. Collectively, members of our Committee have been involved in nearly every major

[1] The United States Trustee for Region 2, Tracy Hope Davis, Judge Sean H. Lane, Chief Judge Carla Craig and Christine Azzaro, active and valued members of the Committee, did not participate in the preparation of this comment letter or the decision by the Committee to submit this comment letter to the UST Program.

This comment letter does not necessarily reflect the individual views of all of the members of the Committee, or of any institutions with which these individuals may be associated.

chapter 11 case filed in recent years. As such, the members of our Committee have a long history of working collaboratively with our local U.S. Trustees and other constituents.

The Proposed Guidelines are a significant development in the current debate over professional fees in bankruptcy cases. If adopted, the Proposed Guidelines would have a profound impact on the review of professional fees in the cases in question – not only because the Proposed Guidelines establish uniform standards that would be applied by U.S. Trustees and followed by professionals across the nation, but also because bankruptcy courts can be expected to rely on those standards to some extent in evaluating professional compensation under the Bankruptcy Code, if not to expressly require compliance with them.[2] The Committee commends the UST Program and its staff on the thoughtful and extensive analysis of the issues contained in the Proposed Guidelines.

Nonetheless, the Committee has significant concerns with respect to the Proposed Guidelines. As more fully set forth below, the Proposed Guidelines include several provisions regarding which compliance would be exceedingly burdensome, if not impossible, or that are otherwise problematic. Thus, while the desired benefits of the Proposed Guidelines are clear – namely, potential savings to the estate and its constituents from reduced professional fees – it is equally clear that the Proposed Guidelines would impose substantial additional direct and indirect costs. As a result, the Proposed Guidelines could end up unintentionally undermining their own stated goals, as well as the overall bankruptcy process, by inadvertently harming clients and impairing the ability of estate-retained professionals to adequately represent their clients, thus potentially leading professionals to forego representations of debtors and statutory committees in favor of work that carries less administrative burden and risk.

The Proposed Guidelines Will Benefit from a Robust and Open Rulemaking Process That Includes Practitioner, Judicial and Client Input

Bearing in mind the extensive impact that the Proposed Guidelines would have on the bankruptcy process, the Committee urges the UST Program to further conduct a robust and open rulemaking process before *any* changes to the UST Program's existing guidelines are adopted. This entails having significant discussions with bankruptcy practitioners so that the UST Program can fully assess the likely impact of proposed changes and ensure that any changes made are consistent with the UST Program's goals and are practical for practitioners to adopt in their practices.

It also entails receiving input from judges, who ultimately bear the responsibility of deciding matters of professional compensation and actively rely not only on the UST Program but also on the professionals whom the Proposed Guidelines would affect.

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2 Many courts, through local bankruptcy rules or standing orders, expressly require professionals to comply with the UST Program's fee guidelines. *E.g.*, E.D.N.Y. LBR 2016-1 ("A person seeking an award of compensation or reimbursement of expenses shall comply with the requirements contained in any fee guidelines promulgated by the United States Trustee."); Administrative Order re: Amended Guidelines for Fees and Disbursements for Professionals in Southern District of New York Bankruptcy Cases, General Order M-389 ("*General Order M-389*") at 1 (Bankr. S.D.N.Y. Nov. 25, 2009) (requiring professionals to certify, among other things, that requested fees and disbursements "fall within . . . the UST Guidelines" except as otherwise described in the certification and fee application).

Finally, the Committee urges the UST Program to reach out to clients – the corporate debtors, statutory committee members and creditors that, under the Bankruptcy Code's framework, already possess the authority and incentives to scrutinize professional fees. For many reasons, these parties may not respond to the UST Program's requests for public comment, but their perspective is critical. A central feature of the Proposed Guidelines is the attempt to ensure that "client-driven market forces, scrutiny, and accountability"[3] apply to estate professional fees by, among other things, encouraging the adoption of budgets and staffing plans, requiring clients to provide verified statements, and imposing other requirements on clients. The UST Program should, therefore, hear directly from clients – debtors, committees and creditors alike – about their views on the perceived problems and the proposed solutions.

In our experience, there is a common misperception that clients have little incentive to scrutinize estate professional fees or that estate professional fees are insulated from market forces. Furthermore, while the Proposed Guidelines' focus on clients is worthwhile, the additional costs and burdens they impose on clients and their professionals in an attempt to increase accountability threaten to outweigh any potential gains. As our comments below attempt to emphasize, a broader perspective regarding the potential impact of the Proposed Guidelines on the economic wellbeing of clients is needed. The Committee suggests that, in addition to soliciting and considering the comments it receives as part of the present comment process, the UST Program convene a series of working group sessions or public forums aimed at facilitating meaningful discussions with participants in the bankruptcy process.

