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

SUPPLEMENT TO 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"

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On January 30, 2012, the National Bankruptcy Conference (NBC) submitted its comments (the NBC 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 for public comment on November 4, 2011 (Proposed Fee Guidelines). The NBC Comments noted that the NBC intended to continue its deliberations and efforts to develop constructive approaches to address the concerns reflected in the Proposed Fee Guidelines and that it might supplement the NBC Comments. The NBC is pleased to submit this Supplement to the NBC Comments to reflect substantial additional consideration that the NBC has given to the Proposed Fee Guidelines.

At the outset, the NBC reiterates its position stated in the NBC Comments that the NBC believes that the market controls the Proposed Fee Guidelines seek to promote are not likely to be materially enhanced by the detailed, intrusive additional reporting requirements for both the professionals and the client that the Proposed Fee Guidelines would impose. The Proposed Fee Guidelines do not address—and, in all likelihood, cannot address—the cost drivers that have caused professional fees in large chapter 11 cases to grow since the Existing Guidelines were promulgated, including that the cases themselves have, for a variety of reasons, become larger, more litigious and more complex. Instead, the NBC believes that the Proposed Fee Guidelines are more likely to engender challenges and litigation throughout the country over the extent to which courts will require compliance with those guidelines and, if they are enforced as written, to cause some full-service firms to decline estate-compensated engagements because of the impact of the required disclosures on their relationship with the rest of their clients—all without furthering the stated goals of the Proposed Fee Guidelines. Ironically, those challenges and litigation, and the additional burden of compliance with the Proposed Fee Guidelines to the extent they are enforced as written, are likely to add to the cost of the professional fees in larger chapter 11 cases.

PMB 124, 10332 MAIN STREET • FAIRFAX, VA 22030-2410 • TEL: 703-273-4918 • FAX: 703-802-0207
E-mail: info@nbconf.org • Website: www.nationalbankruptcyconference.org

This supplement is intended to present alternatives to the proposals contained in Sections C.3.l. vii-viii, C.7.a-d, and C.8.c. of the Proposed Fee Guidelines. As currently drafted, these proposals would require the disclosure of specified information regarding hourly rates charged to other clients and related client verification (the Customary Compensation Proposals). The NBC commented on these proposals at pages 12-15, Sections 7-9, of the NBC Comments, and, for the reasons stated therein, the NBC does not support them. Nevertheless, the NBC recognizes the underlying concerns that led to the Customary Compensation Proposals and submits that there are alternative, less problematic means to address these concerns.

The statutory backdrop for the Customary Compensation Proposals is Section 330(a)(3)(F) of the Bankruptcy Code, which requires that a court, in determining "reasonable compensation," take into consideration "whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title." The Customary Compensation Proposals appear designed to require that professionals carry their burden on this standard by providing meaningful evidence, rather than assertions, in the application itself (as opposed to through discovery, if requested) regarding "customary compensation" in non-bankruptcy matters and how their proposed compensation compares to that in such matters. The Customary Compensation Proposals do so by taking what amounts to a "one size fits all" approach that requires specified information about (i) the professional's billing practices and fee structures in other cases, and (ii) whether the client took specified steps to ascertain that the professional's compensation is comparable to that charged by the professional firm in other engagements. As noted in the NBC Comments, however, we are concerned that these proposals will impose complex, intrusive, disruptive and counter-productive procedures.

The NBC submits that, in lieu of the provisions in the Customary Compensation Proposals, the Proposed Fee Guidelines should (i) provide, in substance, that the professional must provide sufficient evidence in the employment application, supplemented in any fee applications, to enable the UST, other parties in interest and the court to evaluate the issue of "customary compensation," and (ii) specify at least three alternative, **but non-exclusive** methods of satisfying the professional's obligation. Each of these alternative methods would entail the disclosure of certain fee-related information (the exact nature of which would depend on the method chosen) through a certification by either the professional or the debtor's general counsel (again depending on the method chosen). In essence, these three certification methods would be "safe harbors," any one of which would be sufficient to satisfy this disclosure obligation, and are described below.

