NATIONAL BANKRUPTCY CONFERENCE
A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

COMMENTS OF THE NATIONAL BANKRUPTCY CONFERENCE
On 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"
Issued by the
Executive Office of the United States Trustees
For Public Comment on November 4, 2011

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The National Bankruptcy Conference (NBC) is pleased to submit these comments on 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", issued by the Executive Office of the United States Trustees (EOUST) for public comment on November 4, 2011 (Proposed Fee Guidelines). Although the NBC has specific comments on many of the proposed Guidelines, some preliminary general observations are in order.

In 1996, the EOUST adopted "Guidelines For Reviewing Applications For Compensation And Reimbursement Of Expenses Filed under 11 U.S.C. § 330" (Existing Guidelines) to apply in all chapter 11 cases (including larger ones). In light of the well-publicized magnitude and growth of professional fees in the largest chapter 11 cases and in an apparent concern that these fees may not be subject to the same market forces as fees outside of chapter 11 cases, the EOUST has proposed the new Proposed Fee Guidelines for attorneys in larger chapter 11 cases.

The NBC recognizes and concurs in the goals the EOUST "seeks to achieve … with the proposed guidelines", including to "ensure bankruptcy professional fees are subject to the same client-driven market forces, scrutiny, and accountability that apply to non-bankruptcy engagements," "ensure all professional compensation is reasonable and necessary", "increase disclosure and transparency … and client and constituent accountability for overseeing the fees and billing practices", "increase efficiency and decrease the administrative burden of review" and "increase public confidence in the integrity of the bankruptcy compensation process." These are laudable goals, which the NBC supports. However, the NBC questions whether the Proposed Fee Guidelines in practice will promote these goals.

There is no question that fees in the largest chapter 11 cases are very large and have grown substantially since the Existing Guidelines were promulgated in 1996. In the NBC members' experience, however, the most significant part of this growth in professional fees is not related to the matters addressed in the Proposed Fee Guidelines. Consequently, the Proposed Fee Guidelines are not likely to have a meaningful impact in achieving the EOUST's goals. Instead, the broad new requirements that would be imposed under the Proposed Fee Guidelines are likely to add to the cost of the chapter 11 cases to which they apply, due to the additional compliance obligations they would impose, without providing a commensurate benefit.

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In NBC members' experience, the costs of major chapter 11 cases do not differ substantially from the aggregate costs of other intensely negotiated and litigated corporate transactions and litigation. A chapter 11 case is fundamentally a major corporate transaction with many more components than a corporate transaction outside of bankruptcy. A chapter 11 restructuring often requires the resetting, in a courtroom/litigation context, of all of a corporation's legal relationships, often coupled with major multi-party litigation on one or more fronts that is intertwined with the reorganization. Confirming the link between size and cost, a recent thorough study of chapter 11 fees, in both large and small cases, suggests that chapter 11 costs are somewhat predictable and depend largely on the size of the debtor: The larger the debtor, the greater the fees. *See* Stephen J. Lubben, *Corporate Reorganization & Professional Fees*, 82 AM. BANKR. L.J. 77 (2008).

As Judge Richard Posner recently commented, "Litigation is expensive!" *In re Fort Wayne Telsat, Inc.*, 2011 U.S. App. LEXIS 23371 *17 (7th Cir. Nov. 23, 2011). Chapter 11 is even more so. It is inherently expensive because it is multiple-constituency, high stakes, "bet the company" litigation that also imposes substantial additional costs on a business that would not be incurred outside of chapter 11.

For example, outside of chapter 11, there is one set of professionals compensated by the business that is concerned with looking out for the business's interests—its counsel, its accountants and its financial advisors. In a large chapter 11 case, there is at least one additional set of professionals compensated out of the estate, *i.e.*, the official creditors committee's professionals (attorneys, financial advisors and accountants), who are also looking out for the estate's interests (although the interests of the clients represented by the two sets of professionals and their approaches might diverge in various matters). Thus, in chapter 11 (in contrast to outside of chapter 11), the business pays for at least two sets of professionals (and sometimes more, if there is more than one official committee, each with its own estate–compensated team of professionals) to look out for the interests of the business, plus the cost of their interaction with one another and with third parties. In addition, in a chapter 11 case, the business may also be required to pay the professional fees incurred by the secured lenders (either as "adequate protection" payments or because the secured lenders are oversecured) and the DIP lenders.

Furthermore, chapter 11 involves litigation and other court proceedings that do not exist outside of bankruptcy, running the gamut from motions required to obtain court approval of out of the ordinary course of business transactions (and negotiation with other constituencies over the terms of such transactions and objections to such motions), to relief from stay proceedings, to proceedings relating to the assumption and rejection of executory contracts and unexpired leases, to contested plan confirmation proceedings—just to name some of the court proceedings that arise in chapter 11.

Large chapter 11 cases produce major, complex litigation in the main case, involving multiple competing parties and multiple separate adversary proceedings and contested matters. We are not aware of evidence that litigation in bankruptcy entails higher professional fees than similar litigation outside of bankruptcy. Rather, a business in bankruptcy incurs more litigation expense because it faces more litigation, especially where multiple constituencies with conflicting economic interests are competing for the value in an insolvent enterprise.

In addition, it is also fair to state that the costs of chapter 11 cases have grown as the cases themselves have grown in size. Thus, while the professional fees expressed as a percentage of assets may not have risen, the absolute amount of fees has risen (and the fees are more attention-grabbing) simply because the cases are bigger. By way of illustration, a 2% professional fee cost[1] in a case with $500 million in assets is $10 million—not insignificant, but not one that makes the news. But a 2% professional fee cost in a case with $65 billion in assets translates into $1.3 billion—clearly, a headline grabber. The NBC members' experience is that the magnitude of the numbers does not result from a flaw in the fee application or allowance process, but rather from the multitude of issues, litigation, and complexities that grow as cases get larger—not to mention that litigation can be expected to grow when there is more to fight about—and we are not aware of any empirical evidence that suggests otherwise.

