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February 22, 2012

Executive Office for United States Trustees
20 Massachusetts Avenue, N.W.
Eighth Floor
Washington, D.C. 20536

Re: Comments on Proposed Fee Guidelines

To Whom It May Concern:

On behalf of the Boston Bar Association (BBA), I thank you for opportunity to comment on the proposed Fee Guidelines in bankruptcy. The proposed guidelines were reviewed by the BBA's Bankruptcy Section, a group of attorneys who are experts in the field of bankruptcy law.

The BBA's Bankruptcy Section believes that certain of the Proposed Fee Guidelines would have a detrimental impact on the practice of law generally and on the ability of commercial clients to access capable bankruptcy counsel. I am enclosing comments from members of the BBA's Bankruptcy Section. These individual comments do not represent formal positions of the BBA, but we hope they will be of assistance to the office of the United States Trustee as it further considers the Proposed Fee Guidelines.

If you have any questions or need further information, please do not hesitate to contact the Co-Chairs of the Bankruptcy Section Douglas Gooding at (617) 574-6517 or John Morrier at (617) 426-5900.

Sincerely,

Lisa C. Goodheart
President

cc: William K. Harrington, Esq., United States Trustee for Region 1
Douglas R. Gooding, Esq.
John T. Morrier, Esq.

Enclosure

Boston Bar Association Bankruptcy Section
Comments on Proposed Fee Guidelines

The Bankruptcy Law Section (the "Bankruptcy Section") of the Boston Bar Association ("BBA") appreciates the Office of the United States Trustee's ("UST") efforts and intentions in trying to formulate updated guidelines in response to a growing concern regarding the cost of chapter 11 reorganizations. However, after considering the Proposed Fee Guidelines, the Bankruptcy Section believes that certain of the Proposed Fee Guidelines would have a detrimental impact on the practice of law generally and on the ability of commercial clients to access capable bankruptcy counsel. Our comments are not intended to be exhaustive. Instead, we focus on the new requirements that firms disclose proprietary information regarding the lowest and highest hourly rates charged to other clients, and that firms disclose detailed project-level budgets that would otherwise be privileged and confidential.

The unanimous sentiment of the private practice bankruptcy lawyers sitting on the Steering Committee of the Bankruptcy Section was that they are opposed to the Proposed Fee Guidelines. What the Bankruptcy Section finds most troubling, was the premise underlying the Proposed Fee Guidelines – namely, that the market for legal services does not function in a manner that could temper the cost of legal services in bankruptcy cases. Your premise is flawed. Bankruptcy cases are akin to "bet the company" litigation and participants are justified in retaining the most capable professionals in times of financial crises. Companies in financial distress also understand that they have available to them a wide selection of firms offering varied degrees of qualifications, locations and rates equivalent to what would be available to a healthy company contemplating a major transaction or litigation. Indeed, it is commonplace for a financially distressed company to interview multiple law firms before deciding to retain lead bankruptcy counsel. Given the highly competitive market, the Bankruptcy Section sees no justification to increase the level of regulation from its current level. On a cost-benefit basis, there is simply no benefit to be achieved by the considerable new costs that the Proposed Fee Guidelines, if adopted, would impose on practitioners and law firms. To the contrary, as discussed below, the additional costs and burden of the Proposed Fee Guidelines are more likely to cause a retraction in the number of capable smaller firms available to assist financially distressed middle market companies.

Regulations if Implemented May Cause Firms to Exit Bankruptcy Market

Moving beyond our general policy concerns, the Bankruptcy Section is opposed primarily to the new requirements forcing firms to disclose proprietary rate information and confidential budgets. Specifically, we encourage your office to reconsider the requirement that, for each attorney in a law firm, there be disclosure of his or her lowest and highest hourly rate over the last 12 months charged to other bankruptcy clients and non-bankruptcy clients and other proposed guidelines seeking disclosure of discounted fee arrangements with other clients on other unrelated matters. We believe that these requirements go too far. Specific fee arrangements with individual clients are treated as proprietary and confidential by both firms and their clients. This requirement will give other clients and competitors of the law firm an unfair competitive advantage in what until now would have been an arm's length, bilateral, market driven process.

As an example, assume a corporate lawyer's standard hourly rate is $700, but for certain clients for whatever reason, she is billed at a 10% discount. If the firm is forced to disclose in a fee application that the corporate lawyer has charged downwards of $630 in the last 12 months, then other clients who have not received the same discount would be given an unfair advantage to try to pressure the firm into providing similar discounts. Similarly, other law firms, now armed with this proprietary information, will now have a competitive advantage in their efforts to take clients away from the disclosing firm.

We fear that this disclosure requirement will deter capable firms from agreeing to represent companies facing financial hardship. Bankruptcy is typically not the predominant practice area in a firm and many firms could make the rational and perfectly legitimate decision to not represent debtors or creditors' committees so as to avoid public disclosure of proprietary information (particularly firms that practice outside the dominant jurisdiction of Delaware and the Southern District of New York). Such an outcome would mean financially distressed companies would have fewer law firms to choose from, thereby pushing up the price for this type of legal expertise.

