

Statement on the United States Trustee Program's Proposed Professional Fee Guidelines
for Large Chapter 11 Cases

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Bankruptcy is one of several contexts in which federal courts oversee professional fees. Bankruptcy sales and restructurings are not purely private transactions; professional fees associated with the court-approved sale or restructuring of a financially distressed firm are a matter of public interest.

Congress authorized the United States Trustee Program to be directly involved in fee review, and to issue guidelines to facilitate this process. It is advantageous for the USTP to utilize and improve its use of this authorization for at least three reasons. First, structurally, an administrative body is in a better position than courts to engage in a multi-disciplinary analysis of professional fees. Second, it can promote transparency and uniformity on a wider scale (although here that result depends to some extent on court adoption). And third, it enables courts to review evidence in a more traditional adversarial setting to the extent that a fee application would otherwise be uncontested, as is often the case.

Even if the market for chapter 11 services were working perfectly (and some evidence, albeit contested, suggests otherwise), professional compensation inherently creates public perception challenges for the bankruptcy system, especially given the sacrifices that stakeholders to a bankrupt corporation are expected to make. Greater transparency in fee applications would reduce concerns and address allegations that professionals are overly compensated for unnecessary work and diverting value. Decades of social psychology "procedural justice" research suggest that stakeholders evaluate the legitimacy of government procedures and institutions in part by their assessment of the fairness of the process rather than strictly by the outcome.

In its efforts to update the guidelines, I would respectfully encourage the USTP to focus first on procedural matters that would address these issues head on, the centerpiece of which is submission of fee applications in searchable and sortable formats. This would enable efficient evaluation of individual cases as well as apples-to-apples comparisons across cases, and could substantially increase public confidence in the bankruptcy system. Because the Bankruptcy Code also requires consideration of non-bankruptcy services, the "Customary Compensation" proposal in the National Bankruptcy Conference's supplemental comments could be pursued at this phase as well.

Retaining a relatively modest scope for the initial fee guideline expansion could increase the number of courts willing to adopt the guidelines quickly. Furthermore, analysis of the data gathered from fee applications submitted in searchable and sortable formats might well inform the direction of more specific guidelines down the road. I therefore would suggest a temporary deferral of consideration of other proposed guidelines.