Also, as chapter 11 cases have become larger and more complex, the number of professionals employed at the expense of the estate has proliferated as the work done by each type of professional becomes more specialized. For example, where one firm of financial professionals for the creditors committee previously may have sufficed, now multiple financial and management professionals may be employed, each with its own particular strengths or specialty.

Other factors have pushed chapter 11 professional fees higher as well. Capital structures have become increasingly complex. The increase in claims trading since the Existing Guidelines were adopted in 1996 means that financial participants (including those whose investments are based, in whole or in part, on predicted outcomes in intercreditor, avoidance or other litigation) are now involved extensively as creditors in the larger cases, often at several levels of the debtor's capital structure and often at loggerheads with one another. Moreover, negotiating a consensual plan becomes more difficult, complicated and time-consuming when the composition of key creditor constituencies changes during the course of a chapter 11 case as debt is brought and sold. Intercreditor disputes between creditors holding claims in different parts of the capital structure (including disputes over matters such as substantive consolidation and intercompany claims) are expensive. Consider, for example, *Owens Corning*, *Adelphia*, *Enron*, *Lehman Brothers* and the recent developments in the *MF Global* cases. Similarly, expensive and complex fraudulent conveyance litigation following the failure of major leveraged buyouts has grown considerably since 1996: consider, for example, *Lyondell*, *TOUSA*, and *Tribune*.

Moreover, a chapter 11 case is a "bet the company" event. Corporate boards and managers understandably want the most skilled, sophisticated and experienced counsel when the survival of the company and the business is at stake. Nevertheless, the NBC members' experience is that debtor corporations do not write blank checks to their counsel. Debtors' general counsels have spent their careers managing legal costs, and they do not relinquish those instincts or skills once their companies are in chapter 11. They still have expense control

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[1] In his study, Professor Lubben found that, "In either data set [large cases and small cases] fees total about 4 percent to 4.5 percent of the sum of assets and debts." Lubben, 82 AM BANKR. L.J. at 102-03. Further, Professor Lubben found this percentage "unexceptional" when compared to the cost of other transactions involving fundamental changes to a corporation's financial structure such as an IPO or merger. *See id.* at 130-31.

responsibilities, and they still answer to their more senior management and boards, who still report financial results, which are affected by professional fees in chapter 11 cases. Similarly, members of creditors committees are certainly aware that creditor recoveries are affected directly by the size of professional fees.

In other words, in the NBC members' experience, the market controls that the Proposed Fee Guidelines seek to promote are already present in large chapter 11 cases. They are not likely to be materially enhanced by most of the detailed additional reporting requirements for both the professionals and the client that the Proposed Fee Guidelines would impose. And the Proposed Fee Guidelines do not (and, as to a large extent, are not statutorily authorized to) address the several factors discussed above that largely drive the increase in chapter 11 costs seen in recent years.

In addition, the NBC questions whether all of the goals set forth in the cover letter, while laudable, are within the EOUST's statutory authority in adopting guidelines. The NBC recognizes the EOUST's statutory authority under 28 U.S.C. § 586(a)(3)(A) to adopt guidelines for the United States Trustees' review of applications for compensation and reimbursement under section 330 of title 11 (fee applications) and the United States Trustees' authority and responsibility to file objections to fee applications (among other things) when they conclude that the applications do not meet the standards for allowance under section 330. The guidelines therefore may appropriately guide the United States Trustees' review of, and objections to, fee applications, but they should be limited to that statutorily-authorized purpose.

As the Proposed Fee Guidelines correctly recognize, "only the court has authority to award compensation and expense reimbursement under section 330 of the Code". Proposed Fee Guidelines A.3, at 2. The statute does not authorize EOUST guidelines to determine the allowance of compensation or expense reimbursement, either directly or indirectly. Yet any provisions in the Proposed Fee Guidelines that impose obligations on professionals as a condition to the allowance of compensation would seem designed to have just such an effect. Further, the statute does not authorize the EOUST to prescribe forms or procedures for filing fee applications or employment applications. That function is the province of the Federal Rules of Bankruptcy Procedure and local bankruptcy rules. Accordingly, the Proposed Fee Guidelines should make clear that they are directed only to what the United States Trustees may do and may not do and should not directly impose any requirements on the professionals themselves.

Beyond all of this, for the first time, the Proposed Fee Guidelines seek to impose obligations on clients (not just professionals) by purporting to require them to certify as to due diligence and budgets. Whether these proposed requirements are useful or not in achieving the goals the cover letter sets forth, the only enforcement mechanism the Proposed Fee Guidelines suggest is to seek to penalize the professionals for their clients' conduct, by objecting to the professionals' fees. The NBC is troubled by these provisions based on both absence of statutory authority and misdirected enforcement remedies. Further, these provisions—aimed as they are at the disclosure of communications and interaction between the attorney and the client—may represent an inappropriate encroachment on the attorney-client relationship.

In sum, while professional fees in large chapter 11 cases have grown since the Existing Guidelines were promulgated in 1996 as the cases themselves have for a variety of reasons become larger, more litigious and more complex and involve more and more professionals, the

Proposed Fee Guidelines do not address these cost-drivers. We do not believe that the Proposed Fee Guidelines will deal with professional fees in a materially better or more cost-effective manner than the Existing Guidelines. To some degree, by focusing so closely on the fine details of hours and hourly rates, the Proposed Fee Guidelines may miss the forest for the trees.[2] They also may be misdirected in attempting to determine the "cost of comparable services" outside of bankruptcy, which might as appropriately be the overall cost rather than an hourly rate. (*See* fn. 1, *supra;* fn. 2, *infra.*). Accordingly, the NBC believes that it would be more productive to explore alternative, potentially more effective methods of insuring that professional fees in large chapter 11 cases are reasonable. From the standpoint of guidelines for potential UST objections, the following might be productive lines of inquiry:

1. Scrutinizing The Involvement Of Creditors Committee Professionals In Adversary Proceedings And Contested Matters That Are Already Being Prosecuted Or Defended By The Estate's Professionals. In the experience of our members, from time to time, creditors committees participate (effectively as co-party) in adversary proceedings and in contested matters that are already being handled by debtors or may join in prosecuting objections to claims that are already being prosecuted by debtors. In other words, there are essentially two parties with parallel interests on the same side of litigation on behalf of the estate, using two sets of estate-compensated professionals to do so. (This is to be distinguished from situations where, for conflict or other reasons, the creditors committee prosecutes an action on behalf of the estate in lieu of the debtor.) Should the UST consider guidelines for objecting to the compensation of the committee's professionals for services duplicative of the debtor's professionals in such litigation, absent a showing of a compelling need for separate involvement of the committee and its professionals in such litigation?

