MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

November 23, 2012

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

Re: Updated Proposed Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases

Dear Director White:

Managed Funds Association ("**MFA**") [1] appreciates the opportunity to provide additional comments to the United States Trustee Program ("**U.S. Trustee**") on its Updated Proposed Guidelines for reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330[2] by Attorneys in Larger Chapter 11 Cases ("**Updated Guidelines**").

MFA supports the effort of the U.S. Trustee to review and update the existing guidelines; and especially endorses the U.S. Trustee's goal to ensure that bankruptcy professional fees are subject to the same client-driven market forces, scrutiny, and accountability that apply in non-bankruptcy engagements. While the Updated Guidelines will be employed uniformly by the U.S. Trustee, MFA also favors broader application and encourages their adoption by all Bankruptcy Courts to set a uniform national standard.

MFA submitted comments to the U.S. Trustee's initial proposed guidelines.[3] In that letter, MFA stated that, based on its experience, it shares the perception that bankruptcy compensation has moved from the economy of administration standard to a premium standard by

[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 many other regions where MFA members are market participants.

[2] 11 U.S.C. § 330 (a) generally provides that after notice to the parties in interest and the U.S. Trustee and a hearing, the court may award to a trustee, a consumer privacy ombudsman, an examiner, an ombudsman or a professional person reasonable compensation for actual, necessary services rendered by the person and reimbursement for actual, necessary expenses (such person is referred to in the letter as the "applicant").

[3] Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, MFA, to Clifford J. White III, Director, U.S. Trustee, dated September 21, 2012

which bankruptcy professionals are effectively compensated at rates higher than those realized in comparable non-bankruptcy engagements. We supported expanding the Updated Guidelines to require that applicants make additional disclosures to the court, the parties, and the U.S. Trustee to assure them that applicants are satisfying the statutory burden to demonstrate that compensation is reasonable based on comparable services and said that such disclosures should address "effective" rates – what professionals actually charge and collect.

As in our prior submission, MFA directs its supplemental 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.

Discounts and Alternative Arrangements – Blended Hourly Rate

MFA previously highlighted outside counsels' widespread use of discounted compensation arrangements in other contexts, which can take various forms. In particular, MFA members have observed that non-bankruptcy professionals and professionals providing bankruptcy services directly to creditors regularly agree to alternative fee arrangements; however, estate retained professionals do not.

Peer reviews that analyze fee arrangements in bankruptcy generally don't identify this compensation difference, though it is readily apparent to many members of MFA, who engage professionals both inside and outside bankruptcy. MFA agrees with the U.S. Trustee in its efforts to introduce more market-driven considerations into the professional fee arrangements in bankruptcy for estate professionals and reduce the difference between fees paid to estate-retained professionals and the terms of engagement of professionals outside of bankruptcy.

MFA supports the U.S. Trustee's approach in the Updated Guidelines of capturing discounts in making comparisons of bankruptcy versus non-bankruptcy engagements, but believes the U.S. Trustee should clarify and bolster the provisions relating to the "blended hourly rate" in the following ways below.[4]

Broader Disclosure

First, the U.S. Trustee should strengthen the provision regarding disclosure and explanation of discounts and alternative engagements. The current provision provides that alternative fee arrangements "not billed by the hour to the client but for which the applicant tracks hours and revenue by hours worked, the applicant should include this information in the calculation and explain as necessary."[5]

However, some discounts or alternative arrangements (*e.g.*, regular legal bill write-offs, limits to hourly rate step-ups, volume discounts) in non-bankruptcy engagements may not be

[4] Updated Guidelines ¶ C.3.a. Discussion of Public Comments ¶ 6.

[5] ¶ C.3.a.iv.(d).

readily captured in blended hourly rate calculation or allocated to a specific hourly timekeeper. The exhortation to "explain as necessary" may be insufficient to address this concern.

MFA suggests that the U.S. Trustee require the applicant to disclose any discount or other alternative arrangements in non-bankruptcy matters, whether tracked by hours and revenue or included in the blended rate calculation. If the applicant includes the discount or alternative arrangement in the blended hourly rate, then the applicant should also explain its calculation methodology. This disclosure and explanation will provide parties in interest with greater understanding of these arrangements and assist them in evaluating the non-bankruptcy compensation arrangements and comparing them to estate-billed bankruptcy arrangements.[6]

MFA also urges the U.S. Trustee to monitor these disclosures and explanations, especially in the period immediately following the effective date of the Updated Guidelines, and exercise its discretion to seek additional information from applicants to assure that these disclosures and explanations are adequate to achieve the purpose of the Updated Guidelines.[7]

Exclusion for Estate-billed (Section 330) Engagements

Second, the U.S. Trustee should require that the blended hourly rate for non-bankruptcy matters exclude only bankruptcy matters that are estate-billed (that is, allowed and paid pursuant to Bankruptcy Code section 330). The current provision excludes "all bankruptcy engagements" for full service law firms, while excluding "all estate-billed bankruptcy engagements" for law firms that specialize (exclusively or primarily) in bankruptcy.[8]

In MFA's experience, counsel who provide bankruptcy services that are not subject to payment under Bankruptcy Code section 330, that is, not estate-billed (for example, *ad hoc* committee representation), regularly agree to discounts and other alternative arrangements. Under the Updated Guidelines, the applicant is permitted to exclude these arrangements from the calculation of the blended hourly rate for law firms that do not specialize in bankruptcy.

