

UNITED STATES TRUSTEE PROGRAM

FREQUENTLY ASKED QUESTIONS: FEE GUIDELINES FOR ATTORNEYS IN LARGER CHAPTER 11 CASES

Professional Compensation in Bankruptcy

Q. How are bankruptcy attorneys paid under the Bankruptcy Code?

A. Under the Bankruptcy Code, attorneys and other professionals who provide services for the debtor and official committees are entitled to be paid from the bankruptcy estate – the pool of assets and monies otherwise available to pay creditors – but the attorneys and other professionals must first file applications to be paid with the court and have the court approve the payments. Section 330 of the Bankruptcy Code says fees must be reasonable and necessary, and comparable to what attorneys charge outside of bankruptcy cases. Applicants must prove that their fees and expenses comply with the Bankruptcy Code before the court may enter an order directing the bankruptcy estate to pay the fees.

Q. What role does the U.S. Trustee Program (USTP) play in bankruptcy compensation?

A. One of the U.S. Trustee’s statutory duties is to review, comment, and object, where appropriate, to fee applications that do not satisfy the standards for payment under the Bankruptcy Code. Once the U.S. Trustee objects to fees, it is up to the court to decide if any or all of the fees should be awarded. Often, the USTP is the only party to object to professional compensation.

Q. If the Bankruptcy Code establishes what fees and expenses can be paid, why does the USTP have Guidelines?

A. The Guidelines, which are mandated by law, are an important statement of policy governing the USTP’s review of fee applications filed by attorneys in large chapter 11 cases. The Guidelines do not supersede statutes, rules, or court orders, but they do communicate the criteria used by U.S. Trustees in reviewing fee applications, the USTP’s expectations of professionals, and possible bases for U.S. Trustees’ objections to the payment of fees and reimbursement of expenses.

Q. Does the court adjudicate all USTP objections to fees?

A. Not necessarily. Many times, the U.S. Trustee will ask questions or seek more information from the professionals before filing an objection, and the answers or information may resolve the U.S. Trustee’s need to object. In other instances, the U.S. Trustee may object and then reach an accord that resolves the objection. In either case, the court must review and determine whether to award the compensation and may reach a different conclusion than did the U.S. Trustee.

Purpose and Content of the Guidelines

Q. Why did the USTP update the Guidelines?

A. The Guidelines were originally published in 1996. Since then, there have been significant changes in the legal industry and the complexity of business reorganization cases. The nature of many large bankruptcy cases has grown more complex as new financial practices and financial instruments have entered the marketplace. In addition, enormous amounts of money are at stake in large bankruptcy cases, including huge professional fees, which can reduce public confidence in the bankruptcy system. Further, law firm billing practices and law office technology have undergone profound changes, such as the common use of discounts and budgets in non-bankruptcy cases.

Q. What are the primary goals of the Guidelines?

A. The primary goals are (1) to ensure that attorneys' fees in larger chapter 11 bankruptcy cases are subject to the same client-driven market forces, scrutiny, and accountability that apply in non-bankruptcy cases and (2) to increase disclosure and transparency in the bankruptcy compensation process for attorneys.

Q. To what cases do the Guidelines apply?

A. The Guidelines apply to chapter 11 cases with \$50 million or more in assets and \$50 million or more in liabilities, aggregated for jointly administered cases and excluding single-asset real estate cases (cases where the debtor's sole asset is a piece of real property). These values are based on the information in the bankruptcy petition.

Q. When do the Guidelines take effect, and what provisions apply until then?

A. The Guidelines take effect in cases filed on or after November 1, 2013, for attorneys in larger chapter 11 cases. Until then, the 1996 Guidelines apply. On and after November 1, 2013, the 1996 Guidelines continue in effect for all other professionals and for attorneys in chapter 11 cases below the large case threshold.

Q. Overall, what do the Guidelines do?

A. In general, the Guidelines provide for:

- A showing that rates charged reflect market rates outside of bankruptcy.
- The use of budgets and staffing plans.
- Disclosure of rate increases that occur during the representation.
- Use of rates that are based on the attorney's home office location.
- The submission of billing records in an open, searchable electronic format.
- The use of independent fee committees and fee examiners.

- The use of model forms and templates for applications for compensation and expenses.

Q. Why is the USTP so concerned about “market rates” for attorneys?

A. Section 330 of the Bankruptcy Code requires courts to determine “reasonable compensation for actual, necessary services” based on factors that include “customary compensation charged by comparably skilled practitioners in cases other than” bankruptcy cases – in other words, the market rate.

Q. Under the Guidelines, how do attorneys provide information on market rates?

A. Attorneys may provide an average, or “blended,” hourly rate charged by professionals in their law firm or selected offices of their law firm.

Q. Why does the USTP want budget and staffing plans, and why require a court order for them?

A. Requesting budget and staffing plans is consistent with practices used in non-bankruptcy cases to manage legal costs. The USTP’s budget and staffing plan templates are modeled after those used by the Association of Corporate Counsel. The Guidelines provide for a court order in cases where the parties do not consent to providing a budget.

Q. Do the Guidelines permit attorneys to increase their rates during a bankruptcy case?

A. The Guidelines contain provisions pertaining to notice and approval of rate increases. Rate increases may be significant and, therefore, the court and the parties should have the opportunity to consider whether the increases are reasonable. Case law on this issue may differ from district to district, and the USTP will seek to challenge settled law where appropriate.

Q. What if an attorney works on a case in a location other than his or her home office, and market rates are different in the two locations?

A. The Guidelines allow attorneys to charge customary rates from their “home forum,” but not to charge higher rates in a case pending in a higher priced forum.

Q. How does the USTP enforce the Guidelines?

A. USTP staff adhere to the Guidelines when reviewing and commenting on the fee applications of attorneys. Only the court has the authority to award compensation and reimbursement under section 330 of the Bankruptcy Code. If litigants challenge the Guidelines by asking the bankruptcy court not to follow them, the USTP will vigorously defend the Guidelines and file appeals as appropriate.

Process for Updating the Guidelines

Q. Was the public involved in the updating process?

A. Yes, the USTP went to great lengths to solicit public input on the proposed Guidelines. In November 2011, the USTP posted an initial draft and invited public comments. In June 2012, the USTP conducted a public hearing at Department of Justice headquarters in Washington, DC. In November 2012, the USTP posted a second draft, which included an analysis of the comments on the first draft, and invited comments on the second draft before promulgating the final Guidelines.

Q. Why did the USTP publicize the proposed Guidelines so widely?

A. The Guidelines represent a significant step forward in increasing transparency and accountability in chapter 11 professional fees. While the Guidelines are not subject to the notice and comment process of the Administrative Procedure Act, the USTP publicized them widely because of their importance to the bankruptcy system and the extraordinary amount of interest in them.

Additional Information

Q. What about the USTP Guidelines for other types of professionals and cases?

A. These Guidelines are part of a multi-step revision process. Until the USTP adopts superseding guidelines in the next phases of revisions, the 1996 Guidelines will continue in effect for the review of fee applications filed in large chapter 11 cases by professionals who are not attorneys; in all chapter 11 cases below the large case threshold; and in cases under other chapters of the Bankruptcy Code.

Q. Where are the Guidelines published?

A. In addition to being posted on the USTP's Web site, the Guidelines will be published in the Federal Register.