



September 21, 2012

Director Clifford J. White III
Director, Executive Office for
United States Trustees
20 Massachusetts Avenue, N.W.
Washington, D.C. 20530

Re: United States Trustee Proposed Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases (“**Proposed Guidelines**”)

Dear Director White:

Managed Funds Association¹ (“**MFA**”) appreciates the opportunity to provide comments concerning the Proposed Guidelines and welcomes the effort of the United States Trustee Program (“**U.S. Trustee**”) to review and update the existing guidelines.

The Proposed Guidelines are far-ranging as the U.S. Trustee addresses its avowed goals to enhance transparency, efficiency, and accountability in the system governing compensation and reimbursement of bankruptcy professionals. MFA is particularly supportive of the U.S. Trustee’s aim to ensure that bankruptcy professional fees are subject to the same client-driven market forces, scrutiny, and accountability that apply in non-bankruptcy engagements.

We will direct our comments and suggestions primarily to the comparable services standard governing the review of attorneys’ fees and the disclosures and information to aid parties in determining whether fee applications satisfy the statutory requirements for reasonable and necessary fees and expenses. We think that MFA’s perspective is distinct and specially informed. MFA members include many of the economic stakeholders that are investors in Companies in bankruptcy and therefore have a real economic interest in ensuring that value is maximized for all

¹ The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.

stakeholders. As well, MFA members are active consumers of legal services in the non-bankruptcy setting thus giving the MFA a unique perspective in commenting on the Proposed Guidelines.

We recognize that Chapter 11 cases have increased in size, complexity, and litigiousness, all factors contributing to increases in professionals' compensation. But we observe that many of these factors are present in engagements by counsel in non-bankruptcy engagements and as clients of law firms, we believe that the demands on counsel of the caliber involved in the highest profile cases generally does not differ between bankruptcy and non-bankruptcy engagements.

Based on our experience, we share the perception that bankruptcy compensation has moved from the economy of administration standard to a premium standard by which bankruptcy professionals are effectively compensated at rates higher than those realized in comparable non-bankruptcy engagements.

This is an informed observation. Many of our members are parties in interest in larger Chapter 11 cases and retain many of the same Chapter 11 professionals for non-bankruptcy engagements. The market for legal services outside bankruptcy is, in our view, competitive and the standard compensation based on fixed hourly rates is yielding somewhat to alternative approaches.

In recent years, our industry has sought and obtained major controls on the costs of outside counsel. These controls take many forms and frequently involve some form of discount on rates or billings. Outside of the bankruptcy field or in bankruptcy engagements that are not subject to compensation under Bankruptcy Code section 330 (*e.g.*, *ad hoc* committee representations), there is a growing divergence between professionals' "published" rates and the rates actually charged – "effective" rates – or compensation obtained based on those rates. In bankruptcy cases, we do not perceive the same cost control-driven constraints and commend the U.S. Trustee's efforts to introduce these considerations into the bankruptcy compensation system.

We are mindful of the concerns and objections lodged by many professionals regarding the Proposed Guidelines, including apprehension about disclosure of proprietary or confidential information and the burdens of compliance. However, many comments were resistant to any change and concluded with what cannot be done.

We think that additional disclosures are necessary to assure that compensation applicants are satisfying the statutory burden to demonstrate that compensation is reasonable based on comparable services. In particular, disclosures should address "effective" rates – what do professionals actually charge and collect. We also think that any new guidelines should be flexible to accommodate the changing compensation landscape.

In MFA's experience, "effective" rates reflect various forms of prevalent discounts provided to clients of law firms. These discounts may take the form of a negotiated discount to the published hourly rate, a write-off of a legal bill, or limits to step-ups in hourly rates, among other alternative fee arrangements.

We find constructive the approach suggested by the National Bankruptcy Conference ("NBC") in their Supplement to Comments on the Proposed Guidelines dated February 27, 2012 ("Supplement"). The NBC espoused the use of non-exclusive safe harbors to provide alternative methods by which professionals could satisfy their statutory obligations. The NBC options involved (a) law firm certification concerning rates customarily charged by attorneys for services both inside and outside bankruptcy and blended hourly rates and (b) debtor certification regarding diligence and cost control efforts to assure that the estate is charged on a market basis.

Non-exclusive safe harbors afford flexibility and accommodate alternative compensation arrangements. They also extend some certainty to professionals seeking standards by which they satisfy their statutory obligations. While MFA does not endorse the NBC Supplement, it lauds the approach as far as it goes.

However, we find that neither the NBC Supplement nor other comment and suggestions sufficiently recognize the pervasive use of discounts in professional compensation arrangements. Discount arrangements are more pervasive than the NBC or other professionals will concede. They are regularly sought and given in non-bankruptcy engagements; therefore, we think that any safe harbor should measure the market by the effective discount provided in non-bankruptcy engagements.

As one commentator noted, over three-quarters of "alternative billing arrangements" outside of bankruptcy involve discounts. See Transcript dated June 4, 2012 of Public Meeting of U.S. Trustee on the Proposed Guidelines, at pp. 138-39 (Comment of Nan Roberts Eitel, Associate General Counsel, Executive Office for U.S. Trustee, citing ALM benchmarking survey).

Consequently, we think that the Proposed Guidelines should require more explicit disclosures concerning discounts provided by attorneys in non-bankruptcy arrangements. This disclosure may be included in a safe harbor, but should be more plainly and overtly referenced than capturing it in a "blended rate" as the NBC proposed.

We have also observed that debtor entities engage many professionals during the Chapter 11 case to provide services substantially similar to those provided prior to the bankruptcy filing. In those instances, we think that the professionals should either extend any discount arrangement provided in the 12 months prior to the petition date or provide an explanation why the discount was not extended to the debtor client.

We note that the NBC Supplement proposed scheduling an early status conference with the U.S. Trustee and, perhaps, the Court, regarding legal fee matters. Supplement, at p. 6. We think that a conference early in the case would be helpful and that all parties in interest should be eligible to attend.

We reiterate our appreciation for the opportunity to comment on the Proposed Guidelines and are available to address any questions that you may have regarding our comments.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director,
General Counsel