SPECIFIC COMMENTS TO THE PROPOSED GUIDELINES

The Committee's specific comments on the Proposed Guidelines – which range from substantive legal concerns to practical concerns about their implementation, as well as comments of a more technical nature – are set forth in greater detail below and in the attached addendum. Working within the framework of the Proposed Guidelines, the Committee hopes to assist the UST Program, not only by identifying potential issues but also, where possible, by offering proposals for potential solutions or alternatives.

A. Proposed Safeguards Should Be Subject to Court Approval

The measures included in the Proposed Guidelines are not appropriate for all chapter 11 cases, even larger ones, and should remain subject to approval by the bankruptcy court based upon the facts and requirements of each particular case. In the context of reviewing fee applications in larger chapter 11 cases, the Proposed Guidelines incorporate a number of procedural safeguards that go beyond the requirements of the Bankruptcy Code or the Bankruptcy Rules – *e.g.*, budgets and staffing plans, verified client statements and statements from professionals.[4] In addition, the Proposed Guidelines contain guidance on the establishment of special fee review procedures, such as fee committees and fee examiners.[5] Although certain of these procedures have been implemented in bankruptcy cases before, they entail significant costs and are by no means routine even in large chapter 11 proceedings. More importantly, when

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3 Proposed Guidelines at 3.

4 *Id.* at 5-6, 10-12.

5 *Id.* at 16-18.

these procedures have been implemented, it has been only following review by, and pursuant to an order of, the bankruptcy court.

The Committee believes the current judicially determined approach is the appropriate means for applying these safeguards. The Proposed Guidelines not only risk overstepping the court's authority to determine the appropriate procedural rules that govern the proceedings before it,[6] but they also sacrifice the benefits that this judicial approach provides – namely, the benefit of the experience of bankruptcy judges, local U.S. Trustees and other professionals, the flexibility to tailor the procedural safeguards to the particularities of the bankruptcy proceeding and the opportunity to experiment with new and possibly more effective ideas for addressing the relevant issues. Furthermore, as discussed below, because these procedural safeguards come at a significant cost and there are sufficient differences in opinion as to their efficacy, courts should have the final word on the appropriate types and operation of additional procedures that they deem necessary.

The Committee proposes that rather than a "one size fits all" approach, the Proposed Guidelines instead recommend "best practices" (along the lines of the "Special Fee Review Procedures" provisions)[7] for U.S. Trustees to consider when exercising their discretion to seek judicial approval for these procedural safeguards.

B. The Threshold for a "Larger Chapter 11 Case" Should Be Increased

The threshold for applying the Proposed Guidelines should be increased to ensure that they will apply only to chapter 11 cases that are sufficiently large to justify the additional oversight and associated costs prescribed by the Proposed Guidelines. The Proposed Guidelines state that they are intended to apply to "larger chapter 11 cases," which are defined as cases involving "more than $50 million in combined assets and liabilities, aggregated for jointly administered cases."[8] An explanation regarding how this threshold was arrived at would be beneficial. For example, while numerous studies have been conducted regarding bankruptcy professional fees, the members of the Committee are unaware of any study that would justify setting a threshold at or around this level.

We believe that the number of cases to which the Proposed Guidelines would apply would be excessive given the proposed threshold.[9] A more appropriate option, in the Committee's view, would be to tailor the threshold so that it captures only those cases involving

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6 Because the failure to employ these procedural safeguards creates a presumption that the fee application is subject to objection, the Proposed Guidelines effectively require them.

7 Proposed Guidelines at 16-18. To the extent, however, that the Proposed Guidelines' "Special Fee Review Procedures" prescribe what "will" be the case, they should be revised to provide what "should" be the case, to allow sufficient flexibility for local U.S. Trustees to exercise their discretion and to give appropriate deference to judicial determination of such issues.

8 *Id.* at 1.

9 For example, according to a LexisNexis search, in 2010 and 2011, there were approximately 204 filings by public companies with either $50 million or more of assets or $50 million or more of liabilities. According to a bankruptcydata.com search, in 2010 and 2011, there were 138 filings of public companies and "major private companies" with $50 million or more of assets. These figures, however, are not exactly comparable to the threshold set forth in the Proposed Guidelines, since they do not account for all private company filings, companies with liabilities and/or combined assets and liabilities of $50 million or more, or co-debtors that are jointly administered.

significant professional retentions that would justify the additional administrative oversight and related costs imposed by the Proposed Guidelines. Members of the Committee have expressed the opinion, based on their experiences, that a substantially higher threshold would be more appropriate.

