

# KAYE SCHOLER LLP

425 Park Avenue  
New York, New York 10022-3598  
212.836.8000  
Fax 212.836.8689  
www.kayescholer.com

January 31, 2012

Executive Office of the United States Trustee  
8<sup>th</sup> Floor  
20 Massachusetts Avenue, NW  
Washington, D.C. 20530

Re: Proposed Fee Guidelines

Ladies and Gentlemen:

This letter is submitted on behalf of the Business Reorganization and Creditor's Rights Group of Kaye Scholer LLP ("Kaye Scholer") in response to the *Proposed Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed Under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases* (the "Proposed Guidelines") released by the United States Trustee Program (the "USTP"), on November 4, 2011. Kaye Scholer has substantial experience representing clients in large chapter 11 cases, and is frequently retained as counsel on behalf of debtors and committees under sections 327 and 1103 of the Bankruptcy Code. As such, we believe that we are in a position to meaningfully comment on the Proposed Guidelines. It is our hope that the comments below serve to enhance the guidelines as eventually adopted.

While Kaye Scholer generally supports and recognizes the purposes underlying the procedures and recommendations detailed in the Proposed Guidelines, it is our view that several areas of the Proposed Guidelines are inappropriate, unduly burdensome and/or not consistent with the Bankruptcy Code. We would request modifications to ensure that the Proposed Guidelines accomplish the USTP's stated goals in the most effective and efficient way for all constituents in large chapter 11 cases, while at the same not creating undue administrative burdens on professionals.

1. Non-compensability of certain routine billing activities

Section B(4)(e) of the Proposed Guidelines suggests that the U.S. Trustee believes the following tasks deserve extra scrutiny and are potentially non-compensable: (a) preparation of monthly fee statements; and (b) redaction of bills and invoices for privilege. We believe that the Proposed Guidelines should treat these tasks which are not otherwise inherent to the ordinary client billing process as presumptively compensable (absent a showing of unreasonableness or other basis for objection).

Preparation of monthly fee applications, like interim and final fee applications, is not inherent to the customary attorney-client billing process and rather is a product of the fee application and review process contemplated by the Bankruptcy Code. This is of particular concern in view of the Proposed Guidelines' imposition of additional administrative

requirements in connection with monthly fee statements which will require professionals to devote even more time and effort in preparing the statements. A professional should not be required to bear those fees and costs (subject of course to the professional acting reasonably and undertaking the tasks in a time-efficient manner). Similarly, redaction of time entries is often necessary to preserve the ability of parties in interest to conduct a meaningful review of time records, while preserving the client's attorney-client privileges, and is not inherent to a professional's customary billing process. Reasonable, time-efficient fees and costs associated with the review and redaction of time entries should likewise be compensable as a legitimate and necessary part of the fee application process.

## 2. Billing increments

Section C(5)(c) of the Proposed Guidelines states that "time should be recorded in tenths of an hour" (*i.e.*, six minute increments). Kaye Scholer's practice is to bill clients in increments of one-twelfth of an hour (*i.e.*, five minute increments). Clients billed in five minute increments realize a cost-savings from this smaller and more accurate time measurement. To accommodate firms like Kaye Scholer which bill in increments smaller than one-tenth of an hour, we propose a modification to section C(5)(c) of the Proposed Guidelines as follows: "time should be recorded in increments no larger than tenths of an hour." Such a modification will enable firms such as Kaye Scholer to continue employing practices beneficial to their clients, in a manner which is wholly consistent with the USTP's stated goals.

## 3. Budgets and staffing plans

Section C(6)(a) of the Proposed Guidelines encourages the use of budgets and staffing plans by firms seeking payment under section 330 of the Bankruptcy Code, and states that when budgets or staffing plans are used, they should be included in fee applications. While Kaye Scholer recognizes the utility and importance, where appropriate, of budgets and staffing plans, a firm's inclusion of such documents in a fee application may very well reveal a client's strategy, and could result in a waiver of attorney-client privilege. Disclosure of such budgets and staffing plans should not be the standard protocol and should instead only be made available by agreement or by order of the Court under appropriate circumstances and on appropriate conditions. Requiring inclusion in every case may have the practical effect of discouraging the use of budgets and staffing plans in order to avoid attorney-client privilege waiver issues -- a result which would ultimately be contrary to the goals of the USTP.

## 4. Transitory professionals

Section B(4)(d) of the Proposed Guidelines states that the U.S. Trustee will consider the number of "transitory" professionals in evaluating the reasonableness of a professional's compensation. Section D(1)(o) of the Proposed Guidelines defines "transitory" professionals as professionals who have billed fewer than 15 hours in any 120-day interim period. This creates an improper presumption that the use of specialty professionals for narrowly tailored assignments and issues is somehow contrary to a client's best interests, and would seem to

discourage the use of “transitory” professionals. In fact, in large, complex chapter 11 cases, the use of specialty attorneys to provide narrowly tailored service to a client is customary, highly efficient and truly cost-beneficial and advantageous to the client. In our view, the use of “transitory” billers should not be disfavored by the Proposed Guidelines and should instead be encouraged to the extent that it creates efficiency and limits costs. At the very least, a fifteen hour definition of a “transitory” biller is too high and should be lowered to five hours.

