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Office of the U.S. Trustee
Region 3
833 Chestnut Street
Suite 500
Philadelphia, PA 19107

Dear Roberta,

In December of 2011, in my capacity as Chair of the Business Bankruptcy Committee of the Business Bankruptcy Section of the American Bar Association, I appointed a working group to study the proposed Guidelines of the U.S. Trustee's Office (the "Proposed Guidelines") related to large chapter 11 cases. In response to your request I asked the working group to explore alternatives to the Proposed Guidelines consistent with your policy objectives. The attached comments reflect the additional comments of the members of the working group. These comments ("Comments") are submitted on behalf of certain individual members of the Business Bankruptcy Committee (the "Committee"). They have not been approved the Section of Business Law or the House of Delegates or Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these comments was exercised by Rafael Zahralddin-Aravena and Judith Ross of the Business Bankruptcy Committee of the ABA Section of Business Law. Contributions were made by David Posner, Kit Weitnauer, Jacob Renick, Kenneth Aaron, and Lia Allen, all of whom are members of the working group.

Although the members of the Business Bankruptcy Committee of the Business Law Section who participated in preparing these Comments may be members of firms, and may have clients who might be affected by these Comments, the Comments are those of the members themselves and should not be construed as representing the views of their firms or the American Bar Association. In addition, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Sincerely,



Patricia A. Redmond

SUGGESTED MODIFICATIONS TO THE U.S. TRUSTEE'S OFFICE PROPOSED FEE GUIDELINES FOR LARGE CHAPTER 11 CASES

A working group, appointed by the Chair of the Business Bankruptcy Committee of the Business Bankruptcy Section of the American Bar Association (the "Working Group") to study the proposed Guidelines of the U.S. Trustee's Office (the "Proposed Guidelines") related to large Chapter 11 Cases, has completed that study and respectfully submits the following suggested changes to the Proposed Guidelines.¹ The Working Group welcomes discussion with the U.S. Trustee's Office regarding these suggestions.

The Working Group generally favors the following objectives (which it believes are, in substance, the same objectives the U.S. Trustee's Office sought to achieve in promulgating the Proposed Guidelines):

- To encourage efficiency of retained professionals in large Chapter 11 Bankruptcy Cases; and
- To ensure that discounts otherwise available in the market for certain types of legal and other professional work are made readily available to debtors in large Chapter 11 Cases.

For reasons more fully set forth in the letter dated January 31, 2012, from Patricia A. Redmond, the Chair of the Business Bankruptcy Committee of the Business Bankruptcy Section of the American Bar Association, addressed to the Office of the U.S. Trustee, the Working Group believes that the Proposed Guidelines would, if implemented, fail to meet their objectives. The Working Group anticipates that if the Proposed Guidelines are not modified substantially, the U.S. Trustee's Office and affected professionals will be embroiled in wasteful litigation over the Proposed Guidelines. The Working Group also believes that there is an opportunity to create a productive dialogue with the U.S. Trustee, clients, and the bankruptcy bar if best practices are collected and updated on an ongoing basis, so that clients can enjoy the most effective representation for the best results.

Before addressing the bulk of the Working Group's suggested modifications to the Proposed Guidelines, the Working Group suggests the following changes as an initial matter:

- The amount of claims and liabilities of a large Chapter 11 Case to which the Proposed Guidelines are to apply should be changed from \$50 million in assets and liabilities (which is too small) to \$100 million in assets;
- The Proposed Guidelines should apply to all professionals employed in a large Chapter 11 Case, not just attorneys. The Working Group understands that the U.S. Trustee's Office is contemplating new guidelines for investment bankers, so

¹ These comments represent the consensus reached among the members of the Working Group (who are listed on Exhibit A), but do not represent the views of 1) any individual or law firm listed thereon; 2) the American Bar Association; or 3) the Business Bankruptcy Section of the American Bar Association.

the U.S. Trustee's Office may want to consider making the Proposed Guidelines apply to all professionals except investment bankers; and

- The Proposed Guidelines should be described as “best practices” that if not followed, where applicable and appropriate, may be a basis for an objection to the amount of fees charged.

Efficiency and Discounts

In the Working Group's view, the objective of ensuring that debtors receive discounts (where appropriate) and of encouraging professionals to be efficient can best be met by proposing the following best practices:

- Replacing the complicated, cumbersome and unworkable disclosures described in the Proposed Guidelines with the disclosures required under the existing U.S. Trustee Fee Guidelines, and in addition requiring that the declaration of all retained professionals:
 - explain annual rate increases of more than 10% (exclusive of standard seniority step ups); and
 - indicate whether the increased rates are charged in recently filed chapter 11 cases that are similar in size.
- Clients are encouraged, as a best practice to explore alternative fee structures with their professionals, as permitted by 11 U.S.C. § 328, but such alternative fee structures should not be mandatory.
- The Proposed Guidelines should be modified to specify that
 - “In cases where there is more than one section 327(a) or 1103(a) general counsel, whether local counsel or otherwise, or in instances where conflicts counsel has been employed, best efforts should be made to assign the work to the appropriate firm to perform the task based upon the complexity, importance and nature of the problem, issue or task addressed, and based on whether one of the firms can handle more routine tasks more economically to take advantage of cost efficiencies. Thus, in those instances where discounts or lower rates can be obtained for handling more routine work, such as simple claims objections; simple avoidance actions; adequate assurance for utilities motions; simple executory contract rejections; and other less complex matters, debtors can take advantage of such efficiencies in the form of a lower billing rate. Failure to implement such cost saving strategies are not grounds for disallowance of fees so long as the fees charged otherwise comply with the statutory requirements related to reasonableness.”

Budgets

The Working Group does not oppose the use of budgets where appropriate:

- Budgets should, however, be employed only with respect to work that is susceptible to being budgeted, such as work that can be characterized as “routine” legal work, including:
 - simple claims objections;
 - simple avoidance actions;
 - adequate assurance for utilities;
 - simple executory contract rejections;
 - bankruptcy schedules/ SOFA’s; and
 - other routine areas of the practice.
- Budgets should not be mandatory and failure to have a budget and/or failure to adhere to a budget should not result in disallowance of fees.
- Budgets should be line item only -- not detailed.
- Budgets should never be made public.
- In those cases where the major secured lender has approved a budget and/or carve out for professional fees in a case, budgets are unnecessary.

Other Matters

The Working Group also proposes the following additional modifications to the Proposed Guidelines:

- The Proposed Guidelines should not apply to special counsel employed under section 327(e).
- The attorney declaration submitted in support of the fee application should state either 1) that the CRO or responsible in house lawyer of the debtor (in the case of debtor’s counsel) has reviewed and approved the legal fees sought in the relevant application or 2) that a designated responsible party of any creditors’ committee (in the case of creditors’ committee counsel) has reviewed and approved the legal fees sought in the relevant application.
- The Working Group believes that the existing reasonableness standard applicable in bankruptcy cases adequately addresses many of the provisions of the Proposed Guidelines. By way of example, it does not seem necessary for the fee guidelines to

contain a detailed discussion of how many associates can attend hearings in a particular case. The bankruptcy court has the power to independently decide in a given case whether attendance by multiple lawyers at a hearing is reasonable under the circumstances of that case.

EXHIBIT A

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