C. Comparisons of Hourly Rates and Other Compensation Terms

The provisions of the Proposed Guidelines relating to comparisons of hourly rates and other compensation, if enforced as drafted, could significantly impact the willingness of attorneys to be retained by the estate and, by extension, impair the ability of debtors and statutory committees to attract the best possible counsel. In particular, as more fully discussed below, the provisions of the Proposed Guidelines relating to compensation terms are problematic insofar as they (i) may be read to suggest that the Proposed Guidelines incorporate the "economy of administration" standard previously rejected by Congress, (ii) would seemingly require that firms disclose confidential, proprietary information regarding the terms of their retention by other clients, and (iii) would be otherwise overly burdensome and seek information that is not helpful in evaluating the reasonableness of the compensation being sought.

Under the Proposed Guidelines, professionals would be required to provide comparisons of their hourly rates and other compensation terms with other estate-paid matters, with other bankruptcy engagements, and with other dissimilar, nonbankruptcy engagements, including providing the lowest, highest and average hourly rates billed during the preceding year and stating whether they have charged any clients less than the hourly rates in the application.[10] Moreover, professionals would be required to disclose whether they have offered or agreed to variations from, or alternatives to, their standard or customary billing rates, fees or terms for services provided during the fee application period.[11]

Under the Bankruptcy Code, the cost of comparable services is a significant factor in determining a professional's reasonable compensation.[12] Accordingly, the Committee acknowledges the validity of appropriate disclosure to allow courts and parties-in-interest to review professional fees and determine whether they are reasonable in light of the cost of comparable services.

Nevertheless, the Committee urges the UST Program to exercise care in determining the form that such disclosure should take. In particular, the Proposed Guidelines should remain "procedural guidelines" that aid in the administration of the estate, and thus should not embody a substantive standard of what constitutes reasonable compensation under the Bankruptcy Code.[13]

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10 Proposed Guidelines at 8, 10-11, 14-15.

11 *Id.* at 11.

12 11 U.S.C. § 330(a)(3) ("In determining the amount of reasonable compensation to be awarded to . . . [a] professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including . . . (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.").

13 Although it was initially proposed that the Executive Office of the United States Trustee adopt "procedural and *substantive* guidelines," *see* S. REP. NO. 102-279, at 28 (1992) (emphasis added), in the end, section 586(a)(3)(A)(i) of title 28 of the United States Code, as enacted under the Bankruptcy Reform Act of 1994, provides for the adoption of only "procedural guidelines," apparently based on concerns expressed regarding the separation of powers. This is in keeping with the legislative intent of section 586(a)(3), which emphasizes the procedural

The Committee is concerned that the Proposed Guidelines express a presumption that professionals should charge rates at the lower (if not the lowest) end of the range of compensation on the grounds that the resulting "savings" would inure to the benefit of the estate's constituents. This, in effect, adopts notions underlying the "economy of administration" standard that governed professional compensation under the prior Bankruptcy Act and was rejected by Congress when it enacted the Bankruptcy Code.[14]

In our experience, during the last 34 years since the "economy of administration" standard was rejected and the "cost of comparable services" standard has been applied, the bankruptcy bar has improved, not only because more experienced, skilled and qualified professionals have been attracted to the field, but also because the size and diversity of the bar has increased.[15] The bankruptcy system as a whole, upon which clients, judges and U.S. Trustees alike rely, has been better served by a stronger professional bar, resulting in tangible economic benefits to estates. Ultimately, clients – the debtors, committees, creditors and other parties in interest – would pay the price for an erosion of these benefits to the bankruptcy system if the "economy of administration" standard were reintroduced.

The Proposed Guidelines' disclosure requirements present further problems. First, the terms of a firm's retention by other clients, including hourly rates, are confidential, proprietary information, the disclosure of which would be extremely problematic for firms in representations completely unrelated to the bankruptcy case at hand. For example, disclosure of a firm's lowest, highest and average rates, as well as variations or alternative compensation arrangements that have been made, could be used to the firm's detriment in completely unrelated contexts by current or potential clients, and even competitors. The purpose of the confidentiality of these terms goes further, however, than merely protecting the professional's interests. These terms are set forth in engagement letters that are often governed by confidentiality provisions that prevent any disclosure without the approval of the client.

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guidelines' administrative function – namely, to "help foster greater uniformity in the application for and processing and approval of fee applications." 140 CONG. REC. H10,769 (Oct. 4, 1994).