2. Consideration of Non-Hourly Fee Arrangements For Attorneys in Discrete Matters. It can be argued that one of the factors driving professional fees in large chapter 11 cases (as well as engagements outside bankruptcy) is a compensation system that is based primarily on multiplying hours by an hourly rate; such a system may create (and is perceived to create) economic incentives for professionals to spend more hours. Indeed, the Proposed Fee Guidelines seem in part to be an attempt at government regulation at a very granular level of professionals' practices. Should the UST explore guidelines that would encourage the use of non-hourly arrangements? To be clear, we are not suggesting that a large chapter 11 case as a whole can be handled by counsel on a fixed fee arrangement; however, there may be discrete types of legal services (for example, certain transactional work) or specific matters that are handled on a fixed fee basis outside of bankruptcy when a law firm is engaged to do such work as a discrete matter, that is folded into the overall "hourly rate" construct in a bankruptcy

[2] As noted in the Remarks By Clifford J. White III, Director of the Executive Office for United States Trustees, Before the National Bankruptcy Conference, Washington, D.C., November 10, 2011 ("Remarks"), "It is a myth that any party--including the court or the United States Trustees--can timely and carefully evaluate every time entry in a large chapter 11 case." http://www.justice.gov/ust/eo/public_affairs/testimony/docs/speeches/NBC_Annual_Meeting_111011.pdf, at 7.

case simply because that is how billing is perceived to function in bankruptcy. Is it worth exploring whether this is in fact the case?

3. Do Debtors and Committees Always Need Separate Financial Advisors? Should the UST consider objecting to the retention of separate financial professionals by a creditors or equity holders committee, absent a compelling showing that the committee needs separate financial professionals to do work that the debtor's financial professionals are also doing? Even if there are some areas of conflict that require a committee to employ separate financial professionals to engage in certain functions, is it really necessary that a committee have separate financial professionals to engage in all functions? Should the guidelines prompt the USTs to object when separate engagements are not convincingly justified?

4. Parceling Out "Commoditized" Work Such As Routine Avoidance Actions and Objections to Claims to Less Expensive Counsel. There is no question that debtors and committees require highly experienced and sophisticated counsel to deal with the complexities of large chapter 11 cases, which may be a matter of "life or death" for the debtor and that the hourly rates of such professionals are commensurate with their sophistication and expertise. One can question, however, whether having such sophisticated firms handle simpler, more routine or "commoditized" matters like routine preference actions and garden variety objections to claims of trade creditors and the like is like using a Ferrari to drive to the supermarket and may impose unnecessary costs on the estate. Should the UST consider developing guidelines that would encourage the use of less expensive counsel for certain classes of discrete, more routine matters?

5. Compensation of Professionals Engaged By Ad Hoc Committees and Similar Groups. It is not uncommon to see one or more ad hoc committees or other informal groups receive reimbursement for compensation paid to their professionals (or even have their professionals compensated in the first instance) from the estate under Section 503(b)(3) of the Code under a "substantial contribution" theory. The Proposed Fee Guidelines do not address these payments, presumably because they are not claimed under section 330. Nevertheless, the UST may wish to consider the following question in formulating guidelines to address such applications: Where the committee or group has conferred a benefit that is not a benefit to the estate as a whole, but rather a benefit to the interests of a particular creditor or equity holder constituency whose interests the group pursued, should the UST object on the grounds that the reimbursement of compensation should come from the distributions that would otherwise be made to that constituency?

* * *

To be clear, the NBC is not now taking a position on any of these points. We raise them as questions for consideration by the EOUST in promulgating guidelines that could be more effective in accomplishing the stated purpose of the Proposed Fee Guidelines than are those guidelines as presently constructed.

COMMENTS ON PARTICULAR PROPOSED FEE GUIDELINES

Although the NBC believes that there are more effective ways to achieve the goals the Proposed Fee Guidelines seek to promote, if the EOUST determines to follow the Proposed Fee Guidelines' model, the NBC has a number of specific comments that are described in the attached Appendix. These comments, however, should not detract from the NBC's fundamental concern about the Proposed Fee Guidelines for the reasons stated above.

* * *

The NBC recognizes the concerns that led to the development of the Proposed Fee Guidelines and intends to continue its deliberations and efforts to develop constructive approaches that attempt to address those concerns. Accordingly, the NBC may supplement the comments set forth herein in the next few weeks to reflect the results of its further deliberations.

APPENDIX OF SPECIFIC COMMENTS

The comments which follow are not made in order of importance, but rather in the order in which the relevant provisions appear in the Proposed Fee Guidelines. In the case of each comment set forth below, reference is made to the page number and section of the Proposed Fee Guidelines to which the comment relates.

1. **Scope of Proposed Fee Guidelines – Who is Covered? (p. 1, § A.2)**. The Proposed Fee Guidelines state that they "apply only when USTP attorneys review applications for compensation filed by attorneys employed under Sections 327 or 1103 of the United States Bankruptcy Code . . . in chapter 11 cases where the debtor's scheduled assets and liabilities combined exceed $50 million . . ." This formulation creates issues of both over-inclusiveness and under-inclusiveness.

   a. As to over-inclusiveness, the Proposed Fee Guidelines should clarify that they apply only to fees charged on an hourly basis, and not to fixed fee or contingent fee arrangements, because a number of the guidelines seem inapposite to fixed fee or contingency fee arrangements. For example, the guideline regarding staffing inefficiencies (p. 4, § B.4.b), involving matters such as multiple professionals attending meetings, appropriateness of the skill level of the professional to the task, etc., seems appropriate only where the professional is being paid on an hourly basis, but not in the case of contingency or fixed fee arrangements.

   b. The $50 million assets/liabilities threshold that would trigger the application of the broad new requirements imposed by the Proposed Fee Guidelines is too low. Under this threshold, the Proposed Fee Guidelines could apply to a single asset real estate case involving a single commercial shopping center.[3] The threshold for a

[3] The NBC had understood from the EOUST Director's remarks that single asset real estate cases would be excluded from the application of the Proposed Fee Guidelines. See Remarks at 3.

