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January 31, 2012

Executive Office of the United States Trustee
20 Massachusetts Ave. N.W.
8th Floor
Washington, D.C., 20530

Via email USTP.Fee.Guidelines@usdoj.gov

RE: Draft Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed under USC § 330 by Attorneys in Larger Chapter 11 Cases

Dear Sir/Madam:

I am writing on behalf of the Association of Insolvency and Restructuring Advisors (“AIRA”) to set forth our organization’s comments on the above-captioned guidelines (the “Proposed Guidelines”). Thank you for this opportunity to share our thoughts and suggestions. We would be pleased to have our representatives meet with you to discuss our comments and issues.

The following comments represent the views of AIRA and not the views of any individual member of our organization.

AIRA is the leading nonprofit professional association serving financial advisors, accountants, crisis managers, business turnaround consultants, lenders, investment bankers, attorneys, trustees and others involved in the fields of business turnaround, restructuring, bankruptcy and insolvency. One of our objectives is to develop, promote and maintain professional standards of practice, as reflected by our CIRA and CDBV programs and the many regional and national conferences that we hold. It is from this perspective that we are submitting our comments.

Although the Proposed Guidelines are initially intended to apply only to attorneys in larger Chapter 11 cases, we believe that these standards may eventually apply to other professionals that are retained under §327 or §1103 of the United States Bankruptcy Code (the “Code”), such as the professionals comprising the bulk of our membership.

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While we have additional comments and concerns regarding the Proposed Guidelines, we will limit our comments to the more significant issues which we feel warrant your consideration.

Our overall concern is that the Proposed Guidelines will create further inefficiencies in bankruptcy proceedings and fail to meet their stated objectives in any meaningful way.

Potential Impact of the Guidelines

The overall impact of the Proposed Guidelines may result in the selection of professionals solely or primarily on the basis of effective hourly rates. This “race to the bottom” for professional fees may effectively result in a return to the “economy of administration” standard which prevailed prior to the Code. This standard was specifically rejected in the passage of the Code; although § 330 was enacted in 1994 to curb perceived billing abuses, the economy of administration standard was not reimposed.

We are concerned that the additional disclosure and reporting requirements, especially with regard to budgets and staffing plans, will result in unnecessary disclosure of both litigation and restructuring strategies, as well as lead to substantial costs and efforts by the professional in complying with these requirements, by the US Trustee in monitoring compliance and by the Courts in addressing the many disputes that will inevitably arise. All of these factors will be to the detriment of the stated objectives of the Proposed Guidelines.

Budgets – Benchmarking the Fee Application to the Budget and Staffing Plan

The Proposed Guidelines encourage the use of budgets and staffing plans and require explanations of budget variances exceeding 10% of the amounts budgeted, as well as explanations for the appearance of any timekeeper(s) not appearing on the staffing plan.

In our experience:

- it is not feasible to anticipate the path of a large Chapter 11 case and, as a result, any budget and staffing plan will be subject to continuous and significant modification as issues are identified by the professional and other parties-in-interest;



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- any modification to the budget and/or staffing plan will require reconciliations to previous budgets and explanations of variances to each party-in-interest, which will require substantial effort by all parties and result in decreased efficiency and increased administrative review;
- preparation of a meaningful budget and staffing plan may disclose confidential or otherwise privileged issues and such disclosure may not be in the best interests of the estate. These issues might include matters involving:
 - Litigation planning and strategy
 - Forensic investigations and issues
 - Lien perfection challenges/weaknesses
 - Down-sizing and employee layoff plans
 - Anticipated sale of a division or subsidiary
 - Director and Officer litigation
 - Valuation issues
 - Union contract issues
- Although budgets have been required in many cases involving fee committees or fee examiners, Clifford J. White III and Walter W. Theus, JR (Director and Trial Attorney, respectively of the Executive Office for US Trustees), in the December/January 2011 issue of the *ABI Journal*, stated that “The jury is out on the efficacy of budgets. Occasionally, a budget will flag potential duplication of effort before it occurs. On balance, however, the budgeting process does not appear to impose significant billing discipline.”
- Budgets for financial advisors, accountants and other non-lawyer professional are most often reactive to legal positions and issues over which the non-lawyer professional has little or no control, including many mid-stream decisions by lawyers that have little significance on legal fee budgets but have substantial impact on financial advisory, valuation or bankruptcy accounting services and corresponding budgets (see description below).

