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January 30, 2012

VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Executive Office for United States Trustees
20 Massachusetts Avenue, N.W.
Eighth Floor
Washington, D.C. 20536

Re: Comments on Proposed Fee Guidelines

Ladies and Gentlemen:

The attached "Comments From 119 Law Firms" (the "Comments") are submitted to you on behalf of the 119 law firms listed as signatories at the end of the Comments.

The Executive Office for United States Trustees should feel free to contact any of the individual representatives of the signatory firms, whose names are listed below.

Yours very truly,

D. J. Baker

D. J. Baker

cc (via electronic mail): Individuals listed on the attached Exhibit A

EXHIBIT A

FIRM	REPRESENTATIVE(S)
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COMMENTS FROM 119 LAW FIRMS

Regarding the Proposed Guidelines (the "Proposed Guidelines") for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases

In November 2011, the United States Trustee Program ("USTP") published the Proposed Guidelines for chapter 11 cases under the Bankruptcy Code in which the debtor's scheduled assets and liabilities exceed $50 million. The USTP announced an open period for public comment through January 31, 2012. These Comments express major concerns about the Proposed Guidelines by a significant number of law firms regularly engaged in debtor and committee representations in chapter 11 cases. The firms signing this letter represent a diverse cross-section of law firms, with firms of all sizes and from all parts of the country joining in these Comments.

Introduction

A key reform that Congress incorporated into the 1978 Bankruptcy Code was existing section 330, which established a public policy of compensating professionals in bankruptcy on a basis comparable to the compensation that they receive outside of bankruptcy.[1] This change in public policy, coupled with the changes in reorganization law represented by chapter 11, has been a huge success. Prior to 1978, compensation in bankruptcy practice was governed by the standard of "economy of administration," with professionals largely being compensated at less than their customary rates on the basis of what was cheapest for the estate. As a result, many talented lawyers avoided the field, and virtually no major law firm had a bankruptcy practice.

Section 330 changed all that and, along with the adoption of the expanded reorganization provisions of chapter 11 of the Bankruptcy Code, gave rise to expanded domestic and new international services in the United States reorganizing major U.S. and global corporations.[2] The services of major law firms are now widely available in bankruptcy cases, and companies from

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[1] *See* 124 CONG. REC. 33, 994 (1978) (Joint Explanatory Statement) (remarks of Sen. DeConcini), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6511 ("[T]he policy of this section [330] 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 a bankruptcy code.").

[2] *See* Keith J. Shapiro & Nancy A. Peterman, *The Bankruptcy Reform Act of 1994 and Professional Fee Awards*, 1996 ANN. SURV. BANKR. L. 9, 3 (1996) ("Over the years, the 'cost of comparable services' standard has been successful in attracting highly skilled professionals to the bankruptcy field. In fact, after the enactment of the 1978 Code, many large law firms throughout the United States developed practice groups solely devoted to the bankruptcy practice because professionals no longer feared that their fee requests would suffer from an automatic reduction by the court.")

around the world have sought to establish a presence in U.S. venues so that they can make use of the highly specialized skills and expertise that United States lawyers have to offer them in restructuring their companies.[3]

Major companies in major industries, including airline, steel, trucking, power generation, telecommunication, and automotive firms, among others, have in turn reorganized in chapter 11, and along with their successful reorganizations, have continued as viable businesses employing millions of people and avoided the higher job losses that would have followed from liquidations.[4] Job losses in the auto, steel, and airlines industries alone would have been huge without chapter 11. Where the insolvency laws in most other countries result in the liquidation of troubled businesses, the Bankruptcy Code and U.S. restructuring professionals enable those businesses to keep operating.[5] The experience of the past three decades since Congress changed

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[3] *See, e.g.*, *In re Marco Polo Seatrade B.V.*, Case No. 11-13634 (Bankr. S.D.N.Y. 2011) (Netherlands-based international maritime shipping company); *In re Lyondell Chemical Co.*, Case No. 09-10023 (Bankr. S.D.N.Y. 2009) (Dutch-based international chemical company); *In re AT&T Latin America Corp.*, Case No. 03-13538 (Bankr. S.D. Fla. 2003) (AT&T Latin America's only operating companies were located in Peru, Chile, Argentina, Columbia, and Brazil); *In re Aerovias Nacionales de Colombia S.A. Avianca*, Case No. 03-11678 (Bankr. S.D.N.Y. 2003) (Colombian national airline); *In re DirecTV Latin America, LLC*, Case No. 03-10805 (Bankr. D. Del. 2003) [D.I. 3] (U.S. company but 100% of revenues generated in Latin America); *In re Cenargo Int'l, PLC*, Case No. 03-10196 (Bankr. S.D.N.Y. 2003) (U.K. based freight services company with operations in Europe); *In re United Pan-Europe Communications N.V.*, Case No. 02-16020 (Bankr. S.D.N.Y. 2002) (Netherlands-based communications company); *In re FLAG Telecom Holdings Ltd.*, Case No. 02-11732 (Bankr. S.D.N.Y. 2002) (Bermuda-based company providing international network services); *In re Global Ocean Carriers Ltd.*, Case No. 00-956 (Bankr. D. Del. 2000) (international shipping company headquartered in Greece).

