COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION

November 21, 2012

Via Electronic Mail and U.S. Mail

Executive Office for U.S. Trustees
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Re: Comment Letter on Guidelines for Reviewing Applications for Compensation and 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 respectfully provides this comment letter to the United States Trustee Program's (the "*UST Program*") "Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases" (the "*Guidelines*"). On January 27, 2012, the Committee submitted to the UST Program a comment letter (the "*January 27th Letter*") on the "Draft for Public Comment" of the Guidelines (the "*Proposed Guidelines*"). The Committee appreciates the UST Program's efforts in revising the Proposed Guidelines and submits this letter with limited further comments generally addressing application of the Guidelines.

As discussed in the January 27th Letter, the Association of the Bar of the City of New York is a professional organization with more than 23,000 members. Its Committee on Bankruptcy and Corporate Reorganization comprises 45 members, and includes many lawyers

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who practice regularly in bankruptcy courts throughout the country representing debtors, creditors, and other parties in interest in business reorganization cases.[1]

Committee members have been involved in nearly every major chapter 11 case filed in recent years, and have a long history of working collaboratively with U.S. Trustees in our home regions and elsewhere.

The Committee again commends the UST Program and its staff on its thoughtful and extensive analysis of the comments it received on the Proposed Guidelines, and we remain available to discuss these comments at your convenience. The Committee recognizes the UST Program's goals of, among other things, full disclosure and transparency in billing practices of professionals who are compensated by bankruptcy estates, ensuring that bankruptcy professionals are subject to the same client-driven market forces as apply in non-bankruptcy engagements, decreasing the administrative burden of retention and fee applications, and, overall, increasing public confidence in the integrity and soundness of the bankruptcy process.[2] At the same time, however, we believe that these goals must be balanced with the efficient and economical administration of bankruptcy engagements. Our principal concern with the Guidelines is that we believe certain of the provisions impose substantial burdens on professionals and those reviewing professionals' retention and fee applications and costs to the estate without commensurate benefit to the estate. Our specific comments to the Guidelines are set out below.

SPECIFIC COMMENTS TO THE GUIDELINES

A. Applicability

We note that the UST Program has revised the threshold for application of the Guidelines to $50 million or more in assets and $50 million or more in liabilities. We regard this as a favorable change, but still believe that this threshold could result in the imposition of significant costs and burdens in cases that cannot afford them. Every chapter 11 case is different and there may well be circumstances (even in large cases) in which the additional costs associated with the Guidelines do not afford commensurate benefits. Therefore, we believe that it is imperative that the U.S. Trustees exercise their discretion, when appropriate, not to apply the Guidelines or to apply the Guidelines in modified form. For instance, in consensual cases or cases where there are a limited number of creditors, it may be appropriate to not apply the Guidelines even if the asset and liability threshold is met. An exercise of discretion in these circumstances (or other appropriate circumstances) could result in decreased professional fees for the estate.

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[1] The United States Trustee for Region Two, Tracy Hope Davis, Southern District Bankruptcy Judge Sean H. Lane, Eastern District Chief Bankruptcy Judge Carla Craig, and law clerk Christine Azzaro, active and valued members of the Committee, did not participate in the Committee's discussion of the Guidelines, the preparation of this letter, or the Committee's decision to submit this letter to the UST Program. In addition, this letter does not necessarily reflect the individual views of all of the members of the Committee or of any institutions with which Committee members are associated.

[2] *See* Guidelines at B(1).

Because the Guidelines do not supersede local rules, court orders or other controlling authority,[3] we believe that each U.S. Trustee can (and, when warranted, should) exercise his or her discretion to determine whether the Guidelines should apply at all in a particular case or whether they should be applied selectively, in the absence of other guidelines or as circumstances warrant. In the Southern and Eastern Districts of New York, for instance, the bankruptcy courts have long-standing guidelines that govern the retention and payment of professionals, and we urge the UST Program to encourage these courts to modify their existing guidelines so as to allow for the flexible application of the Guidelines. We believe that this flexibility would allow U.S. Trustees to balance the application of the Guidelines against the needs of a particular case. Such flexibility would also promote the development of "best practices" consistent with the UST Program's goals and considerations but not resulting in the rigid application of bright-line tests and rules in every case.