Rates and Fee Structure

Although the Proposed Guidelines are not initially presented as applying to those who are not attorneys, we believe it appropriate to comment at this time.



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Our members (other than attorneys) can be broadly referred to as Financial Advisors.

Financial Advisors are often selected in highly competitive processes known as a “beauty contest” whereby at least three potential Financial Advisors present their qualifications for the services initially contemplated, an understanding of the issues facing the Debtor and the industry in which it operates, the anticipated initial scope of the work, prior work experience and qualifications of the personnel proposed to be assigned to the engagement and the proposed rate structure. The proposed client (whether it be the Debtor, a creditors’ committee or another party-in-interest) selects its professionals based on its perceptions of ability, experience and cost. Many times, alternative billing arrangements are utilized, such as reduced hourly rates with the potential for a success fee, blended hourly rate caps, monthly billing rate caps, fixed fees, etc. These competitive forces are similar to those occurring in non-bankruptcy matters and we believe that market-driven competition and review by the many parties-in-interest, including the Courts and your organization, is the best way to control professional fees in bankruptcy proceedings.

Many of the disclosures required by the Proposed Guidelines require the disclosure of:

- the highest, lowest and average hourly rate billed during the preceding 12 months for each professional and paraprofessional for estate-billed and all other matters (if applicable); and
- whether any client was charged more or less than the hourly rates included in the application.

Due to the effect of the various alternate billing arrangements described above, the billing systems of substantially all financial advisory firms do not permit the calculation of such rates as suggested by the proposed fee guidelines. This is because the effects of the alternate billing arrangements are generally applied to the overall engagement and are not available for each individual timekeeper.

Geographic Variations in Rates

The Proposed Guidelines allow “non-forum” rates where the locally prevailing rates are lower; conversely, the US Trustee will object if professionals increase their rates based on the forum where the case is pending if they bill a lower rate where they maintain their primary office.

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The Proposed Guidelines are silent as to the proposed treatment of reducing “forum” rates to local rates as a result of geography or competitive pressures.

All of the national financial advisory firms operate on a national level and strive to bring the most appropriate personnel to each engagement, many of whom are from “non-forum” offices. This is more prevalent for financial advisors than for attorneys, since admission to practice requirements for financial advisors is generally not an issue. These firms have established national rates for their personnel, which may be reduced for local cases solely due to geography and other local competitive pressures, as noted above.

Any prohibition on the ability to reduce rates to serve in matters outside the professional’s primary forum will result in “two-tier” organizational structures—one with professionals who serve only in the “national” cases (presumably those pending in the Districts of Delaware and the Southern District of New York) and another with professionals serving only those cases pending in the rest of the country. Such stratification of abilities and experience will deny the retention of the most qualified professionals to many clients solely on the basis of hourly rates and is not in the best interests of efficiency and judicial economy. In addition, it is likely to decrease flexibility in negotiating alternative fee arrangements in the larger Chapter 11 cases.

Recommendations

We acknowledge that, at least anecdotally, fees for all professionals in large Chapter 11 cases appear to be high. However, as shown by Professor Lubben’s study, these fees need to be considered in light of the size and complexity of the cases. We suggest the following:

- Study the costs of large non-bankruptcy transactions—A successful large Chapter 11 case generally involves the transfer of the economic ownership of the Debtor to new owners. Many believe that the costs of a large Chapter 11 case are consistent with and comparable to the cost structure for similar non-bankruptcy transactions involving a change in control.
 - Recommendation- Investigate and compare the costs of changes in ownership transactions, both within and outside of the bankruptcy process



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- Study the benefits of adopting budgets and staffing plans—There are a sufficient number of recent large Chapter 11 cases employing the use of budgets and staffing plans to enable a determination of the benefits, if any, of employing these tools.
 - Recommendation—Commission an “event study” to determine whether or not there is a net benefit to utilizing budgets and staffing plans.

- Develop appropriate fee disclosure guidelines for financial advisors—As noted above, many financial advisory firms operate on a national level and almost all financial advisory firms employ alternate billing strategies. The internal accounting for these alternate arrangements generally make it impossible to comply with certain provisions of the proposed guidelines if they are made applicable to financial advisory services firms.
 - Recommendation—Work with our organization to accomplish your objectives while identifying and resolving the issues applicable to financial advisory firms.

As noted above, these are our primary concerns with the Proposed Guidelines. We would be more than happy to meet with you to discuss these concerns, and to assist with assessments of comments received on the Proposed Guidelines.

Very truly yours,

Grant Newton, CPA
Executive Director