"larger" chapter 11 case to which the requirements of the Proposed Fee Guidelines would apply should be higher—at least $100 million in combined assets and liabilities.[4]

c. As to under-inclusiveness, it is not clear why the Proposed Fee Guidelines apply only to ***attorneys*** in larger chapter 11 cases, and not also to other professionals (such as accountants, financial advisors, examiners and trustees) to the extent they are compensated by the estate on an hourly basis. Further, whatever expense reimbursement guidelines are ultimately adopted for larger chapter 11 cases should apply across the board to all professionals, since the issues involved are similar regardless of the specific type of professional whose expenses are at issue. In regard to the foregoing, the introduction to the Proposed Fee Guidelines states that, following the effectiveness of the Proposed Fee Guidelines, "the 1996 Guidelines will continue in effect for the review of applications filed under Section 330 in (i) larger chapter 11 cases by those seeking compensation who are not attorneys . . ." Although we understand that the EOUST intends to adopt new future guidelines for non-attorney professionals seeking compensation in larger chapter 11 cases, we do not understand any basis for applying different guidelines to non-attorney professionals in larger chapter 11 cases seeking compensation on an hourly basis than those applicable to attorneys seeking compensation on such a basis or for applying different rules of expense reimbursement depending on whether the professional seeking the reimbursement is an attorney or a non-attorney.

d. Based on the foregoing, the introduction to the Proposed Fee Guidelines should be modified to: (i) increase the threshold for their applicability to scheduled combined assets and liabilities of at least $100 million; (ii) exclude, from the guidelines relating to fees, fixed fee and contingent fee arrangements, and (iii) replace the narrow reference to "attorneys" with a broader reference to all estate-compensated professionals who are compensated on an hourly basis (as to fees) or seek reimbursement of expenses, and whose compensation or expense reimbursement is subject to review under Section 330.

2. **Non-Working Travel Time (p. 5, § B.4.i).** Among the Proposed Fee Guidelines for determining whether to comment on/object to a fee application is whether the application includes time for "non-working" travel billed at the full rate. However, as the Proposed Fee Guidelines themselves explain earlier on, one of the objectives of the UST in reviewing and commenting on fee applications is to ensure that "all professional compensation is reasonable and necessary, ***particularly as compared to the market measured both by the professional's own billing practices for bankruptcy and non-bankruptcy engagements and those of its peers***." Proposed Fee Guidelines at 3, § B.2.b (emphasis added). By this standard, to the extent that law firms or other professionals customarily charge for travel time at their full hourly rates, the "non-working travel time" provision of the Proposed Fee Guidelines does not

[4] We note that Professor LoPucki's database of "large chapter 11 cases" is based on cases with assets greater than $100 million in 1980 dollars, which is a substantially higher amount today. Protocols for Lopucki-UCLA Bankruptcy Research Database at 1, available at http://lopucki.law.ucla.edu/Protocols_1-6-2012.pdf.

appear consistent with the "market" approach. It seems anomalous to object categorically to a fee practice that may be part of normal market practice outside of bankruptcy.

3. **"Overhead" (p.5, § B.4.h; p.6, § B.5.e)**. One of the Proposed Fee Guidelines for determining whether to comment on/object to a fee application is whether the application includes items that the UST believes should be considered part of a professional's "overhead" and not billed to the client (the estate). Section B.5.e elaborates on this point by indicating that objectionable "overhead" includes, among others, word processing, secretarial, telephone charges, heating and cooling, and library and publication charges. With respect to "telephone charges," however, the Existing Guidelines refer to overhead as including "local telephone and monthly cell phone charges." This approach makes sense, because these are fixed charges. The broader reference to "telephone charges" in the Proposed Fee Guidelines would, however, appear to encompass incremental long distance charges, which are allocable to, and incurred for, calls for a specific client. These costs can be substantial for lengthy, multi-party calls. Consistent with the "market" approach referred to in section B.2.b of the Proposed Fee Guidelines, this type of incremental, client-specific cost should be reimbursable if that is the practice outside of bankruptcy.

4. **Budget and Staffing Plans (p. 5, § B.4.l; p. 10, § C.6)**.

a. The Proposed Fee Guidelines should clarify that professionals may charge for the time spent on budgets and staffing plans, since that seems to be the intent. *See* Exhibit "A" (Item 5, referring to Project Category: "Budgeting (Case)"). This approach seems appropriate, at least if the professional customarily charges its non-bankruptcy clients for such plans.

b. Budgeting and staffing plans should not be mandatory, and the failure to prepare a budgeting or staffing plan should not be grounds for objecting to a fee application – at least not where the client ordinarily does not require budgeting and staffing plans for this kind of engagement. Budgeting will certainly impose additional costs; however, the value of budgeting is questionable in the context of the reorganization process, where so much of the legal cost that a debtor or committee incurs depends on the conduct of potential adversaries over which they have no control and whose conduct may be unpredictable. Section C.6 of the Proposed Fee Guidelines appears to recognize this point when it provides, "the United States Trustee will consider budgets and staffing plans in reviewing applications for compensation," and that, "***if*** a budget and staffing plan has been adopted by a professional, the budget and staffing plan should be attached to the application." (emphasis added). The "if" language suggests that budgeting is not required—which is the right result and should be clarified.

c. We understand that the UST has expressed concern that normal market focus do not operate in bankruptcy -- a perception with which the NBC does not necessarily agree (as discussed in the preliminary comments). But the market leaves the issue of requiring a budget to the client. If the client customarily does not require a budget and does not want a budget in chapter 11, we do not believe that requiring the client to do something it has not done, does not find useful and does not wish to do or pay for will restore the operation of market forces if they are not otherwise working.