14 *See* 124 CONG. REC. H11,091-2 (Sept. 28, 1978); 124 CONG. REC. S17,408 (Oct. 6, 1978) ("[B]ankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11. . . . *Notions of economy of the estate in fixing fees are outdated and have no place in [the] bankruptcy code.*") (emphasis added); H.R. REP. NO. 95-595, at 294 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286 ("The effect of the last provision [i.e., the cost of comparable services] is to overrule *In re Beverly Crest Convalescent Hospital, Inc.* . . . and other, similar cases that require fees to be determined based on *notions of conservation of the estate and economy of administration.* If that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere. . . . Bankruptcy specialists, however, *if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.*") (emphasis added).

15 An oft-repeated criticism of the current bankruptcy compensation system is that a "conspiracy of silence" among bankruptcy professionals discourages them from objecting to one another's bankruptcy fees. In our experience, this problem is vastly overstated, and fee applications are subject to more rigorous scrutiny (even if objections are often expressed informally) and more compromise than nonbankruptcy engagements. Indeed, bankruptcy proceedings are one of the few forums in which opposing parties have the ability to weigh in on a professional's compensation.

Furthermore, these disclosures – especially disclosure of the lowest rate that has been charged by a professional in other nonbankruptcy practice areas or the fact that the professional has charged lower rates to other clients – are unlikely to be helpful in the comparable compensation analysis for numerous reasons. For example:

- Certain practice groups bill at lower hourly rates, but are nonetheless maintained by law firms because clients expect full-service firms to have these practices available. Other practice groups are able to bill at much higher hourly rates due to their degree of specialization (e.g., certain tax practices) or where there is high demand for a small supply of such practitioners (e.g., Supreme Court advocacy).

- Bankruptcy engagements often require the expertise of professionals from a number of practice areas, which further complicates disclosures about whether any client has been charged lower hourly rates in bankruptcy engagements.

- Policies with respect to providing discounts to clients may vary even within firms. Some professionals may agree to charge a lower rate at the outset, others may charge their customary rates but thereafter agree to discounts, others still may provide write-offs of fixed amounts that are not tied to any specific professional's rates, and others could decide not to charge any time billed by particular professionals. These variations make numerical comparisons of hourly rates, even within a firm, problematic and not illuminating.

- Moreover, agreements to provide variations or alternative compensation arrangements to particular clients may be informed by numerous other factors, including the amount of business that the client provides to the firm and the ability to charge a success fee, among others. None of these considerations is relevant to the typical bankruptcy case. It would, for example, be inappropriate and unhelpful to compare fees charged to a client for a one-time engagement with those that a firm might apply to long-time clients that have provided (and will continue to provide) large amounts of ongoing work.

- Even among bankruptcy cases or estate-paid bankruptcy engagements, a range of factors may affect billing, including the practitioner's role in the case and the debtor's cash/financing resources.

- Billing rates may vary according to a professional's home office, but the Proposed Guidelines' disclosures contemplate disclosing a firm's lowest rates without any such distinction.

Lastly, as a practical matter, the Committee believes that collecting this information will be unduly burdensome. For example, many firms have literally hundreds if not thousands of attorneys working on thousands of matters over the course of a year. Moreover, compiling the Proposed Guidelines' disclosures may not even be within the ability of many firms' accounting departments.

The Committee believes that alternatives to the proposed disclosures should be explored. One example is found in bankruptcy cases pending in the Southern District of New York where professionals are required to certify that "the fees and disbursements sought are billed at rates

and in accordance with practices customarily employed by the applicant and generally accepted by the applicant's clients."[16]

D. Budgets and Staffing Plans

The provisions of the Proposed Guidelines relating to budgets and staffing plans should be eliminated or revised insofar as they are likely to be unworkable, overly burdensome or otherwise problematic as written. The Proposed Guidelines contemplate the creation of client-approved budgets and staffing plans.[17] If budgets and staffing plans have been created, then each fee application must include a comparison of actual charges and actual staffing against those contemplated, and an explanation of variances of more than 10% from the budgeted fees.[18] Additionally, for work performed by a timekeeper who was not listed on the staffing plan, the fee application must explain why such timekeeper's services were not contemplated in the original staffing plan.[19]

As an initial matter, the Proposed Guidelines are not clear about the consequences of failing to adopt budgets and staffing plans. Although the Proposed Guidelines stop short of mandating such budgets/plans, the Proposed Guidelines expressly "encourage" their adoption.[20] The Committee is concerned that since the failure to utilize budgets and staffing plans could create a presumption that a fee application is subject to objection on this basis, the Proposed Guidelines would effectively require them. The Committee requests that the Proposed Guidelines expressly disavow any presumption that fee applications would be subject to objection on this basis, unless budgets and staffing plans have been ordered by the court.