These three certification methods would be "safe harbors" **only** with respect to the applicant's burden on the issue of "customary compensation" under Section 330(a)(3)(F), and not on any other issues or potential objections to the employment or compensation of a professional. Importantly, the applicant would not be required to use any of these alternatives, but could propose another form of disclosure tailored to the firm's circumstances and ability to gather and organize internal information, subject to the risk that the UST might object to the adequacy of the disclosure if the UST found it insufficient to enable the UST to evaluate the issue of "customary compensation." The Proposed Fee Guidelines should make clear that other

evidence may suffice if it is sufficiently detailed to show compliance with the statutory standard.

Our purpose in proposing a "safe harbor" approach on the issue of "customary compensation" is based on two principal factors. First, different firms have different billing practices and different accounting systems. Not all firms can or should be expected to accommodate a one-size-fits-all approach to this disclosure. Second, the Proposed Fee Guidelines are plowing new ground, and as noted in the NBC Comments, the legal fee market is especially dynamic now.

One thing that became clear in the course of our deliberations is that many firms have moved away from a simple model of charging fees based on the process of multiplying the number of hours spent by each attorney on a matter by that attorney's standard hourly rate, to a variety of fee structures. Consequently, we cannot be sure that the Customary Compensation Proposals, however they ultimately are written, will get it right the first time. Providing a non-exclusive safe harbor approach allows room for experimentation among the firms, the UST regions and the courts, all of which would be directed at a principle that the Proposed Fee Guidelines would articulate, *i.e.*, that the applications provide sufficient evidence to show that the proposed compensation complies with the statutory standard. In fact, given the dynamics of the legal fee market, it may be prudent to review the results of the new guidelines in two or three years to evaluate the appropriateness and adequacy of disclosure models other than those suggested below to achieve the UST's goals.

In addition, also as described below, the NBC submits that scheduling a status conference early in the case among the UST, general counsel for the debtor (or such other officer of the debtor as is responsible for supervising outside counsel and monitoring and controlling legal costs), the chairperson of each official committee, and lead bankruptcy counsel for the debtor and each official committee (and perhaps involving the court) may promote the Proposed Fee Guideline's goal of encouraging clients to take steps to ensure that the fees and expenses of their counsel are both reasonable and for actual and necessary services (*see, e.g.*, Proposed Fee Guidelines § C.8.d). Such a status conference may also help ensure that fees are reasonable in the circumstances of a particular case.

A. Alternative Methods for Providing the UST with Information to Evaluate Comparability to "Customary Compensation" in Non-Bankruptcy Matters

The NBC suggests that the Proposed Fee Guidelines provide that the submission of any one of the three forms of certifications described below would satisfy the applicant's burden to provide the UST with information regarding "comparability" to "customary compensation." Again, however, these are non-exclusive alternatives for satisfying the applicant's evidentiary burden, and the applicant would be free to attempt to meet its burden by other forms of disclosure. In any event, the burden would remain on the applicant. Moreover, these alternatives are "safe harbors" only on the issue of presenting evidence regarding "customary compensation," and not on other issues that might be raised in connection with an application to employ or compensate counsel.

1. Certification By the Law Firm of Rates Customarily Charged by Attorneys Working on the Case

Under this alternative, the applicant law firm would provide a certification stating, in substance, that with any exceptions noted therein, the hourly rate charged for each of the ten individual attorneys who billed the most hours to the case during the relevant fee application period (or, if fewer than ten attorneys billed on the case, all attorneys who billed on the case) is no greater than the hourly rate that the firm charged for each attorney for at least the majority of hours billed during the current "rate period"[1] to clients other than the chapter 11 client. For purposes of making this certification, the applicant would take into account only time billed to other client matters that were billed (a) solely on an hourly fee basis (as opposed to a fixed fee, contingency fee, partial contingency fee, or other similar arrangement) and (b) not on a "pro bono" or "public service" basis. Further, if more than ten attorneys billed time to the chapter 11 case during the relevant fee application period, the same requirement would apply for any attorney who billed more than two-thirds of his or her billable hours for the applicable fee application period to the chapter 11 case.