d. Moreover, even if the client adopts professional budgets, such budgets should not be made public. For example, outside of bankruptcy, some clients request budgets for litigation. Disclosing that budget to the adversary in the very litigation for which the budget is prepared would give that adversary important confidential (and, perhaps, privileged) information as to what the litigation is costing and will ultimately cost in total to the client (and how much economic pain the litigation is inflicting on the client), and would thereby give the adversary important information with respect to, for example, potential leverage in settlement negotiations. Neither clients nor attorneys disclose their litigation budgets to adversaries outside of bankruptcy, and they should not be required to do so in bankruptcy.

e. In addition, to the extent that the Proposed Fee Guidelines address the issue of budgets, they should clarify that: (i) the period for which a budget is prepared should correspond to the next period that would be covered by an interim fee application, to make meaningful comparisons of budgeted to actual fees for the applicable period possible; (ii) a budget should in no event be for more than three months (since anything beyond that enters increasingly into the realm of speculation, particularly given the extent to which the magnitude of fees is influenced by the conduct of adversaries and other parties over whom the debtor or committee has no control); and (iii) a budget may be updated periodically as more information is gained.

5. **Charges for Time Spent Redacting Privileged or Confidential Information from Bills or Invoices That Are Required to Be Filed Publicly With Fee Applications (p. 4, § B.4.e.i; p. 11; §§ C.7g)**.

a. The Proposed Fee Guidelines indicate that "routine billing activities" that should not be compensable include "redacting bills or invoices for privileged or proprietary information." However, like preparing interim and final fee applications, redacting bills for privileged or confidential information is typically is not done outside of bankruptcy. When an attorney submits a bill to a client outside of bankruptcy, nothing is redacted for privilege or confidentiality because the invoices submitted to the client are subject to the attorney/client privilege, and clients may want the detailed information that unredacted or unsanitized time records provide, to assist them in understanding the matters on which the attorney was working. The invoices are not filed publicly, and other parties are not given access to these bills. Further, parties other than the client do not have standing to complain about attorneys' bills outside of bankruptcy or some other court process. The only reason why bills or invoices attached to a fee application in bankruptcy have to be redacted at all is precisely because they are attached to a fee application and made available to the public in connection with the fee application process. Thus, the same considerations that warrant compensating professionals for preparing fee applications in the first place (i.e., this is something required in an in-court reorganization process that is not generally required outside of bankruptcy, except in certain types of litigation) seem to apply equally to the need to redact invoices as part of the fee application process.

b. It is true that attorneys and paralegals are (or should be) forewarned about the need to be careful in recording their time in cases where fee

applications must be filed, so as not to reveal privileged or confidential information publicly. That said, there is a fine line between disclosing enough to be sufficiently descriptive and disclosing privileged and confidential information. Further, not all attorneys and paraprofessionals who will render services in a large chapter 11 case will have sufficient information to judge what should and should not be redacted; some will be non-bankruptcy attorneys and paraprofessionals who have limited, if any, experience with public fee applications; and some will be junior, less experienced bankruptcy professionals who suffer from the same lack of experience. As a matter of prudence, it may be appropriate for a law firm to have a more experienced bankruptcy attorney familiar with the overall case and its sensitivities review the time entries before the application is filed, in order to prevent the inadvertent disclosure of privileged or confidential information. Reducing the risk of such disclosure outweighs the incremental cost of additional review to address that risk, and it is reasonable to assume that, if given the choice, the client would prefer the incremental cost to the incremental risk.

6. **Contesting or Litigating Fee Objections (p. 5, § B.4.j)**.

a. The Proposed Fee Guidelines provide that the United States Trustee will consider "whether the fee application seeks compensation for defending or explaining fee applications or monthly invoices that would normally not be compensable outside of bankruptcy." The NBC believes that this consideration should be removed from the Proposed Fee Guidelines, because it is inconsistent with substantive case law governing the compensation of professionals for defending their fees against objections.

b. Although the case law is not entirely uniform, the majority rule is that professionals are entitled to reasonable compensation for litigating the allowance of their fees. *See, e.g., In re Nucorp Energy*, 764 F.2d 655 (9th Cir. 1985); *In re Smith*, 317 F.3d 918 (9th Cir. 2002), abrogated on other grounds by *Lamie v. United States Tr.*, 540 U.S. 526 (2004); *In re Worldwide Direct, Inc.*, 334 B.R. 108, 109 (D. Del. 2005); *In re On Tour, LLC*, 276 B.R. 407, 418 (Bankr. D. Md. 2002). In contrast to the approach taken in the Proposed Fee Guidelines, the rationale for the majority rule is not tied to whether professionals outside of bankruptcy are compensated for litigating fee disputes; rather, it is to ensure that professionals' fee awards are not diluted by the additional expense of fee litigation.

c. The Ninth Circuit has explained that it would be "inconsistent with the policy of the Bankruptcy Reform Act and 'fundamentally inequitable' to demand that counsel prepare and present extensive fee applications and yet simultaneously 'deny[] compensation for the efforts necessary to comply with those requirements.'" *North Sports, Inc. v. Knupper (In re Wind N' Wave)*, 509 F.3d 938, 943 (9h Cir. 2007) (quoting *Nucorp.*, 764 F.2d at 660). "If an attorney is required to expend time litigating his fee claim, yet may not be compensated for that time, the attorney's effective rate for all the hours expended on the case will be correspondingly decreased." *Nucorp.*, 764 F.2d at 660 (internal quotations omitted); *see also Worldwide Direct*, 334 B.R. at 111 ("If compensation is not permitted for fees incurred in defending a fee application, creditors could negotiate reductions in these fee awards knowing full well that the attorney is in a

no-win situation. Even if the attorney prevails, he or she will in effect have financed the litigation without any hope of surviving it whole.") (internal quotations omitted)).

d. In light of the substantive case law permitting professionals to be compensated for litigating the allowance of their fees, the NBC believes that it is not appropriate for the Proposed Fee Guidelines to consider whether fees were incurred in connection with such litigation in determining whether to object to such fees. Whether professionals should be compensated for litigating fee disputes entails a substantive interpretation of Bankruptcy Code § 330, and thus, the NBC respectfully submits, is not an appropriate subject of the Proposed Fee Guidelines.