MFA recommends that the U.S. Trustee amend the Updated Guidelines to provide that the blended hourly rate only exclude bankruptcy engagements that are estate-billed or subject to Bankruptcy Code section 330 allowance and payment, and that this exclusion apply to all law firms.

[6] For example, one alternative arrangement may involve writing off all time related to one matter in exchange for charging full rates in another matter with the same client. A blended rate calculation should capture that arrangement or its existence should be disclosed with sufficient detail to allow interested parties to evaluate its effect.

[7] Updated Guidelines ¶ C.4.

[8] ¶ C.3.a.iv.(a), (b).

Disclosure of Prepetition Billing Arrangements

Regarding Applications for Employment,[9] MFA commends the U.S. Trustee for including a provision on enhanced disclosure of prepetition billing arrangements that requires an applicant to state whether it is billing the client "at the same effective rates" and, if not, to state why the "effective rates differ."

As noted above, discounts and other alternative arrangements may not readily translate into an hourly billing calculation. Also, use of the term "effective rate" may create some confusion with other hourly rate terms (*e.g.*, "blended hourly rate") employed in the Updated Guidelines.

MFA recommends that the provision be simplified: (a) to require an applicant to disclose its billing arrangement with the client during the 12 month prepetition period, including discounted rates or other alternative arrangement; and (b) if the applicant has chosen not to extend that arrangement in the post-petition period, to require an applicant to explain why not.

Special Fee Review Entities – Timing and Scope of Appointment

Regarding Special Fee Review Entities,[10] the U.S. Trustee notes that it ordinarily will seek appointment of a fee review committee or independent fee examiner to "assist … in reviewing fee applications."[11] The U.S. Trustee cites the success of the fee committee in the Lehman Brothers Holdings Case.[12]

MFA appreciates the burden imposed on the U.S. Trustee and interested parties by the normal fee application and review process. However, MFA is concerned that the appointment of the special fee review entity may unintentionally reduce the obligation and duty of the client and its management to negotiate market-based compensation arrangements, to hold its professionals to a high level of accountability, and to thoroughly scrutinize compensation applications.

We believe the timing and terms of the special review entity's engagement are inadequate to offset these possible effects on the client and its management. Special fee review entities are usually limited to monitoring and reviewing fee statements and applications of retained professionals.[13] In addition, their appointment does not necessarily occur at the outset of the case, when professionals are retained and the terms of their engagement set. For example, in Lehman Holdings, the fee committee was appointed over eight months after the petition date.

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[9] Updated Guidelines ¶ D.

[10] Updated Guidelines ¶ F.

[11] *Id.* at ¶ F.1.

[12] Discussion of Public Comments ¶33; *see* Order Appointing Fee Committee and Approving Fee Protocol dated May 26, 2009 (*In re Lehman Brothers Holdings Inc, et al.*, Debtors, Chapter 11 Case No. 08-13555 (JMP) (Bankr. S.D.N.Y.)) ("**Lehman Order**").

[13] *See* Lehman Order, Exhibit A.

To address these matters, MFA recommends that the U.S. Trustee seek appointment of special fee review entities at the earliest stage of large Chapter 11 cases. Further, the scope of the fee review entities' engagement should be expanded to include active consultation with, and oversight of, the client and its management concerning: (a) the retention and professionals both at the outset and during the course of the Chapter 11 case; and (b) the terms of those retentions, which should reflect market-driven considerations.

Conflicts Co-Counsel

MFA firmly believes in proper alignment of interests and effective oversight of management and professionals. As we noted in our testimony at the first field hearing of the American Bankruptcy Institute's ("ABI") Commission to Study Chapter 11 Reform, we believe a more appropriate oversight mechanism of management needs to be established to more fully align directors and management with stakeholders.[14]

Similarly, conflicts of interest of professionals are a recurring issue in large Chapter 11 cases. The Updated Guidelines provide that retention applications should clearly specify lead counsel and clearly delineate secondary counsel's responsibility; and that the U.S. Trustee will carefully review the proposed co-counsel retention to ensure that the lead counsel does not have a pervasive conflict requiring disqualification that the retention of secondary counsel is designed to conceal or ignore.[15] Appropriate use of conflicts counsel reflects a proper sensitivity to the issue and is consistent with MFA core principles, including professional accountability and alignment of interests through undivided loyalty and necessary disinterestedness.

MFA therefore applauds the inclusion and amplification in the Updated Guidelines of the role of co-counsel for both efficiency and conflicts of interest to ensure that professionals in bankruptcy cases address both apparent and perceived conflicts of interest.

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MFA appreciates the opportunity to submit comments to the U.S. Trustee on the Updated Guidelines. We would be pleased to answer any questions that you or your staff may have regarding our comments. Please feel free to contact the undersigned or Jennifer Han, Associate General Counsel, at (202) 730-2600.

Respectfully submitted,

/s/ Stuart J. Kaswell

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

[14] *See* Written Statement of Daniel B. Kamensky, Partner, Paulson & Co., Inc., on behalf of MFA for the ABI Commission Field Hearing on Chapter 11 Reform (Oct. 17, 2012), *available at:* https://www.managedfunds.org/wp-content/uploads/2012/10/ABI-Oct-17-Field-Hearing-MFA-Testimony.pdf.

[15] Updated Guidelines, Exhibit B.