5. Historical and comparative fee-related reporting requirements

Section E(2) of the Proposed Guidelines requires firms to disclose detailed information regarding the billing rates of various firm professionals during the preceding 12 months, including the firm’s highest, lowest, and average hourly rates billed for both bankruptcy and non-bankruptcy matters. Sections E(1)(d) and (e) of the Proposed Guidelines require a professional to indicate in its application for employment whether during the preceding 12 months, it charged any client more or less than the hourly rates quoted for the engagement at issue for the current engagement, other bankruptcy engagements, or non-bankruptcy engagements. Sections C(7)(a) and (b) require a firm’s fee application to contain the same disclosures.

We believe that these disclosures will be both overly burdensome and of limited utility to the U.S. Trustee. Law firms negotiate a wide variety of structured compensation arrangements with their clients (both bankruptcy and non-bankruptcy), often on a volume basis. Indeed, such highly negotiated, nuanced, non-hourly compensation arrangements are becoming increasingly prevalent. Requiring a firm to evaluate and compare its varied billing arrangements will be an undue burden (one which the U.S. Trustee apparently views as non-compensable), particularly so for large firms, and ultimately will not yield meaningful information for the U.S. Trustee to evaluate the fee application. In contrast, section B(1)(iii) of the existing Guidelines more reasonably requires applicants to provide a “statement of whether the compensation is based on the customary compensation charged by comparably skilled practitioners in cases other than cases under title 11.” This statement should be sufficient for the U.S. Trustee’s purposes in the majority of circumstances.

Further, requiring firms to provide such disclosures for the preceding 12 months, as opposed to on a calendar-year basis, is overly burdensome and limits the utility of the applicant’s disclosures. Almost all law firms increase their rates annually, and thus all firms that have raised their rates at the start of a calendar year will answer “yes” in the requested disclosures. Aside from the fact that all firms will invariably answer in the affirmative, the 12 month “look-back” period creates an additional layer of analytical complexity which will obligate a firm to continually update its analysis on a rolling basis each month. Thus a firm will be saddled with a significant administrative burden, which, according to the Proposed Guidelines, is viewed by the U.S. Trustee as non-compensable.

We believe that the disclosures referenced above should not be generally required, as they are of limited utility and place a substantially excessive administrative burden on applicants. If there is a particular concern raised with regard to a firm’s rates in a specific case, the USTP

has the ability to request such information either informally or through discovery. In view of the substantial administrative burden involved, case-by-case treatment rather than a universal requirement is a more appropriate way to deal with the issue.

Alternatively, if the USTP retains the disclosure requirements, we would recommend that instead of a 12-month “look-back” period, applicants should be required to provide answers to the disclosures only with respect to the current calendar year. Requiring rolling 12-month “look-back” is excessively burdensome and an administrative nightmare. Further, an exception for regular, calendar-year rate increases should be incorporated.

#### 6. Expense disclosures

Section E(10) of the Proposed Guidelines requires expense applications to specify “who incurred the expense, if relevant,” as well as the “reason for [the] expense.” Disclosure of such information is appropriate for certain types of expenses, such as lodging, travel, and meals. However, the Proposed Guidelines appear to apply such disclosure requirements to *de minimis* tasks such as photocopying. The section E(10) disclosures should not be universally required, so as not to create needlessly cumbersome expense disclosure requirements. As is currently the case, the U.S. Trustee has the authority to request additional detail in the event that it determines that there may be an issue with respect to expenses.

#### 7. Hypothetical rate and fee disclosures

Section C(3)(m) of the Proposed Guidelines requires applicants whose rates have increased since their retention to calculate the total compensation they would seek had no rate increase occurred, “for comparison purposes.” Section C(3)(n) of the Proposed Guidelines requires debtor’s counsel to provide an estimate of fees and expenses for which approval would be sought absent a bankruptcy filing. Each of these required disclosures places an unnecessary burden on applicants, forcing them to conduct analyses of limited utility and relevance in the vast majority of circumstances. In particular circumstances where the U.S. Trustee determines that such hypothetical comparisons are warranted, the U.S. Trustee has the authority to request them from the applicant on a case by case basis. Making such requirements universal would place an unnecessary burden on applicants.

#### 8. Recommended billing sub-categories

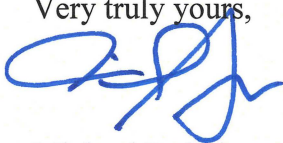
Exhibit A to the Proposed Guidelines contains 24 categories and 20 sub-categories within each project category to be used to track billed time. Section C(5)(h) of the Proposed Guidelines states that “project categories and sub-categories set forth in Exhibit A should be used to the extent applicable.” Further, applicants are encouraged to consult with the U.S. Trustee regarding the need to use sub-categories. Given the myriad potential category/sub-category combinations, use of both categories and sub-categories to bill time would place an onerous burden on timekeepers. It would also pose the risk of revealing client strategy. While the Proposed Guidelines suggest that sub-categories be used by default, we respectfully recommend that the

USTP revise the Proposed Guidelines to make clear that sub-categories should be used only where warranted due to special circumstances, in light of the added administrative burden and risk of disclosure of client strategy inherent in the use of the sub-categories.

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Kaye Scholer appreciates the opportunity to comment on the Proposed Guidelines, and respectfully requests that the USTP consider the comments and recommendations set forth above. We are prepared to meet with the USTP and its staff to discuss these matters in more detail and to respond to any questions.

Very truly yours,



Michael B. Solow  
*Managing Partner, Kaye Scholer LLP*  
*Co-Chair, Business Reorganization and Creditor's Rights Group*