B. Comparable Services Standard / Customary and Comparable Compensation

The changes made by the UST Program with respect to customary and comparable compensation improve the disclosure requirements of the Guidelines (in comparison with the provisions of the Proposed Guidelines) by making them both potentially more meaningful and less burdensome. While all law firms are different, the methods for computing blended rates included in the Guidelines coupled with the Guidelines' recognition that an applicant may propose alternative disclosures should provide U.S. Trustees and firms alike with the necessary flexibility to permit reasonable compliance with the Guidelines.[4] We do have some concern, however, that the Guidelines' reference to blended rates may result in U.S. Trustees coming to regard the comparison of bankruptcy blended rates to non-bankruptcy blended rates as a bright-line test for comparable compensation. The Committee does not believe that information regarding blended rates should be used in this manner, as such rates are not necessarily an accurate reflection of what a firm may appropriately or fairly bill in a bankruptcy engagement.

There are many circumstances that could cause nonbankruptcy blended rates to be much higher than (or lower than) bankruptcy blended rates. For example, a small firm that specializes in foreclosure work but also handles real estate bankruptcies could likely provide nonbankruptcy (*e.g.*, foreclosure) work at a blended rate that is significantly lower than its blended rate for bankruptcy work, as routine foreclosure work is generally less complicated than bankruptcy work. Also, many firms have specialized groups that service the larger revenue-driving departments. These service groups often bill at significantly lower rates, which could result in a downwardly-skewed blended rate. Similarly, covered professionals working on non-bankruptcy matters for non-U.S. offices, and therefore being billed out at local, possibly lower, rates would also skew the comparable rates. Finally, depending on the time of year that the blended rate is calculated, a simple annual increase in rates could make the blended rate appear lower than the rate being charged in the bankruptcy engagement. Generally, the Committee hopes the U.S. Trustees will take these factors and others into account when reviewing the comparable compensation disclosures and exercise their discretion when reviewing professionals' fees.

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[3] *See* Guidelines at A(4).

[4] *See* Guidelines at C(3) and Exhibit A.

We are also concerned that the limited "safe harbor"[5] does not provide the necessary benefits to fee applicants. If professionals are complying with the calculations and disclosures required by the Guidelines, and their bankruptcy and nonbankruptcy blended rates are generally comparable, then there should be a true "safe harbor" that protects such professionals from the burden of making additional disclosures and compiling additional information – and incurring additional associated expenses.

Finally, we note that firms' overall blended rates may constitute confidential commercial information, and that the disclosure of such information could create significant problems for such firms in representations completely unrelated to the bankruptcy case at hand. Accordingly, to the extent that U.S. Trustees compel the disclosure of firm-wide blended rate information (or information that may be similarly sensitive), they should agree to preserve its confidentiality unless otherwise agreed by the applicable professionals and to limit its use to that of assisting the U.S. Trustees in evaluating the fees sought by the firm in the bankruptcy case.

C. Budgets and Staffing Plans

As we noted in the January 27th Letter, we believe that certain of the provisions of the Guidelines relating to budgets and staffing plans may create substantial burdens on the estate and its professionals, and certain of the disclosure requirements are likely to be exceedingly burdensome (especially if the bankruptcy case is contentious). We understand that the budgets and staffing plans will not be required in every case, but rather will be used only on consent or by court order.[6] Nevertheless, we are concerned that the U.S. Trustee will seek these budgets and staffing plans as a matter of course, and as a result, and because of the excessive burden of complying with these provisions of the Guidelines, it will become the norm in virtually every large case for the debtor and major creditors to include a new "first day" motion requesting exemption from these provisions. In particular, we believe that budgets and staffing plans may be unnecessary and redundant in large cases in which at least the debtor and any official committees (once formed) will have already negotiated a detailed budget incorporated into a cash collateral or debtor-in-possession financing order. The creation of a second budget could require significant time and resources with no attendant benefit to the estate.

Although the Committee is pleased that the 20 subcategory activity codes have been deleted from the Guidelines, it remains concerned that the 22 remaining task codes continue to impose unreasonable burdens on professionals with no appreciable benefit to the bankruptcy process. As noted above, in most large cases detailed budgets are negotiated in connection with financing orders. These budgets are tailor made for each case, and make use of budget categories (analogous to task and activity codes) as necessary for the case. In the January 27th Letter the Committee suggested that the Guidelines require no more than four to six general categories, all of which could be changed or supplemented as necessitated by the particular circumstances. The Committee still believes that this would be a more efficient method of monitoring and managing professional fees. This is much more analogous to how the legal

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5 *See* Guidelines at C(4).

6 *See* Guidelines at C(6); E(1).

marketplace works in nonbankruptcy situations, where law firms and clients negotiate budgets based on a small number of general categories.