7. **Disclosure Regarding Hourly Rates Charged To Other Clients (p. 8, § C.3.l.vii - viii; pp. 10-11, § C.7)**. The Proposed Fee Guidelines would require each applicant to answer a series of questions regarding hourly rates charged to any other clients – as opposed to other clients generally – including whether the firm has charged ***any*** client less than the hourly rates included in the application (§ C.7.a) or more than the hourly rates included in the application (§ C.7.b), and whether the debtor was offered or the attorney has agreed to variations from standard or customary rates. (§§ C.7.c-d). Similarly, section C.3.l. vii - viii requires every professional and paraprofessional's "current hourly rate for all other matters" and "highest, lowest and average hourly rate billed in the preceding 12 months for . . . all other matters." These proposals raise a number of serious problems and could prove counterproductive.

a. What a firm has charged other clients, and whether discounts have been given to any other client, is usually highly confidential, proprietary information that is not, and should not be, publicly available. Moreover, the disclosure that discounted-fee arrangements exist with any non-bankruptcy client, without more, can give rise to the unfair implication that the applicant is over-charging the bankruptcy estate unless it offers the same discount. Any such implication, however, ignores the fact that firms enter into circumstances-specific discounted fee arrangements with non-bankruptcy clients for a variety of reasons, such as guaranteed volume; long-standing clients who consistently provide a high level of business; loss leader; desire to acquire experience or build a particular practice area; employment of underutilized practice groups (i.e., mergers and acquisitions in October, 2008); granting a courtesy discount to another professional; or even a fee discount for a "busted" deal that did not work out. Referring back to the "market" model, outside of bankruptcy, law firms do not disclose discounts given to one client to another client.

b. Thus, a "yes" answer to the questions posed in sections C.7.a-d may create the incorrect implication that the applicant is overcharging the estate, as it will be based on incomplete and irrelevant information. To the extent that this Proposed Fee Guideline seeks to address the concern that a firm is "overcharging" the estate, a fairer and a more appropriate approach would be to require disclosure where the hourly rate being charged is greater than the hourly rate customarily charged for the timekeeper's billable hours during the applicable "rate year." By "customarily charged," we mean the base "default" rate—absent an upward or downward adjustment—that the attorney normally charges. That type of disclosure would address

the concern that the chapter 11 estate might be charged more for the services of a particular attorney than the attorney customarily charges, without subjecting attorneys who represent debtors in possession, trustees and committees to the singular burden of being forced to disclose publicly any discount that they give to any client.[5]

c. The considerations outlined above, however, do not seem to apply to the disclosure of, or comparisons with, the hourly rates of the professional disclosed in fee applications filed publicly in other bankruptcy cases. Accordingly, a proposed fee guideline along the lines of Section C.7. whose disclosure requirements would apply only to rates disclosed in fee applications filed by the professional in other cases (subject to the "same rate year" limitation described below) seems unobjectionable and would eliminate the burden on the UST of attempting to gather publicly filed hourly rate information from multiple cases and jurisdictions throughout the United States with respect to the hourly rates charged by a professional who will be compensated by the estate.

d. In addition to the general concerns outlined in a-c above, Section C.7 of the Proposed Fee Guidelines also poses more specific problems that should be remedied. First, as explained in paragraph 8 below, using the "preceding twelve months" rather than the period within a single "rate year" will produce distortions whenever the firm has implemented an annual rate increase within the last twelve months.

e. Second, insofar as Section C.7.b requires disclosure of whether any other client has been charged ***more*** than the hourly rates included in the application, this disclosure seems unnecessary and counterproductive. Although an applicant may wish to disclose voluntarily that it is giving the estate a discount and charges other clients more, what purpose is served by requiring the professional to do so? If anything, requiring an applicant to disclose publicly that it has given the debtor a discount from the hourly rate generally charged to other clients may have a "chilling effect" on the granting of such discounts, because the public disclosure that the debtor has been given a discount may create problems (and demands for similar discounts) on the part of other clients who are being charged higher hourly rates. As a result, requiring such disclosure could have the unintended consequence of discouraging counsel from granting discounts to chapter 11 estate clients. The same issue applies with respect to the public disclosure of an "offer" to the debtor client of a "variation" (i.e., discount) from standard rates as set forth in Section C.7.c, or the actual granting of a discount or "variations," as suggested by Section C.7.d.

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[5] In this context, it should be noted that, in some complex corporate and litigation matters outside of bankruptcy, hourly rates do not determine the final bill, which may be determined on the basis of time charges plus either a success premium which may be a multiple of the aggregate time changes, or a "busted deal" discount for an unsuccessful transaction. The guidelines appear to assume that a lawyer's "hourly rate" determines what the lawyer or his or her firm receives as compensation; in fact, payment received may be substantially more or less than one-hundred percent of aggregate billable time multiplied by "customary" hourly rates.

f. Third, disclosure regarding hourly rates charged to other clients, if any, should be limited to the rates charged in engagements where rates are determined ***solely*** on an hourly basis and involve no fixed or contingency components. The fee guidelines should exclude fixed fee and similar arrangements from the required disclosure of hourly rates. In nonbankruptcy matters, clients and firms may agree on billing arrangements that avoid the traditional "rates times hours" approach. For example, a law firm may take a case on a partial contingency that involves a lower hourly rate, plus a success fee of some sort. Similarly, a firm may take a case on a purely fixed fee arrangement. Determining the effective hourly rate for arrangements with fixed fee or contingency aspects is speculative at best; although law firms keep track of the hours spent on such engagements for internal realization calculations, the data is irrelevant when comparing this to a "pure" hourly fee arrangement. The professional firm may be willing to take the risk of a lower realized hourly rate, because of the potential to earn a much higher hourly rate in a fixed fee or contingency engagement. Attempting to compare the "hourly rates" under such arrangements to those in a purely hourly rate arrangement would result in an inappropriate "apples to oranges" comparison.

g. Section C.7.d is ambiguous; does this refer only to an agreement with the debtor, or to any agreement with any client? If it applies to an agreement with the debtor, this would raise the same issue as paragraphs C.7.b and c. If it applies to all clients, then it raises the broader issues outlined above.