This is particularly appropriate since opinions vary widely about the usefulness of budgets and staffing plans. Representatives from the Executive Office for U.S. Trustees have acknowledged the potentially limited efficacy of budgets.[21] The Committee agrees. In our experience, budgets are unlikely, as a practical matter, to be very instructive or useful – especially to the extent that they require projections far into the future, or are formulated at the inception of a case when it is most difficult to predict the course that the case will take and attention is often more focused on stabilizing the company. More than most other practices, restructuring work, by its nature, involves reacting to events – whether operational, financial or legal – that often cannot be anticipated. This difficulty has been recognized by bankruptcy courts even when such budgets are required.[22] Accordingly, the Proposed Guidelines should

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16 *See* General Order M-389 at 1.

17 Proposed Guidelines at 3, 5, 10.

18 *Id.* at 5, 10, 13.

19 *Id.*

20 *Id.* at 3, 5.

21 Clifford J. White III & Walter W. Theus, Jr., *Professional Fees under the Bankruptcy Code: Where Have We Been, and Where Are We Going?*, AM. BANKR. INST. J., Dec 2010.-Jan. 2011, at 78 ("*EOUST ABI Article*") ("The jury is out on the efficacy of budgets. . . . On balance, however, the budgeting process does not appear to impose significant billing discipline.").

22 *See, e.g., In re Enron Corp., et al.*, Case No. 01-16034 (AJG), slip op. at 5 (Bankr. S.D.N.Y. Apr. 26, 2002) ("It shall be understood that all Budgets are based on certain assumptions and are incapable of predicting the volume

acknowledge these difficulties and permit professionals to submit budgets with appropriate caveats.

Furthermore, the Committee submits that market forces already determine when budgets should be required and the level of detail that is appropriate. In most larger chapter 11 cases, the governing cash collateral and DIP financing orders incorporate budget and fee carve-out requirements that subject professional fees to additional scrutiny. Therefore, the Committee submits that budgeting requirements are better left for participants to set, and that it is unnecessary and wasteful to impose these requirements in every instance. Encouraging the use of budgets and staffing plans in cases where they would not prove effective would serve only to burden estates with additional administrative expenses and divert the valuable attention of clients and professionals from more productive uses of their limited resources.

The Committee posits that in certain cases, budgets and staffing plans could inadvertently harm clients in other ways.[23] For example, the requirement to publicly disclose budgets and staffing plans, as well as the requirement to publicly explain variances, could compromise the ability of counsel to represent its client's interests by exposing its legal strategy prematurely and/or signaling to other parties that counsel anticipates or has expended a significant amount of time in connection with certain aspects of a case. It is for this reason that courts have recognized that care must be taken to prevent the disclosure of budgeting information that is protected by work product and other applicable privileges.

The Committee submits that alternatives to budgets and staffing plans should be explored. The Committee also submits the following additional comments regarding budgets and staffing plans, if employed:

- Providing estimates broken down into the 24 project categories, as contemplated by the Budget and Staffing Plan Template,[24] would both risk disclosing confidential legal strategies (by indicating which aspects of the case are likely to require the most attention) and be extremely burdensome, if not impossible, to do meaningfully. The Committee proposes that the template provide that estimates be broken down into no more than four to six general categories, with the understanding that additional categories may be agreed upon by clients and professionals as appropriate in particular circumstances.

- The Proposed Guidelines are unclear about the time period that is expected to be covered by the budget and staffing plan. The Committee suggests that budgets and staffing plans be submitted no more frequently than on a quarterly basis.

- The Proposed Guidelines do not indicate whether budgets and staffing plans must be prospectively filed publicly on the docket (whether at the inception of the case

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or course of litigation and other matters that may render the actual fees accrued different from the budgeted amounts.").

23 In addition, it is possible that the budgeting requirement might create a perverse incentive by encouraging professionals to overestimate budgets (in order to prevent running over). Budgets might provide a cloak of legitimacy that could compromise the vigilance with which other parties in interest scrutinize fees.

24 Exh. B to Proposed Guidelines at 1-2; *see also* Proposed Guidelines at 5.

or periodically). In addition to creating issues of confidentiality and potentially undermining legal strategy, the filing of budgets and staffing plans raises additional questions about whether such plans would be subject to review and an opportunity to object.