In addition, budgets and staffing plans will likely vary significantly from case to case, depending on, among other things, the nature of the debtor's operations, whether the case is a reorganization or liquidation, and whether or not substantial litigation is anticipated. Because of this, attempting to determine, prospectively, the amount of resources that will be necessary with respect to each of the proposed project categories will be nearly impossible.[7] Creating accurate budgets and staffing plans would be especially difficult early in a case, and the U.S. Trustees should take this into account when determining if and when to request such budgets and staffing plans. To the extent a budget is required, the Committee believes that the budget should be viewed as a whole as opposed to by specific project categories – akin to how cash collateral or DIP budgets are generally viewed. While it will be difficult for professionals to prospectively predict the resources that will be required in a case, it will be virtually impossible to do so by project category with any kind of accuracy. For this reason, the Committee hopes the U.S. Trustees will focus on the budget from a macro level as opposed to a project by project analysis.

Moreover, because the Guidelines require disclosure of budgets and staffing plans and explanations of variances from the budgets and staffing plans, there is a significant risk of disclosing confidential and privileged information (with the risk increasing the greater the level of detail that must be included). For example, because the Guidelines require that detailed budgets be exchanged between the debtor and the official committees,[8] there is a risk of disclosure of confidential information, particularly with respect to claims analysis and potential litigation, which may involve disputes between the debtor and the committees (or their members). There is similarly a significant risk associated with disclosing budgets and staffing plans retrospectively in a fee application (*e.g.*, a large budget for litigation may signal to parties that counsel has anticipated a significant dispute). Although the Guidelines allow the parties to redact their budgets, depending on the facts of the case, redaction could be substantial, which would add a further administrative burden to the estate and its professionals while diminishing any potential benefit of sharing the budget.

We have similar concerns with respect to the staffing plan requirement.[9] Bankruptcy cases evolve rapidly and professionals need flexibility in responding to the needs of each case. And, the larger the case, the less likely it will be for the professionals to accurately predict their staffing needs. Although the Committee understands the UST Program's desire to curb unnecessary billing by professionals, it hopes that the U.S. Trustees will understand that this must be balanced with the necessary flexibility to enable professionals to respond to issues as they arise.

D. Special Fee Review Entities

The Committee recognizes the increased use of fee examiners and fee committees in recent years and that such entities can add value under appropriate circumstances. Nevertheless,

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7 *See* Exhibit D.

8 *See* Guidelines at E(8).

9 *See* Guidelines at E(6).

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we again emphasize that because each case is unique the Guidelines should make clear that each U.S. Trustee retains complete discretion over whether to seek the appointment of a fee examiner or committee, and the composition of such a committee. The Committee believes that the U.S. Trustees should exercise their discretion in this area, and seek the appointment of such examiners and committees only when the circumstances dictate. We agree wholeheartedly that in the event a fee examiner or fee committee is appointed, the appointment order should be clear as to the identity of the examiner or committee members, and, among other things, their compensation, duties, and right to retain professionals. Finally, if a fee review entity is appointed, the Committee believes that the U.S. Trustee should either defer to the fee review entity's information requests or should work with the entity so that professionals are not subject to multiple competing information requests each time they submit a fee application.

E. Co-Counsel Retention

The Committee understands that co-counsel retentions must be carefully reviewed to ensure that there is no duplication of work and that the retention of an additional law firm is beneficial to the estate. Nonetheless, the Committee believes that the Guidelines may be read to improperly limit the type of co-counsel that can be retained in a case. The Guidelines state that "[s]econdary counsel may be either 'efficiency counsel' or 'conflicts counsel.'"[10] Although these types of counsel are the most common types of secondary counsel retained in a case, the Guidelines should not be read to preclude the retention of other types of secondary counsel, as this would improperly limit a client's ability to choose counsel to suit its needs as a given case might require. Also, the Committee notes that neither of these types of secondary counsel appear to encompass "local counsel," which are frequently used in large cases and necessary for their efficient administration

Furthermore, the Guidelines provide that arrangements under which law firms may engage in settlement or other negotiations with certain entities, even while they may not litigate against them are "generally objectionable."[11] The Committee urges that this provision be modified. Such arrangements may be problematic under some circumstances, but will not always be (and may not even generally be) problematic. The "generally objectionable" language suggests that these arrangements will be *per se* prohibited, which we do not believe is appropriate or the intention of the Guidelines. Instead, we suggest that the provision be amended to provide that such arrangements "may, depending on the circumstances, be objectionable." Such a revision would enable the U.S. Trustees to object if the facts so warrant, but not otherwise. This is particularly important as the Guidelines are "procedural," and should therefore not make substantive determinations, especially on a blanket basis. [12]

Also, to the extent that it is appropriate to retain conflicts counsel in a case, the Committee does not believe that a supplemental retention application should be required every time there is a new conflict that arises during the case. Instead, it would be more economical and efficient to simply require a notice or a declaration explaining the conflict and not to require a new court order unless there is an objection that needs to be resolved.