8. **Disclosure of Highest, Lowest and Average Hourly Rate (p. 8, § C. 3.l.viii)**. Under the Proposed Fee Guidelines, the "highest, lowest and average hourly rate billed in the preceding twelve months for estate-billed bankruptcy matters and all other matters (if applicable)" would have to be disclosed for each professional and paraprofessional who worked on the case. To the extent that the reference to "other matters" is meant to encompass discounted rates that may be given to certain non-bankruptcy clients (rather than non-bankruptcy clients generally), this formulation raises the problems outlined in paragraph 7 above. Further, even with respect to "estate-billed bankruptcy matters," the utility of this approach is problematic, because a twelve-month period may "straddle" two "rate years" for a firm that routinely adjusts its hourly rates annually, and the "average" may vary based on nothing more than when the beginning of the new "rate year" happens to occur in the twelve month period. Using the prior twelve month period may produce distortions and varying results based on the happenstance of when regular rate increases occur. For example, if a firm typically increases its hourly rate on January 1 of each year, the requested disclosure would produce very different results (for the "average hourly rate") depending on whether the case was filed in May or August. Since the very next clause (ix) requires disclosure of "any increase in hourly rate during the application period and the number of rate increases since the inception of the case," it would make more sense for the disclosure under clause (viii) to be for the current "rate year," rather than for the past twelve months.

9. **Verified Statement From Client Re Comparability of Compensation Paid to the Professional (pp. 5-6, § 4.m, p. 11, § C.8.c).** Under the Proposed Fee Guidelines, a client would be required to file a verified statement that would set forth, among other information, a "yes" or "no" answer (with any elaboration the client cares to provide) as to

whether the client took steps to ensure that the compensation sought in the application "is comparable to the compensation paid to the professional or the professional's firm for bankruptcy and non-bankruptcy engagements." This proposed verification, however, would serve no useful purpose and could lead to the inappropriate disclosure of proprietary information about the firm's billing practices. As suggested in paragraph 7.b. above, the applicant should be required to disclose whether any of the hourly rates charged to the client are higher than those customarily charged by the firm. If that requirement exists, then it would seem that the only purpose of the question in section C.8.c. would be to delve into conversations between the client and the attorney about a discount from the attorney's customary hourly rate, *i.e.*, did the client ask for a discount and, if so, the nature of the response. Both this question and its response may be problematic. To begin with, the answer to this question could lead to the disclosure that the client was given a discount; and the risk of such public disclosure (including to other clients) might well inhibit an attorney in a chapter 11 case from giving a discount. On the other hand, even if the answer is "no," that should have no effect on the allowance of the professional's fees if the fees being charged are consistent with those customarily charged to other clients. Further, although a "yes" or "no" answer is permitted, it is unrealistic to think that the questioning will stop there. Even if the UST requests no further information, other parties in interest (including adversaries of the debtor) could use this verification as a pretext to seek further information about discussions between the attorney and the client about (i) possible discounts; (ii) likely litigation and other substantive matters to which the attorney might be requested to devote attention and (iii) the fees for each type of service—none of which should be relevant if the hourly rate charged is consistent with the attorney's customary hourly rates.

10. **Expense Reimbursement—Reason for Expense (p. 12, § C.10.e).** Under section C.10.e of the Proposed Fee Guidelines, an application for reimbursement of expenses would have to include, for ***each*** itemized expense, the "reason for expense." This requirement seems unduly burdensome. For example, would an explanation be required each time "copy costs" are incurred or a messenger is used? Would every computer research entry have to be explained? It would be more efficient to require an explanation only for non-routine expenses, such as travel, or for particularly large items, such as a particularly large expense item for a copying project or computer research project, with a reasonable minimum dollar threshold before the requirement that the "reason for expense" be explained applies. This more focused approach would be consistent with the approach taken in section B.5.h (which is marked as a econd subsection "a" for some reason) of the Proposed Fee Guidelines, which states that, "***Unusual*** items require more detailed explanations and should be allocated, where possible, to specific projects." (emphasis added).

11. **Summary Cover Sheet—Estimate of Compensation Irrespective of Bankruptcy (p. 13, § D.1.p)**. One of the items required to be included in the proposed summary cover sheet would, in the case of debtors only, be an "estimate of compensation sought that would have been incurred irrespective of bankruptcy." We are concerned that it might be difficult to distinguish between such categories. The Proposed Fee Guidelines should therefore provide better guidance for how to distinguish between them. For example, disputed claims litigation often occurs outside of bankruptcy, in the context of ordinary civil litigation. If the same litigation is brought in bankruptcy court as an objection to claim, how should it be treated? It also should be clarified that the applicant need provide this estimate for the

applicant firm's fees only and not for those of other firms. A particular firm representing the debtor is not in a position to estimate what all of the other firms employed by the debtor would have charged outside of bankruptcy; each firm submitting a fee application should provide its own estimate.

12. **Summary by Project—Task Category and Sub-Category (p. 9, § C.5.h; p. 14, § D.2)**. The Proposed Fee Guidelines would require that all fee applications summarize fees and hours, not only by "project-task category" but by "sub-category." Exhibit "A" lists twenty such "sub-categories." However, maintaining time records in a usable format will become much more difficult if, in addition to assigning separate matter numbers for each project category, law firms have to assign separate sub-matter numbers for each of twenty activities (i.e., sub-categories) within the project category. For example, when entering a time entry for a phone call under "asset analysis and recovery," the attorney would have to enter both a matter number (for the project category "asset analysis and recovery") and a sub-matter number (for the sub-category or activity "phone call"); otherwise, the only way to provide the "sub-category" summary would be to have someone sort through time entries manually after the fact. The burden of having to record time in this fashion does not seem to be outweighed by any benefit of providing sub-category by sub-category—i.e., activity by activity—summaries. That is, there does not appear to be a particular benefit to knowing how much time on a particular project was spent on phone calls vs. meetings vs. research vs. writing, etc. The key is the overall time spent on the project. If there are subcategories, a more helpful approach would be "substantive" (i.e., separate projects within a general category) rather than "procedural" (i.e., type of activity).