- The Proposed Guidelines request that budgets and staffing plans specify individual professionals and which project categories cover each professional's planned tasks.[25] Fees for professionals not listed in the budgets and staffing plans would require additional explanation and approval.[26] As it is impossible to anticipate all of the needs of a case or the availability of individual professionals, this level of specificity is impossible and should not be required.

E. Categories and Tasks

The provisions of the Proposed Guidelines relating to project categories and task subcategories, as drafted, are overly burdensome and costly. In addition to expanding the number of project categories to 24, the Proposed Guidelines propose that professionals also assign tasks to one of 20 subcategories within each project category.[27] In total, professionals would be required to maintain over 480 project category/subcategory combinations.

The Committee believes that the subcategory requirements are largely unworkable. Professionals are already required to provide detailed time descriptions, including using project categories.[28] The Committee submits that requiring professionals to provide project subcategories that merely duplicate this information fails to provide any real benefit to the estate, while imposing substantial additional administrative burdens on its professionals. At the same time, it is unclear what deficiency the project category and subcategory proposals seek to redress. The existing fee guidelines' project categories, which have been utilized successfully for over 15 years, already contain sufficient flexibility to be tailored, as needed, to the particular needs of each case.[29] Moreover, this requirement is not compatible with common billing systems used by law firms. Lastly, because this is not ordinarily done in nonbankruptcy engagements, time spent dealing with any subcategories should be compensable, which would result in additional administrative expenses for the estate.

Many members of the Committee believe that the proposed subcategories are simply unworkable for these reasons. Some members of the Committee have proposed, as an alternative, that the use of subcategories be scaled back to a few (i.e., no more than four) broad subcategories.

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25 Exh. B. to Proposed Guidelines at 3.

26 Proposed Guidelines at 5, 10.

27 *Id.* at 9, 14; Exh. A to Proposed Guidelines at 1-2; Exh. D. to Proposed Guidelines at 1-3.

28 U.S. Trustee Guidelines for Reviewing Applications for Compensation (Fee Guidelines), 61 Fed. Reg. 24,890 (May 17, 1996), *reprinted at* 28 C.F.R. pt. 1, app., at 3-4.

29 *Id.* at 4.

F. Special Fee Review Procedures

The Proposed Guidelines set forth models and principles for special fee review procedures, such as the use of independent fee examiners and fee committees.[30]

The use of fee examiners and fee committees has proliferated in recent years. Nevertheless, there is a tension between the need for special fee review and the high costs associated with such review, as representatives from the Executive Office for U.S. Trustees have noted.[31] Estates and their creditors are ill-served if such special fee review procedures result only in greater administrative expenses. Fee committees and examiners are, therefore, not necessarily appropriate in all large chapter 11 cases. Accordingly, the Proposed Guidelines should be revised to make clear that there is not a presumption that the U.S. Trustee will seek appointment of a fee examiner or fee committee in every large chapter 11 case and that the U.S. Trustee's decision to seek such an appointment should be based upon the particular facts, circumstances and needs of the case. Furthermore, the Committee recommends that the Proposed Guidelines provide for procedures to periodically reassess the cost of and need for continuing special fee review.

In addition, the Committee believes that the Proposed Guidelines would benefit from further clarification of the duties of, and expectations on, fee examiners and fee committees, and guidance on how they should operate. Among other things, the Proposed Guidelines leave unanswered the questions of whether the filing of reports should be required, whether the fee committee's or examiner's review should extend to reviewing success fees or other compensatory enhancements, what role the fee committee or fee examiner should take at fee hearings, and whether the fee committee's and fee examiner's duties are limited to filing objections or they may also take other positions with respect to matters of professional fees.

Furthermore, while the Proposed Guidelines provide that fee committees should ordinarily consist of representatives of the debtor, the unsecured creditors' committee, other

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30 Proposed Guidelines at 16-18.

31 EOUST ABI Article at 78 ("[T]his level of scrutiny is not inexpensive, particularly when a fee committee retains professionals. The cost of the fee committee can devour a major portion of any fee or expense reductions it obtains."); *see also* Zach Lowe, *Chadbourne to Tribune Fee Examiner: We Want That $13,639 Please*, AM LAW DAILY (Sept. 8, 2009), http://amlawdaily.typepad.com/amlawdaily/2009/09/chadbourne-fee-examiner.html ("Lynn LoPucki, a bankruptcy expert who teaches at both Harvard Law School and the UCLA School of Law, studied 102 recent bankruptcy cases involving large public companies and found that fee monitors – used in 23 of those cases – saved an average of about 1.2 percent of all requested fees and expenses. In contrast, the money law firms and fee monitors billed just to prepare their fee reports amounted to 2.7 percent of total billings in the cases studied, LoPucki says. 'The whole system spends more money fighting about fees and just documenting them than it saves by cutting them,' LoPucki says.").