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[10] *See* Guidelines at Exhibit B.
[11] *Id.*
[12] *See* Guidelines at A(1).

Finally, the Guidelines should clarify that budget and staffing plan requirements are generally not applicable to co-counsel retentions, because they generally entail the retention of a firm for a narrowly defined task, which is much easier to monitor.

F. Miscellaneous

1. Rate Increases.

The Guidelines make no distinction between regular annual step-ups in attorneys' rates due to class advancement (*e.g.*, when a third-year associate becomes a fourth-year associate) and increases in a firm's billing rates. The Committee believes that no special disclosures, calculations, or review should be required for annual step-ups, and that subsections C(2)(k)(ix) and (x) of the Guidelines should be modified to reflect this. The Committee, however, agrees with the UST Program that firms should disclose any across-the-board rate increases.

2. Electronic Records.

Section C(9) of the Guidelines provides that billing records be provided to the U.S. Trustee in open and searchable electronic data format. The Guidelines further state that, if requested, such records should be provided to "any other party." The Committee agrees that professionals' bills should generally be submitted to the debtor, official committees, and the U.S. Trustee's Office in such an open and searchable format so they can be thoroughly analyzed. However, the Committee does not believe that there should be any requirement that firms submit such data to anyone else in such manner, absent compelling circumstances.

3. Compensation for Bills and Fee Applications.

Section B(2)(f) of the Guidelines provides that professionals may be compensated for the time they spend preparing interim and final fee applications, but not for time spent on monthly statements that are submitted pursuant to an interim payment order or for final fee applications to the extent they duplicate work performed on interim fee applications.[13] The Committee agrees that professionals should not be paid for duplicative work. Nevertheless, work performed on monthly fee statements is not necessarily duplicative of work performed on a fee application and may extend beyond work performed on a bill that may be submitted to a client outside of bankruptcy. A blanket policy prohibiting compensation for such work is therefore inappropriate. Professionals should be compensated for work that is unique to bankruptcy. Time spent by professionals negotiating their fees is an example of this. Although professionals would not typically bill a client for such time, outside of bankruptcy fees must be discussed and negotiated only with the client; whereas in bankruptcy, fees are often the subject of negotiation with numerous third parties, including the U.S. Trustees. In bankruptcy, professionals must also redact monthly invoices to protect privilege and confidentiality, which is not necessary outside of bankruptcy. The Guidelines seek to prevent professionals from charging the estate for time that would not be compensable outside of bankruptcy,[14] therefore, to the extent professionals would

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[13] *See* Guidelines at B(2)(f).
[14] *See* Guidelines at B(2)(g).

not have to perform a certain task outside of bankruptcy, they should be properly compensated to the extent it is required in a bankruptcy engagement.

We believe that the UST Program should adopt a more flexible approach to professionals' billing practices and allow professionals to be compensated once – and only once – for the work they do compiling billing records and complying with the Guidelines and local rules. As an example, if the work done to prepare monthly statements makes it possible to submit interim fee applications with virtually no additional work, then the work spent on those monthly statements should be compensable. On the other hand, if the monthly statements require very little work, but the interim fee applications require substantial work, then the work performed on the interim fee application should be compensable. Generally, we believe that this is an area where discretion and flexibility will ensure a better result than rigid adherence to a bright-line rule.

4. Verified Statement from the Client

Section D(4) of the Guidelines provide that counsel's applications for employment be accompanied by a verified statement from the client attesting to, among other things, the steps taken by the client to ensure that the counsel's rates are market. The Committee believes that it is both proper and necessary that clients be able to choose to retain the counsel they believe can best represent them in their bankruptcy case. The Committee does not believe that it is appropriate to have clients attest to "market rate," but only to their belief that the rate being charged is proper under the circumstances and that the retained firm is best suited to represent them in the bankruptcy engagement.

CONCLUSION

We again thank the UST Program for the opportunity to comment on the Guidelines. We appreciate how much time and work has gone into drafting them, soliciting and analyzing comments, and making revisions. We again appreciate you affording us the opportunity to participate in the process.

Respectfully submitted,

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