[4] *See, e.g.*, Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437, 468 (1992) ("In the hearings leading up to the 1978 Code, Congress singled out a number of beneficiaries of its distributional decisions, making repeated references to protecting jobs and saving troubled businesses."); Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129, 171 (2005) (finding that without a multi-party forum like chapter 11 to enable a debtor to rehabilitate, "[t]he risk that employees would be displaced, firms would be dissolved, and the market would be flooded with workers may increase exponentially").

[5] "The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. . . . If the business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets." H.R. REP. NO. 595, 197, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179.

the standard by which professionals are to be paid in bankruptcy cases has shown the wisdom of the change in compensation policy.

Against this public policy decision and within that framework, 28 U.S.C. § 586 authorizes the USTP to adopt uniform procedural guidelines to be used by the U.S. trustee in each district in reviewing applications filed for compensation and reimbursement under § 330 of the Bankruptcy Code. Any guidelines promulgated by the USTP should, however, necessarily conform to the policy choices made by Congress in § 330 – they must be consistent with the public policy of attracting sophisticated professionals to be employed in bankruptcy cases and providing them compensation at their customary rates. Using its 1996 Guidelines,[6] the USTP has been able to exercise its statutory supervisory and administrative functions while continuing to promote the policy objectives mandated by Congress in § 330.

We are concerned, however, that certain parts of the Proposed Guidelines will produce results that depart significantly from the public policy objectives expressed by Congress in § 330, and that portions of the Proposed Guidelines effectively revert to the rejected standard of "economy of administration" in bankruptcy cases. As such, they threaten to undermine a linchpin of the domestic and international restructuring services that have developed in the United States and the infrastructure needed to save jobs through successful reorganizations.

Although many parts of the Proposed Guidelines are consistent with the precedent established by the 1996 Guidelines, some are not. We have limited our comments to those that are most troublesome. First, we point out that 28 U.S.C. § 586 does not authorize the USTP to make any additions or other alterations to the substantive requirements governing the compensation of professionals set forth in § 330, to determine what evidence is relevant to assessing the reasonableness of compensation under the statutory standard, or to establish evidentiary presumptions to govern applications for compensation.[7]

Nonetheless, we suggest that the Proposed Guidelines in several areas do just that – they attempt to impose new and additional substantive requirements on debtors, creditors' committees, and the professionals employed in bankruptcy cases that are not required by the Bankruptcy Code or the Bankruptcy Rules. They seek to require professionals to provide confidential client information, much of which may be subject to attorney-client and attorney work product protections, as well as confidential proprietary business information relevant, if at all, only to the "economy of administration" standard that Congress has firmly rejected.[8] The Proposed

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[6] 1996 Guidelines for Reviewing Applications for Compensation (Fee Guidelines), 28 C.F.R. Part 58, Appendix (herein the "1996 Guidelines").

[7] Indeed, a proposal that the USTP be allowed to issue substantive guidelines was specifically rejected by Congress. *See* S. REP. NO. 102-279, at 28 (1992) (proposing that the Executive Office of the USTP adopt "procedural and substantive guidelines"). *Compare* 28 U.S.C. § 586(a)(3) (providing only for the adoption of "procedural guidelines" by the USTP).

[8] *See* Proposed Guidelines ¶¶ C(3)(l), E(2) and Exhibits E and F (requiring comprehensive billing data in all matters across 12-month period).

Guidelines also contain requirements for retention applications – in effect seeking to modify Bankruptcy Rule 2014, which governs the content of applications for the retention of professionals.[9]

Other parts of the Proposed Guidelines appear to attempt to define what constitutes evidence relevant to the statutory standard of awarding compensation at customary rates, and establish a series of evidentiary presumptions to be applied in determining reasonable compensation for professionals.[10] Evidentiary determinations are a uniquely judicial function, not a supervisory and administrative function. It is the exclusive province of the bankruptcy courts, and ultimately the district courts and the courts of appeal, to determine what evidence is relevant in any given case to establish the statutory standards.[11]