The Committee submits that the fact that special fee review often results in only negligible reductions of professional fees suggests that the process in place in most bankruptcy cases – i.e., public scrutiny of professional fees by parties in interest, the U.S. Trustee and the courts, in accordance with the Bankruptcy Code, the Bankruptcy Rules, local bankruptcy rules and standing administrative orders, case-specific fee procedures and the existing U.S. Trustee guidelines – generally imposes sufficient billing discipline on estate professionals. *See id.* (noting that in the Tribune bankruptcy case, fee and expense reductions amounted to only 0.8% of total amounts requested and were one-sixth of the costs of the fee examiner, and that in the Lehman Brothers bankruptcy case, the fee committee, led by Kenneth Feinberg (the U.S. federal government's pay czar), recommended reductions of only 0.3% of total fee and expense requests).

official committees and the U.S. Trustee,[32] the Proposed Guidelines should clarify that, depending on the circumstances, other parties in interest may also be appropriate members on a fee committee.

In other respects, there appears to be a lack of uniformity as to the governance of fee committees. For example, the Proposed Guidelines should clarify what actions by a fee committee must be authorized through a vote of the committee members, whether the acceptance by a majority of the fee committee members would be sufficient to decide every issue or certain issues would require a supermajority, and how committee member resignations and replacements would be handled. The Proposed Guidelines also provide that fee examiners and the professionals retained by a fee committee should not be subject to any monthly compensation processes otherwise applicable in a bankruptcy case.[33] It is unclear whether this means that such examiners and professionals are not entitled to be paid between interim fee applications or that, alternatively, they are entitled to be paid on a monthly basis without adhering to the monthly compensation processes that apply to all other estate-paid professionals. Lastly, the Proposed Guidelines provide that fee committee members and fee examiners should receive "appropriate" exculpations and indemnifications from any liability arising out of their service.[34] This should be clarified to provide that they will receive standard exculpations and indemnifications on the same terms as other retained professionals.

G. Additional Comments

In addition to the comments discussed in detail above, the Committee respectfully submits the attached addendum containing certain other comments to the Proposed Guidelines.

We thank the UST Program for the opportunity to comment on the Proposed Guidelines. The Proposed Guidelines reflect great diligence, experience and thought on the part of the UST Program and its staff, and we appreciate the UST Program's open and continuing dialogue with other bankruptcy participants concerning these issues. We look forward to the possible opportunity to work with the UST Program as the Proposed Guidelines are further developed and hopefully as working sessions are convened to discuss them further. On behalf of the Committee, I would be pleased to answer any questions you might have regarding these comments, and members of the Committee's working group would be pleased to meet with your staff if that would assist the UST Program's efforts.

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32 Proposed Guidelines at 16.

33 *Id.* at 17.

34 *Id.* at 18.

Respectfully submitted,

Committee on Bankruptcy and Corporate Reorganization

By: _____
Damian S. Schaible, Chair

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Addendum to Comment Letter

Additional Comments

(1) **Nonbankruptcy Fee Estimate.** The Proposed Guidelines provide that applicants representing debtors should estimate the fees sought that would have been incurred regardless of the bankruptcy (e.g., nonbankruptcy litigation and tax advice).[35]

- Comments:
  - The Committee believes that it is difficult to assess services that hypothetically "would have been incurred," or to separate issues that the debtor would have faced (e.g., tax issues) from issues solely related to the bankruptcy filing (e.g., bankruptcy-specific tax issues). Moreover, it is unclear what value this information would provide. For example, in determining whether costs relating to proceedings to approve a settlement pursuant to Bankruptcy Rule 9019 would have been incurred regardless of the bankruptcy, counsel would be required to consider questions such as: Outside of bankruptcy, would the parties have settled these issues? While approval under Bankruptcy Rule 9019 would not have been sought, would other approvals have been necessary, should they be considered, and if so, how would they be valued?
  - Furthermore, these disclosures could be exploited to a debtor's detriment. For example, in a *Stern v. Marshall* analysis, the debtor's assessment that certain litigation would have been conducted outside of the bankruptcy case could be construed as an admission that undermines the bankruptcy court's authority to issue final determinations as to the underlying causes of action.