Alternatives Presently Are Available to the UST

An alternative approach would maintain confidentiality and preserve a level playing field in a highly competitive legal industry, while also giving the court and the UST comfort that a law firm is not intentionally inflating rates for a particular bankruptcy case. Instead of forcing firms to disclose detailed, proprietary information, a firm could be required to certify that the hourly rates being charged are comparable to those being charged by such attorneys for other non-bankruptcy clients, except in specific instances where the firm and a client may have agreed to a lower or higher rate or alternative fee arrangement. A firm can further certify that hourly rates were not increased based on regional differences (i.e., increasing the rate of a Boston-based attorney to New York levels because the case is pending in the Southern District of New York). These types of general certifications are based on trust. And it is perfectly appropriate for the UST and courts to trust that the professional making the certification has been truthful and has undertaken reasonable due diligence. Lawyers, especially, are officers of the court and there should be a presumption that they take seriously their certifications, have undertaken appropriate internal due diligence and that their statements are in fact true. In the few cases where the UST or court suspects that a certification is not accurate, the UST can object and/or request additional information that can be provided under seal. These types of discovery tools are already at the disposal of parties in interest, including the UST. It would be more appropriate to scrutinize certifications in the few cases where it might be necessary than to require all professionals to make detailed, costly and burdensome disclosures of proprietary information in all cases.

If the UST is looking for market information (at a macro level) against which to compare hourly rates and confirm their reasonableness, the UST can obtain such information from various private sources including Citibank, Hoffman Alvery and Hildebrand. These firms generate regional information on market rates for lawyers in all of the major practice areas, but without identifying the firm or lawyer. Perhaps, arrangements can be made with these companies to provide the UST rate information at a discounted price (or even for free). With this information, the UST would be able to

assess whether the rate charged by a professional is market for a particular region, and without penalizing law firms by forcing them to disclose more detailed proprietary information.

Guidelines Would Require Disclosure of Privileged and Confidential Information

Another proposed rule that has caused concern is the requirement that the fee application include detailed budgets and staffing plans. In most cases, the discussions between counsel and client regarding budgets and staffing are privileged and confidential. Moreover, this type of information would give an adversary a roadmap as to a client's strategy and ability to fund litigation. Imagine having to disclose the budget for a particular contested matter, only to have your adversary use it to adjust its tactics and perhaps drive up litigation costs in order to exhaust what it now has learned are the only funds available to the debtor for this litigation. The Proposed Fee Guidelines were unclear whether the budget to be attached to a quarterly fee application is intended to cover the remaining pendency of the chapter 11 case as well as the prior application period. However, either way, we believe that such disclosure would violate the attorney-client privilege and unfairly prejudice the estate representatives in any contested matters.

In addition to the privileged and confidential nature of budgets, there are a number of reasons why this requirement is inappropriate. First, it would be overly burdensome, if not impossible, to prepare budgets for each of the 24 project categories. Second, given the inherently unpredictable nature of bankruptcy, budgets would not be reliable and for that reason would not serve any purpose. Lastly, in almost all chapter 11 cases, postpetition financing arrangements require that a debtor operate within a budget – negotiated among the debtor, secured lender and creditors' committee, and approved by the court – that contains line items for professional fees. The UST can measure actual fees against the debtor's operational budget and see whether professionals are on or off budget without having to force debtors to disclose privileged information or produce budgets not otherwise required by the client.

Costs Associated with the Proposed Guidelines Are Substantial

Moreover, the cost to a firm of having to assemble, format and publish the required data will be significant and may require a firm to hire full-time personnel to comply with the new standards. Either the firm or the clients must absorb these costs. The result will be higher costs to clients or fewer law firms willing to invest in the technology and personnel necessary to comply, or both. In short, the Proposed Fee Guidelines penalize law firms who are willing and able to represent debtors and creditors' committees by forcing them to disclose proprietary information and incur significant cost.

The $50 million Threshold Is Unreasonably Low

Lastly, the Bankruptcy Section is concerned that the Proposed Fee Guidelines will drive up costs and reduce the pool of smaller capable firms that serve the commercial

middle market. The Proposed Fee Guidelines are intended to apply to all chapter 11 cases where the sum of the assets **and** liabilities total more than $50 million. This threshold would capture many middle market and single asset real estate cases and, frankly, is too low. By aggregating assets and liabilities, the Proposed Fee Guidelines are in effect double counting the same assets. Assets of most chapter 11 debtors are encumbered by secured debt. Under the methodology used in the Proposed Fee Guidelines, one would count both the assets and the liabilities secured by those same assets. Put simply, if you have a debtor that owns a single building valued at $25 million, and encumbered by a $30 million mortgage, they would be subject to the guidelines even though the debt is secured by the same real estate asset. Nor is the amount of debt relevant to the size or complexity of a case or company's operations. Accordingly, we suggest that the threshold be raised to $100 million in assets and exclude single asset real estate cases so as to avoid burdening smaller and mid-size firms and debtors with costly fee application compliance costs.

In conclusion, the best way to control rising costs in chapter 11 cases, assuming the problem even exists, is to have a wide and varied supply of capable lawyers to represent financially distressed companies. The Proposed Fee Guidelines would have the opposite effect and could very well drive capable firms away from the practice of bankruptcy law. Reduced supply will result in higher prices for these types of legal services. We encourage the UST to discuss our concerns with members of the Bankruptcy Section. A constructive and collaborative process should result in fee guidelines that are more widely accepted and likely to improve the administration of chapter 11 cases.

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