Specific Comments

1. **The Proposed Guidelines impose a substantive requirement on debtors, creditors' committees, and their professionals that they should prepare and approve fee budgets, staffing plans, and estimates of what the debtor's professional fees would have been in the absence of bankruptcy.[12] The cost of preparing such materials would be large and consume scarce time and resonrces needed to stabilize the debtor in the early stages of a case. Further, such budgets, plans, and estimates would be, by their nature, inherently unreliable. Moreover, they have no bearing on whether the compensation requested by a professional is reasonable for the work that was actually required to be performed in the case.**

We understand and support the desire of the USTP to promote efficiency in bankruptcy cases. We submit, however, that the proposed budgeting process is ill-suited to that end. Not only will it not accomplish the purpose of promoting efficiency, we believe it will in fact add very

[9] *See* Proposed Guidelines ¶ E. The statute does not authorize the USTP to set guidelines at all regarding applications for the retention of professionals, which are governed by § 327 of the Bankruptcy Code and Bankruptcy Rule 2014. *See* 28 U.S.C. § 586.

[10] *See* Proposed Guidelines ¶¶ B(4), C(3)(l), (n), C(6), D(1)(m), (o), and (p).

[11] Issues of relevance and admissibility of evidence involve rulings of law that are subject to appeal. The Proposed Guidelines would alter the evidentiary process and related due process rights to hearings before a court on the issues, among others, of relevance, admissibility, rights to protective orders, and the appropriate scope of discovery.

It would be, moreover, a huge waste of limited estate resources to require the generation of information that is legally irrelevant and that the courts do not require.

[12] While the Proposed Guidelines do not mandate a budget in all cases, they strongly imply that budgets and staffing plans are expected and that professionals will be called on to explain deviations from them.

significant costs to the estate while providing little or no benefit. It could also cause harm by forcing the disclosure of strategic information that is subject to the attorney-client privilege and the attorney work product doctrine. It further carries with it the prospect of being used by adversaries as a tool to cause mischief for debtors, committees, and their professionals and would actually encourage litigation that would increase costs.

First, we point out that the proposed requirements of preparing budgets, staffing plans, and "but for bankruptcy" fee estimates are in effect new substantive requirements imposed on debtors, creditors' committees, and the professionals that they retain.[13] As noted above, 28 U.S.C. § 586 does not authorize the USTP to impose such requirements. To the contrary, as also noted above, the legislative history of that section discloses that a proposal to give the USTP the authority to promulgate substantive guidelines was stricken from the final statutory language.[14] Moreover, it is instructive that the Judicial Conference Committee on the Administration of the Bankruptcy System and the Federal Judicial Center expressly noted that the oversight conducted by the U.S. trustee with respect to fee applications is strictly procedural.[15]

The relevant statutory standard regarding compensation is whether the compensation is "reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under [the Bankruptcy Code]."[16] The applicable question under the law is not, in contrast, whether the fee application is within 10% of budget. Such a comparison says more about the ability to prepare an accurate budget and predict the future course of a particular case than it reflects on whether the compensation sought for the actual work performed is reasonable.

Bankruptcy is a process, not a system that produces pre-defined outcomes. As such, experience has shown that budgets are problematic because they are based on subjective judgments and predictions and are inherently inaccurate and uncertain. They become exponentially more inaccurate as the permutations a matter might take on become greater. Preparing an accurate and meaningful budget and staffing plan at the commencement of a large and complex bankruptcy case is, in fact, virtually impossible. Accurate budgets are largely a function of being able to predict the legal work that will be required to bring a particular project or matter to completion.

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[13] *See* Proposed Guidelines ¶¶ B(4)(l), C(3)(n), C(6), C(8)(a), (b), D(1)(l), (m), (p) and Exhibits B, C and D.

[14] *See supra* note 7.

[15] *See* Conference on Large Chapter 11 Cases, Judicial Conference Committee on the Administration of the Bankruptcy System and the Federal Judicial Center (2004), at 31 ("Arguably, the U.S. trustee can do only what a fee examiner would do—ensure that the description of work is accurate and expenses are documented and compare what other firms are charging for similar work in other cases. The U.S. trustee cannot delve into the substantive issue of whether an attorney should have performed a given task.").

[16] 11 U.S.C. § 330(a)(3)(F).

That in turn requires the necessary steps to be predictable and not subject to variation because of matters outside the control of those preparing the budget.

In fact, most of the factors that drive costs in a bankruptcy case are beyond the control of any party preparing a forecast or budget and are often not subject to accurate prediction. It is very often impossible to predict with meaningful accuracy what issues will surface in the case, what objections will be made, what matters participants may litigate, or the strategies that the various parties in interest may employ in pursuit of their interests in the case, let alone how those strategies may change as the case proceeds. Indeed, the permutations and alternative scenarios multiply exponentially as the size or complexity of a case grows and could be virtually limitless in some cases. The very bankruptcy cases to which the Proposed Guidelines would apply are the very kinds that, by their nature, are likely to be highly unpredictable and ill-suited for forecasting.