(2) **Rate Increases.** The Proposed Guidelines provide that fee applications should indicate who approved the rate increase(s) for the client and when.[36]

- Comments:
  - The Proposed Guidelines are not clear regarding whether this requirement affects periodic rate increases over the life of the case. The terms of periodic rate increases typically are disclosed and agreed to in a professional's engagement letter, which is executed at the beginning of a case. Ongoing disclosure of these standard annual rate increases, therefore, is unnecessary.
  - The Proposed Guidelines' requirement that fee applications calculate the amount of compensation attributable to any rate increase above those rates

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35 *Id.* at 6, 13.

36 *Id.* at 4, 8.

that were approved at the time of counsel's retention[37] should be eliminated. So long as such rate increases are proper, disclosure of such amounts does not serve any purpose under the Bankruptcy Code, since such information does not bear on the determination of whether a professional's fees are reasonable.

- Potential Alternative:
  - Counsel might be required to certify that it has not raised the applicable rates without disclosing the details.

(3) **Noncompensable Fees and Expenses.** The Proposed Guidelines provide that certain fees and expenses will not be compensable.

- Comments:
  - Among other things, the "redaction of bills or invoices" will not be compensable.[38] Unlike preparing monthly invoices, however, these are not activities that would normally be performed outside of bankruptcy and should be compensable.
  - "Overhead" includes telephone charges.[39] However, long-distance telephone charges should be compensable, as they represent an incremental cost to firms and are typically charged to nonbankruptcy clients.
  - "Overhead" includes library and publication charges.[40] The Proposed Guidelines should clarify that library and publication charges do not include legal research services; ambiguity regarding whether research would be reimbursed could inadvertently discourage counsel from conducting sufficiently thorough research, which would be inefficient and detrimental to the client and the bankruptcy process.
  - The Proposed Guidelines provide that contesting or litigating fee objections will not be compensable.[41] However, professionals expose their invoices to the scrutiny of every party in interest in the bankruptcy case, some of whom sometimes raise objections on nonmeritorious grounds in an attempt to gain leverage or to serve other agendas. These fees and expenses should be compensable.

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37 *Id.* at 8, 13.

38 *Id.* at 4, 11.

39 *Id.* at 6.

40 *Id.*

41 *Id.* at 5.

- The Proposed Guidelines provide that U.S. Trustees should consider whether a fee application includes fees for summer clerks or summer associates that are more properly part of the firm's overhead for recruiting and training.[42] The Proposed Guidelines are unclear, however, as to whether it is the UST Program's position that all summer clerk or associate time is noncompensable, or that this applies only to a subset of tasks more properly written off as overhead. The Committee urges the UST Program to clarify that it adopts the latter position: most summer associates are as qualified, if not more qualified, than the firm's full-time paraprofessionals or clerks, and provide valuable services (such as legal research) that benefit clients. Moreover, firms provide compensation to summer associates just as they do to other employees whose fees would be compensated in bankruptcy.

(4) **Client Statements.** The Proposed Guidelines require clients to answer a series of questions under penalty of perjury.[43]

- Comments:
  - Some of these questions may be problematic for clients, who may not have the appropriate legal expertise or background to respond to them.
  - Many of these questions are duplicative of representations made by the professional, thereby resulting in needless additional burden to the estate.
  - Certain questions appear to expose debtors and committees to potential liability based on matters of judgment, which could result in perverse incentives (e.g., diverting client resources to documenting such issues in order to limit potential liability). The Proposed Guidelines should clarify that the certifying professionals shall not be subject to personal liability, and the provision of such certification does not confer any rights on any other parties.

(5) **Multiple Professionals.** Under the Proposed Guidelines, an application must justify seeking compensation for more than one timekeeper's attendance at a hearing or conference.[44]

- Comments:
  - In addition to being impractical, this requirement could lead professionals to manage engagements in an inefficient manner due to concerns that fees for multiple attendees would be subject to objection as a routine matter. As a general matter, efficiencies are gained by conducting a single meeting or call on an issue, rather than discrete conferences. Conducting

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42 *Id.* at 6.

43 *Id.* at 5-6, 11-12.

44 *Id.* at 9.

these types of meetings is an integral part of the services retained professionals provide. It would be impractical and counterproductive to provide explanations for each meeting.

- Because this is not ordinarily done in nonbankruptcy engagements, time spent providing these explanations should be compensable, which would result in additional administrative expenses for the estate.

- This requirement is also ambiguous. First, it is unclear whether internal conferences (which necessarily involve multiple professionals from a single firm) also require justification. Second, it is unclear whether a detailed explanation is required for each event in which more than one professional from a single firm is present, or a blanket statement in a fee application as to the necessity of multiple professionals would satisfy this requirement.