13. **Fee Applications—Disclosure of Rate Variations, Discounts, Etc. (p. 14, §§ E.1.a-e)**.

a. The Proposed Fee Guidelines would require that applications for employment disclose, among other information: (i) whether the client was offered variations from standard or customary billing rates; (ii) whether the firm agreed to any variation from, or alternative to, standard and customary billing arrangements; and (iii) whether, during the preceding twelve months—which may straddle two "rate years"—the attorney or the firm has charged any client more or less than the hourly rates quoted for this engagement. These proposed disclosures raise the same problems and issues as those described in paragraphs 7, 8 and 9 above, with respect to Sections C.3.l.vii-vii, C.7.a-d and C.8.c., and the comments made with respect to those provisions apply equally to Sections E.1.a-e.

b. In addition, Section E.1. should make clear (as does Section E.2), that the relevant data should be reported for U.S. professionals only, except to the extent that a non-U.S. professional is used on the engagement (and, in such a situation, the pertinent information should be required only for the non-U.S. professionals involved in the case). Many firms involved in large chapter 11 cases are international firms with foreign offices, and requiring them to disclose rates charged by offices outside the United States will provide misleading as well as irrelevant data. For example, the London market rate for partners may exceed the domestic rate, while the Tokyo rate for partners may be much lower than the domestic rate. The rate structure of foreign offices

may be very different from that of the US offices, and is irrelevant unless foreign attorneys are being used. Moreover, firms with many international offices and many hundreds if not thousands of attorneys may lack the ability to ascertain accurately the rates being charged by lawyers in all of their offices outside the United States. Therefore, the guidelines should limit the rate comparison disclosure for the firm, generally, to the rates of U.S. based lawyers, although the rates for individual non-domestic lawyers anticipated to devote time to the bankruptcy case should also be disclosed.

14. **Summary Comparisons Between Hourly Rates of Firm Professionals Within And Outside of Bankruptcy Practice Groups (p. 15, § E.2)**. The proposed disclosure regarding fee comparisons between bankruptcy and non-bankruptcy attorneys within a firm is proposed to be made with reference to lowest, highest, and average hourly rates "billed in the last twelve months." As explained in paragraph 8 above, however, such disclosures can be distorted because a given twelve month period may straddle two "rate years." It would be more informative to speak in terms of the rates "billed since the last regular annual modification of hourly rates" or a phrase of similar effect.

15. **Special Review Procedures—(pp. 16-18, § F).**

a. **General.** The Proposed Fee Guidelines indicate that in certain cases, the UST will, in his or her discretion, recommend establishing a special review process, such as a fee review committee or an independent fee examiner, and proceeds to list the guidelines that the UST will follow in connection with fee review committees and independent fee examiners. This section of the Proposed Fee Guidelines should be eliminated, for two reasons. First, it is not at all clear (and we are aware of no empirical evidence) that the substantial costs resulting from the appointment of fee committees and independent fee examiners (including the substantial fees and expenses of the associated professionals) are outweighed by the savings that such mechanisms produce. Second, even if fee committees and independent fee examiners are appropriate in particular cases, we see no benefit in setting fixed guidelines in advance for all such cases using a "one size fits all" approach. Rather, the specifics of the fee committee or independent fee examiner should be established and tailored for an individual case based on the circumstances of that case. That said, if the Proposed Fee Guidelines for special fee review procedures are nonetheless adopted, we have the following specific comments.

b. **Special Review Procedures—Tie Breaking Vote on Fee Review Committee (p. 16, § F.3.a)**. The Proposed Fee Guidelines would require that if there is an "even split" among the members of the fee review committee on a decision, the UST's position will be determinative. The NBC can discern no justification for such a rule – one that would cause a deadlocked fee committee to replicate an objection that the UST can already make on its own. The fee review committee will not have any operative authority—it will simply have standing either to negotiate fees with professionals whose fees are challenged, or to object to those fees – both of which the UST already has standing to do. Giving the UST the "tie breaker" vote on the fee review committee (thereby effectively giving the UST two votes, not one) would seem to serve only to add

the imprimatur of a deadlocked fee review committee to an objection that the UST already has standing to file, in a situation in which the majority of the members of the fee review committee other than the UST disagree with the UST's position. If anything, given the fact that the UST can file its own objection independently, it would seem more appropriate in the case of a tie for the fee review committee to submit a report to the court setting forth the position of the majority of the members of the fee review committee other than the UST.

c. **Review of "Flat Fee" Arrangements For Fee Review Professionals (p. 17, § F.5)**. The Proposed Fee Guidelines would permit compensation under a "flat fee" arrangement for professionals engaged by a fee examiner or fee review committee where appropriate "but only if subject to reasonableness review under Section 330." If this statement means that the flat fee would be conditioned on advance approval as "reasonable," the proposal is not objectionable. However, if it means that the "flat fee" would be subject to after-the-fact "reasonableness" review, that review should occur under Section 328 of the Code, which would permit compensation different from that provided under the fixed fee arrangement "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions"—as is the case with any other flat fee arrangement. After all, why would any professional agree to a fixed fee that can be second guessed (and potentially adjusted) if it proves to be "too high," but not if it proves to be "too low"?

d. **Ability of Fee Review Committee and Fee Examiner to Require Budgets (p. 18, § F.7)**. Under the Proposed Fee Guidelines, fee review committees and independent fee examiners "should establish guidelines and ***requirements*** for the preparation and submission of fee and expense budgets by the retained professionals." Proposed Fee Guidelines, § F.7 (emphasis added). As discussed in paragraph 4 above, however, where the debtor would not otherwise wish to have professionals prepare (and bill for) fee budgets (and does not do so outside of bankruptcy), the professional should not be required to do so in chapter 11, whether by the UST, or by a fee review committee or fee examiner.