The preparation of a bankruptcy case budget would bear little resemblance to the kinds of budgets that clients sometimes request outside of bankruptcy. Those budgets are generally limited to staffing and budget plans for a particular transaction, or sometimes a particular piece of litigation. Furthermore, such budgets, when they are prepared for private clients, are based on a stated set of assumptions with provisions that state they are no longer applicable if the assumptions prove not to be true. Experience has shown, moreover, that the budgeting process produces useful predictions generally only for routine matters for which the steps required to reach completion have a high degree of certainty and are under the control of those preparing the budget.[17] They are best and most often used in situations where the scope of work is known and defined and the parties involved are small in number.

In contrast, a large bankruptcy case would require those preparing a budget to deal with potentially hundreds of transaction and litigation matters, and to predict the strategies and actions of dozens of parties in interest and their attorneys, if not more. Moreover, as claims are traded, changes will occur, not only to the parties and their attorneys, but also to their goals, strategies and tactics. We do not believe it is realistic to expect either a client or its lawyers to predict a budget for all transactions and all litigation (including claims that are unknown as of the time the budget is prepared) that a large and complex business will experience over a 12- to 36-month period, let alone one that would attempt to predict the endless permutations possible in a large bankruptcy case. Moreover, to do so in the detail and by the categories proposed in Exhibit B to the Proposed Guidelines would be an exercise in futility doomed to failure from the outset.[18]

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[17] For example, budgets are routinely exceeded when opposing parties undertake to protract negotiations in a transaction as a tactical strategy to gain negotiating leverage against those subject to a budget. The existence of a budget could also create an incentive for mischief and become a tool used by adversaries of the debtor or creditors' committee to gain leverage over them and/or their professionals in both transactions and contested matters.

[18] The budgeting process that sometimes occurs in connection with "carve-outs" to debtor-in-possession financing liens or cash collateral orders is not comparable. First, that process occurs largely in cases where there are few, if any, unencumbered assets, and little or no value in those assets beyond the secured debt. Because of that, such cases tend to be more focused in scope and

Beyond its lack of utility, such an undertaking would impose very significant costs on the estate. It would divert needed resources of both the debtor and its professionals from the more urgent matters that permeate the early stages of any bankruptcy case, such as stabilizing the debtor, obtaining needed financing, making payroll, and preserving key supplier relationships. The costs would not only far outweigh the usefulness or predictive value of any budget, but also involve an exercise that is irrelevant to determining the reasonableness of compensation being requested. The statutory standard for compensation of professionals is not compensation for work that they predict they will need to perform in a case, but rather *for the work that was actually necessary to be done in the case.*

Finally, the level of detail required by Exhibit B of the Proposed Guidelines would invade the attorney-client privilege and the attorney work product privilege. For example, it would force premature disclosure of the debtor's intentions regarding key contracts, disputed claims, or disposition of assets. A large budget for litigation might signal that debtor's counsel expects the possibility of litigation over certain issues, serving in effect to disclose, to the potential detriment of the debtor, creditors, and the prospects for a successful reorganization, information that is and should remain otherwise privileged and confidential under the Federal Rules of Evidence and long-standing common law doctrines.

The same problems that plague the proposed budgeting and staffing requirement also apply to the proposal to require the debtor to prepare an analysis of what its professional fees would have been outside of bankruptcy. This is a potentially enormous unnecessary cost to impose on the estate.[19] We respectfully suggest that it would also be a theoretical exercise in trying to quantify the unquantifiable based largely on speculation over what might not have been required outside of bankruptcy.

The exercise also serves no useful purpose. What costs might have been outside of bankruptcy has no bearing on the necessity of fees once a bankruptcy case is filed. Bankruptcy transactions and litigation involve procedures that differ from those employed outside bankruptcy. Sometimes those differences may add to the complexity and cost; sometimes they may be more

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of shorter duration with fewer issues. The process is rare in large, more complex cases. Secondly, when such budgets and carve-outs do occur, they involve aggregate sums representing the outer caps on total fees covering a relatively predictable fixed period of time. That is an entirely different forecasting process than the kind of detailed budgets by category proposed in Exhibit B for large and complex cases of uncertain duration.

