FOLEY

FOLEY & LARDNER LLP

ATTORNEYS AT LAW
402 W. BROADWAY, SUITE 2100
SAN DIEGO, CA 92101-3542
619.234.6655
619.234.3510
WWW.FOLEY.COM

619.685.4651

MEMORANDUM

CLIENT-MATTER NUMBER
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TO:

FROM: Victor A. Vilaplana

DATE: January 26, 2012

RE: Comments re US Trustee Guidelines

This comment is submitted by Foley & Lardner LLP in response to the new proposed guidelines for reviewing application for compensation and reimbursement of expenses filed under 11 U.S.C. § 330 by attorneys in larger Chapter 11 cases (the "Proposed Guidelines")[1] and published for public comment by the U.S. Trustee (the "UST") on November 4, 2011.

We applaud the UST's efforts to achieve very laudable goals in connection with the compensation for all professionals, not just attorneys[2]. We understand the goals of certain of its recommendations (for example, encouraging the adoption of budgets), but believe that many require further refinement. We also agree that greater use of electronic filing is a "best practice" and probably also inevitable.

However, certain of the Proposed Guidelines seems, to us, to ignore the realities of market forces at play in employment by estate professionals, impose very burdensome tasks on the professionals without a proportionate benefit to the estate, infringe on the attorney-client relationship, create an employment and compensation model which is different from the model

[1] 28 U.S.C. § 586 empowers the UST to review in accordance with procedural guidelines . . . applications filed for compensation and reimbursement under Section 330 of title 11." Thus the whole of part E of the Proposed Guidelines exceeds the authority granted under 28 USC § 586 since such section deals with applications for employment not applications for compensation or reimbursement.

[2] It is not clear why these Proposed Guidelines are being imposed only on attorneys and no other professionals, nor is it clear that such unequal treatment can be legally justified. [check this with Simon]

used in any other employment arrangement, lead to an increase the costs of administration, and create disincentives for experienced and knowledgeable practitioners to represent debtors, trustees or committees.

I. Market Forces

The Proposed Guidelines are intended to cover "larger Chapter 11 cases" and such cases are defined as cases where assets and liabilities exceed a combined total of $50 million. This threshold seems quite low. According to the ABI Chapter 11 Fee Study (using 2004 case data), the average Chapter 11 debtor had assets of $21.2 million and liabilities of more than $37 million. These numbers are most likely larger now.

In addition, from experience, the legal market for representation of debtors, trustees or official committees in middle market cases is extremely competitive. The use of "beauty contests" is very common and may be the norm in larger Chapter 11 cases. In these interviews, proposed counsel is inevitably asked about billing rates, expertise, staffing, expense reimbursement policies, and is quite often asked for a discount from the quoted rates.[3] Therefore, the market for professionals in the larger cases is already at work ensuring that its professional fees and employment terms are fair and reasonable under the circumstances of the case.

In addition, once employed professional fees are subject to the scrutiny of the U.S. Trustee in the case, other parties and ultimately the court. Such degree of review is already highly unusual in most client-professional relationships. Therefore, sufficient competition at the outset and review during the course of the case exists to provide assurances that professionals are not being compensated excessively.

II. Burdensome and Impractical

The Proposed Guidelines impose burdens on estate professionals which are extraordinary, not consistent with normal practices, and impractical. Many firms now have offices throughout the U.S. and in foreign countries. Different fee arrangements may be in existence between the firm and certain of its clients based on volume of generated work, nature of work, secundment of attorneys to the client, unique expertise of particular attorney, nature of matter (e.g., contingent fee), and other factors. Currency exchange rates are volatile and therefore fees in dollar terms may change frequently and without notice. In addition, with the pressure upon firms to enter into alternative fee arrangements, firms now have contingent fee arrangements, fixed fee arrangements and escalated pricing mechanisms based upon various contingencies. Given the different fee arrangements and the number of attorneys in large firms separately negotiating fees and alternative fee arrangements, it would be impossible in to provide accurate billing comparisons on billing rates in certain of those situation (e.g. fixed fee

[3] With respect to expertise, we suggest that the UST add to B(3) certification of estate professionals by a professional body as a factor in determining whether the UST will comment on a fee application.

arrangements). To the extent such information could be provided and compared, such comparison would be meaningless and irrelevant in other situations (e.g. volume discount fees), and could result in disclosure of proprietary and confidential information by the firm.

In addition, collecting such information, verifying the accuracy, coordinating with the firm's various offices and accounting department will undoubtedly require additional time by counsel. If it is billed to the estate, it will increase administrative expenses. If not billed to the estate, it will not permit reimbursement of attorneys in a manner comparable to non-bankruptcy matters, contrary to the intentions of Congress in 11 U.S.C § 330.

III. Excessive Micro Management

The Proposed Guidelines require excessive detail and impose unreasonable limitations. For example, B(4)(f) appears to require that entries under 0.5 hours have detailed tasks separately identified and billed. However, many tasks (court appearances, preparation of memoranda, meetings) exceed 0.5 hours and are not susceptible to being broken down into tasks. B(5)(a) refers to the prorating of expenses and it should be made clear that this does not apply to cases which have been administratively consolidated. B(5)(e) does not reflect that long distance calls, heating and cooling for weekends, and other such expenses are not "overhead" to the extent that such expenses would not have been incurred during normal business hours and may be typically charged to a specific client whose specific client's requirements necessitated their incurrence. C(3)(m) should not apply if the court approved employment application permits regular annual fee increases. C(3)(n) appears burdensome and the costs associated with counsel attempting to estimate such fees and expenses outweigh any possible benefit to the estate. C(10)(e) requiring a reason for each expense seems entirely unjustified. Certain items should be explained but others (copying charges, long distances calls, etc) need not be.

These are but a few examples where the Proposed Guidelines excessive detail request will burden counsel and the estate (through higher costs) with no corresponding benefit of the estate.

IV. Conclusion

We understand that additional comments from 119 law firms, Foley & Lardner LLP being one of them, are being submitted to the UST. These are our separate comments which supplement and to some extent repeat the comments from the 119 law firm.