[19] Also in the category of large unnecessary costs is the requirement that in every case and for every fee application the debtor undertake a calculation of its administrative expenses. *See* Proposed Guidelines ¶ C(9)(b). In large cases, this can be very time-consuming and costly. Although the potential for administrative insolvency is certainly relevant, in reality, administrative insolvency is not an issue in most cases. As such, periodically determining outstanding administrative expenses would be a costly exercise consuming resources without purpose. If the professionals in the case are not themselves monitoring the issue of administrative insolvency (which they have every incentive to do), the U.S. trustee can raise the issue in those few cases where it is appropriate.

efficient. In either event, comparing the two different procedures does nothing to assist in evaluating the reasonableness of the professional fees actually incurred in the bankruptcy case.

The reality is that most bankruptcy cases, particularly larger cases, are necessarily uncertain endeavors. Completely unanticipated litigation, transactions, case administration, and other expenses routinely arise, and those costs and expenses are often inherently unpredictable. Requiring a debtor to attempt to predict such expenses, or to estimate what its expenses might have been outside of the bankruptcy context, is an unrealistic, but costly exercise that will also drain scarce management resources from an already stressed debtor. In addition to being inherently speculative, these analyses are entirely irrelevant in applying the statutory standard of reasonable compensation for *the work that was actually performed in the case.*

2. **The Proposed Guidelines regarding the comparison of hourly rates seek to apply an arbitrary and irrelevant evidentiary requirement that is inconsistent with public policy governing the compensation of professionals.**

The Proposed Guidelines would require professionals to provide detailed comparisons of the hourly rates charged not only in other estate-billed matters, but also the highest, lowest, and average hourly rate ever billed in private engagements in the preceding 12 months.[20] This requirement is in effect an evidentiary proof requirement. We respectfully suggest that 28 U.S.C. § 586 does not authorize the USTP to make rules of evidence or determine required proof. The determination of those factors is uniquely the province of the Federal Rules of Evidence and the bankruptcy court. It involves rulings of law subject to due process requirements, including rights of appeal.

Moreover, the Proposed Guidelines' evidentiary requirements are based on assumptions and premises that would result not even in comparing apples and oranges, but a comparison more akin to apples and peas. Both are somewhat round, but the similarities end there. The standard set by Congress for the compensation of professionals is whether the compensation is reasonable "based upon the <u>customary</u> compensation charged by comparably skilled practitioners in cases other than cases under [the Bankruptcy Code]."[21] The Proposed Guidelines and their search for the lowest rate charged by any professional at a given level of experience in the last 12 months are, in this critical respect, an improper and inappropriate reversion to the "economy of administration" standard that was expressly rejected by Congress when it enacted the Bankruptcy Code.

Numerous factors affect the circumstances under which law firms provide discounts to clients from customary rates and the lowest rate that might happen to have been charged to any client in any given period.[22] Similarly, numerous factors affect the highest rate that might be charged in

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[20] *See* Proposed Guidelines ¶¶ C(3)(l), C(7)(a), (b), E(1)(d) (e), E(2), and Exhibits E and F.

[21] 11 U.S.C. § 330(a)(3)(F) (emphasis added).

[22] Those factors include, among others, the type of work, the duration of the relationship, the prospects for future business from that client, the volume of likely future business, the overall

any 12-month period, including negotiated premiums, results obtained, discounts provided for certain other kinds of work to that same client, and usual and customary market rates for particular kinds of transactions, such as mergers and acquisitions and capital markets transactions where hourly rates are generally higher. However, the lowest rates charged to any client worldwide in any particular 12-month period, as well as the highest rates charged, are not relevant to § 330 of the Bankruptcy Code, which expressly states that the standard for the award of compensation is "the <u>customary</u> compensation charged by comparably skilled practitioners in [non-bankruptcy cases]".[23] By definition, discounts are not customary compensation, else they would not be discounts. They are given because the circumstances are not customary. The same is true for write-offs and other special circumstances that would give rise to the lowest rate ever charged. Similarly, the average rate charged is in turn affected by the highest and the lowest rates, and is therefore also not relevant to whether the compensation is reasonable and at customary rates.[24] The statutory standard is the <u>customary charge</u> and whether the overall compensation sought is reasonable in the particular circumstances of the case.

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blended rate realized from the entire client relationship, the volume of discounted work versus the amount of work billable at usual and customary rates (or premium rates), the possibility of premium above usual and customary hourly rates for other work from that client, staffing requirements for the work, whether the transaction closed, whether premium rates are paid on closed transactions, promptness of payment, difficulty of the billing and collection process, credit risk, whether bills require court approval, and whether the client agrees to reimburse usual and customary expenses or requires the absorption of additional expenses into overhead. The factors that give rise to discounts do not apply to chapter 11 representations. To the contrary, the factors governing chapter 11 representations would give rise outside of bankruptcy to billings at customary (or higher) rates. The statutory standard set in § 330 is customary rates.

In addition, ad hoc circumstances applicable to a particular situation can drive special discounts and write-offs, resulting in an aberrational "lowest rate" that is representative of nothing. It is not the province of the USTP to re-write the legislative standard by seeking the disclosure of inapplicable lowest rates ever charged in an apparent effort to pursue "most-favored nation" pricing for bankruptcy cases. One of the clearest examples of this improper objective in the Proposed Guidelines is Paragraph C(7)(d), which requires a professional with every compensation application to answer the question, "Did you agree to any variations from, or alternatives to, your standard or customary billing rates, fees or terms for services provided during the period covered by the application?" This question suggests a bias presuming that bankruptcy work should be performed at rates discounted from professionals' customary rates – in direct contravention of the public policy embodied in the statutory standard of § 330 that estate professionals be compensated at their customary rates.

[23] 11 U.S.C. § 330(a)(3)(F) (emphasis added).

[24] Furthermore, when a firm has offices across the United States or worldwide, a compilation of the highest, average, and lowest billing rates solely by seniority fails to take into account geographic and practice area differences that affect billing rates. These differences can materially skew the calculation of highest, lowest, and average billing rates across a firm,

In addition, the terms of a firm's retention by other clients, including pricing information, is proprietary, confidential business information. The Proposed Guidelines, if adopted, would interfere with contractual requirements to keep such information confidential and create significant business issues and difficulties for a firm's private practices.[25]

One result could well be that firms, particularly those whose debtor and committee bankruptcy practices represent a relatively small percentage of firm revenue, simply withdraw from such representations, concluding that, when added to the existing impediments, risks and delays of getting paid in bankruptcy cases that do not exist with private clients, the interference with their private client relationships resulting from the Proposed Guidelines do not make such representations worthwhile business engagements.[26] The Proposed Guidelines may therefore have the effect of decreasing competition in the bankruptcy field and raising costs while lowering quality. Such a result is directly contrary to the public policy embodied in § 330 of the Bankruptcy Code to attract competition and high-quality representation to the field by making bankruptcy practice and compensation comparable to other practice fields.

Congress established a specific statutory procedure for the USTP to address whether an application for compensation complies with the statutory standard of § 330. That procedure is not unilaterally to seek to impose evidentiary and discovery requirements through what are supposed to be procedural guidelines. Instead, Congress provided that an objecting U.S. trustee should file a motion under § 330(a)(2), whereupon the fee application would become a contested matter subject to Bankruptcy Rule 9014 and the discovery provisions in Bankruptcy Rule 7026. For example, we do not believe that the lowest, highest, and resulting average fee rates are

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thereby rendering such data both unreliable and irrelevant for comparison in any particular bankruptcy case.

[25] One especially troubling provision is Proposed Guideline ¶ E(1)(g) requiring committee professionals in an application for employment to disclose private fee arrangements with identified individual clients just because that client or clients happen to be on the creditors' committee in a case. There is absolutely no basis for this proposed requirement.

[26] An additional problem is that compliance with these aspects of the Proposed Guidelines is logistically impossible, and calls for attorneys to certify facts that their internal systems are unable to generate with reliability. Many large firms have multiple offices throughout the United States and some throughout the world. There are undoubtedly firms that do not have centralized billing and information systems that allow them to generate information on a centralized firm-wide or national basis. Even among those that do, the current state of computerized systems, including those that are among the most advanced in the legal industry, does not permit generation of the highest and lowest rates charged anywhere in the firm in any given period, or in turn the average charged. The systems simply are not intended or designed to track across multiple offices, hundreds of billing attorneys, and thousands of individualized invoices, individual deviations from standard hourly rate cards and structures driven by ad hoc discounts, special write-offs, the permutations of individual client rate agreements, manual adjustments to bills, or the myriad other individualized factors that may come into play with respect to a given invoice. In turn, the attorney certifications regarding these matters called for by the Proposed Guidelines simply are not feasible. *See* Proposed Guidelines ¶ C(7).

legally relevant under the statutory standard or an appropriate topic for discovery. The appropriate scope of discovery, relevance and required proof are all legal issues subject to hearing and determination by the court, with rights to seek protective orders and appeal rulings of law. The debtors, committees, and their professionals are entitled to have access to the judicial process for the determination of these issues, rather than to have the outcome of those issues de facto imposed through purported administrative guidelines.

We therefore urge that the Proposed Guidelines be re-focused on providing procedural guidelines that are consistent with promoting the public policy embodied in the statutory standard and relevant to whether the compensation sought is consistent with the customary rates charged in non-bankruptcy cases. We do not dispute that customary rate information is relevant, or that, if challenged under § 330(a)(2), professionals must meet their evidentiary burdens.

3. The Proposed Guidelines apply several arbitrary evidentiary presumptions that are neither rational, consistent with the standard of compensation set forth in § 330 of the Bankruptcy Code, nor authorized by the USTP enabling statute, 28 U.S.C. § 586.

The Proposed Guidelines incorporate several other provisions that are based on the "economy of administration" standard that Congress rejected in § 330 of the Bankruptcy Code, rather than furthering the public policy of promoting a high-quality bankruptcy practice with compensation comparable to the customary compensation available in private representations.

In addition to calling for the production of irrelevant and costly budgets, staffing plans, "but for bankruptcy" analysis, and comparisons of highest and lowest rates ever charged, the Proposed Guidelines also apply a number of arbitrary evidentiary presumptions designed to deny professionals compensation for actual services rendered that would be paid to them in the private sector.[27]

One example is the presumption that compensation should be denied for the attendance of more than one professional at court hearings.[28] The reality is that it is not possible adequately to represent a debtor or creditors' committee with one attorney at most hearings in large cases covered by the Proposed Guidelines, and certainly not on a motion day when a multi-page agenda of motions is scheduled to be heard. Matters subject to trial and requiring the introduction of evidence always require at least two, and often more attorneys adequately to manage exhibits, witnesses, and the flow of the hearing and trial process. In a large case, different attorneys are responsible for different motions and matters. No one attorney can handle everything. Each needs to appear to handle their assigned matters. It would be more costly and

[27] *See* Proposed Guidelines ¶¶ B(4), C(5), C(7) and D(1).

[28] *See* Proposed Guidelines ¶¶ B(4)(b) and C(5)(g). Subcategories 15 and 16 of Exhibit A to the Proposed Guidelines seem to assume that only one attorney will present at a hearing, and all others will simply sit silent. This, of course, is usually not the case, but instead multiple attorneys often address the court regarding the various matters that each is handling, or additional attorneys present may be handling exhibits and witnesses.

inefficient to require one attorney to learn everybody's respective matters and then report the results of the hearing later, than it is for the attorneys to handle their respective matters themselves. This is particularly so for courtroom matters, where in-depth familiarity with the law and facts governing motions before the court is indispensable to adequate client representation and an efficient hearing process. Limited familiarity with the matters before the court can result in disrupted hearings and waste judicial time. Moreover, when any part of a matter requires a partner to handle it, the one-attorney rule would add to the cost of the case by denying the debtor and the committees the benefit of lower associate rates for those aspects that can be handled by an associate, in effect requiring instead that everything be handled by a partner with a higher billing rate.[29]

The provision denying compensation for reviewing time details for conformity to the unique billing and fee application requirements of bankruptcy and redacting privileged information is also contrary to the public policy expressed in § 330 of the Bankruptcy Code.[30] The bankruptcy fee application process imposes a host of requirements that do not exist in private practice or apply to private bills, and professionals are entitled to be compensated for the cost of complying with them. Outside of bankruptcy, bills sent to clients are not subject to review by adverse parties in interest or the public at large and do not need to be redacted for privileged information. Moreover, contrary to the assumption in the Proposed Guidelines, debtor and creditors' committee clients are entitled to see a bill that is not redacted in order to perform their obligations to review the work of their professionals. Redacting privileged information from such bills before they become public is legally required to preserve such privileges.

The Proposed Guidelines also improperly deny professionals their reasonable compensation for defending or explaining fee applications or monthly invoices.[31] The rationale in the Proposed Guidelines that such time would normally not be compensable outside of bankruptcy, fails to recognize that these are costs that professionals only bear inside of bankruptcy through the requirement to file fee applications that subject their compensation to public scrutiny. Denying compensation on this basis is contrary to § 330(a)(6), which recognizes that compensation may be awarded for the preparation of fee applications.

Another rule incorporated into the Proposed Guidelines that functions to deny professionals compensation at customary rates for services actually performed, is the rule presumptively denying compensation for the time of any professional that bills less than 15 hours in any 120-

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[29] As a common example, an associate may have primary day to day responsibility for most aspects of a particular matter and therefore have the most in-depth knowledge of relevant facts, but a partner with greater courtroom or trial experience is required to attend the hearing. Indeed, admission to the trial bar is required by local rule in many jurisdictions to conduct evidentiary hearings.

[30] *See* Proposed Guidelines ¶¶ B(4)(e), C(7)(f) and (g).

[31] *See* Proposed Guidelines ¶ B(4)(j).

day period.[32] There is simply no rational basis to presume that such billings represent unnecessary or duplicative time. It is more likely that billings in any given period that are under the arbitrarily set 15-hour limit represent the savings obtained for the estate by calling upon those with specialized expertise who are able to deal with the relevant legal issues with minimal time. A large bankruptcy case requires professional services that extend across wide swaths of the law, often involving areas of highly specialized expertise. One of the efficiencies that full-service firms can provide is the ability often to address such areas of specialty with minimal legal research. The public policy of § 330 is to encourage full-service firms with this expertise to make it available to businesses that seek to reorganize.[33] Outside of bankruptcy, professionals are not asked to justify every use of such expert services. It violates the public policy of § 330 to require it in a bankruptcy setting, and indeed, directly undercuts one of the primary objectives of Congress in enacting § 330.

Similarly, there are instances in which a discrete research or drafting project can be most efficiently handled by assigning it to a lower rate attorney. Such projects may not require familiarity with other aspects of the bankruptcy case, and the assigned individual may not have other involvement in the matter. An arbitrary 15-hour limitation would again operate to penalize legitimate professional judgments on how best to meet the client's needs.

4. Applications for retention are governed by Bankruptcy Rule 2014.

The statutory provisions authorizing the USTP to promulgate guidelines are limited to guidelines respecting applications for compensation of professionals. No statutory authority allows the USTP to specify the contents of or requirements for professional retention applications. Accordingly, Section E of the Proposed Guidelines should be withdrawn in its entirety.

<u>Conclusion</u>

The bankruptcy fee application process is already a burdensome, resource intensive process that provides far more information than is normally provided outside of bankruptcy. Applications for compensation are reviewed by the parties in the case, the U.S. trustee, and the court. We respectfully urge that the Proposed Guidelines would unnecessarily make that process even more burdensome, time consuming, and costly without improving the administration of cases.[34]

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[32] *See* Proposed Guidelines ¶ D(1)(o) and Exhibit C.

[33] Significantly, "[b]ankruptcy judges who have handled mega-cases recognized the benefit of attorney expertise in a complex case, and while local counsel can be of assistance, mega-cases require experienced counsel." Conference on Large Chapter 11 Cases, *supra* note 15, at 27.

[34] Another example of a simply unworkable requirement in the Proposed Guidelines is Exhibit A, which requires time to be categorized into 1 of 24 categories and 1 of 20 subcategories under each category, for a total of 480 categories and subcategories. The Proposed Guidelines also require time to be billed in tenths of an hour. When the two are combined, it means that attorneys are to decide for every discrete task which of 480 possible categories and subcategories that task falls under. For some isolated tasks involving only a tenth of an hour, it may take

The existing 1996 USTP Guidelines have worked in a manner consistent with the public policy embodied in § 330 of the Bankruptcy Code. While they have been in effect, talented professionals have been encouraged to enter the bankruptcy field, major law firms have devoted the resources and developed the expertise needed to restructure major international corporations, and the United States has become an international center for rehabilitating businesses – rather than liquidating them – and ultimately saving jobs. Major parts of the Proposed Guidelines are contrary to the public policy that has produced these results and are clearly improperly focused on seeking to re-establish "economy of administration" as the standard of compensation in bankruptcy cases, even though Congress has long since rejected this standard.

In light of the significant and widespread concerns[35] that exist regarding the Proposed Guidelines, we respectfully suggest that before proceeding further to issue revisions to the 1996 Guidelines, the USTP convene a series of meetings with practitioners, judges, and debtors and creditors' committees from larger chapter 11 cases, to discuss the USTP's concerns with the current fee process and hear and solicit views on the relevant issues from the participants.

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longer to figure out the right category and subcategory than the substantive time being billed. Moreover, many projects in larger cases have multiple lawyers working on the project, often including lawyers from practice areas that are unfamiliar with the parlance and categories of bankruptcy practice. The number of categories and subcategories in common use today is a fraction of the 480 that the USTP proposes to mandate for the first time. Yet one of the most time-consuming, difficult, and costly aspects of preparing any fee application even today under the 1996 Guidelines is reconciling into consistent categories and subcategories the time of what may be dozens of attorneys during any fee application period. Extending that process to 480 categories and subcategories *for every discrete task billed in tenths of an hour* is simply unworkable. No client outside of bankruptcy requires anything even remotely approaching such an undertaking. It would be an enormously costly exercise to pay for, while returning information of marginal benefit at best that is simply not necessary to evaluate the overall reasonableness of a bill or fee application. There is such a thing as too much detailed information which costs far more to generate than the benefit provided by the detail, and this requirement falls squarely under that umbrella. Standardizing the categories for billing time in bankruptcy is a commendable objective, but the number of categories and subcategories should be drastically reduced. As set forth in the Conclusion above, we urge the USTP to work with the bankruptcy bar to come up with an approach that is feasible.

[35] While all the Comments set forth herein do not necessarily reflect the views of every signatory firm or of every practitioner in every firm, they do reflect widespread concern among bankruptcy professionals with the Proposed Guidelines.

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