This form of certification would provide evidence, for each attorney included in the certification, that the hourly rate being charged is "customary" in the sense of being the same or lower than that charged for at least the majority of hours billed by the attorney to other clients, or disclose the extent to which that is not the case. (The reason for limiting the certification in a case where more then ten attorneys from the firm billed time to the chapter 11 case to the ten attorneys most involved in the case, plus any attorney who spends at least two-thirds of his or her billable time on the case, is practicality; in a large case where a large number of attorneys with different areas of expertise may spend a relatively small amount of their time on the case, it seems unduly burdensome (and not particularly conducive to the "comparable compensation" analysis) to require the firm to engage in this analysis for every single attorney who spends some time—no mater how little—on the case). In addition, the Proposed Fee Guidelines might require that if more than some specified threshold (for example, 10% or 20%) of the hours billed to the estate during a particular fee application period were billed at a rate that is higher by some minimum threshold, than the "customary rate," as determined above, then the applicant should explain the deviation.

This approach would address the consideration set forth in Section 330(a)(3)(F) of the Code, without being unduly intrusive. Further, the fact that a minority of the hours which an attorney bills to other clients might be billed at a rate (or rates) lower than that billed to the estate (and lower than that for the majority of the hours billed to other clients) should not be objectionable, because the "minority discounted rate" is not the "customary compensation" for the attorney's work.

2. Certification Comparing "Blended Hourly Rates"

The second alternative approach recognizes that although law firms may enter into "discounted" fee arrangements with non-bankruptcy clients for a variety of reasons, focusing solely on such "discounts" tells only part of the story of "customary compensation." Large, full service law firms may also receive premium compensation—

[1] As defined in NBC Comments at p. 14, § 8

for example, for certain transactional work or complex litigation. Further, discounts and premiums may be interrelated; for example, a client who provides "premium billing" transactional work may, as a *quid pro quo*, be given discounts on more routine work. In contrast, debtor's counsel in a bankruptcy case is not likely to receive a "premium" or a fixed fee with a "premium" built in simply because counsel succeeds in obtaining confirmation of a chapter 11 plan, even though such a plan may share many of the features of a complex corporate transaction that would merit premium billing outside of chapter 11.

Accordingly, another way to compare compensation in bankruptcy matters to that in non-bankruptcy matters would be for the law firm to certify the following information **either** for the firm as a whole (excluding foreign offices that did not bill substantial time to the case) **or** for each office in which attorneys collectively billed at least 10% of the hours that the firm billed on the chapter 11 case during the relevant fee application period: (A) for either the most current "rate year," or the last full "rate year": (1) the "blended hourly rate" for the firm or office, as applicable, based on total revenues divided by total hours, excluding hours spent on "pro bono" work or work which was done at a low rate as a "public service" and (2) the respective percentages of hours billed by partners, of counsel, associates, contract attorneys, and paralegals at the firm or that office, as applicable, for the applicable rate period; (B) the blended hourly rate billed to the estate by attorneys from the firm or that office, as applicable, for the applicable fee application period; and (C) the respective percentages of the time billed to the estate for the applicable fee period by professionals at the firm or that office, as applicable, by partners, of counsel, associates, contract attorneys and paralegals. A material difference between the blended hourly rate charged to the estate for a given fee application period by the firm or office, and that generally realized by the firm or that office, not accompanied by a comparable difference in the relative proportion of partners, associates, etc. could be an occasion for the UST to make further inquiry.

3. Certification Regarding "Due Diligence" By General Counsel or Other Responsible Officer of the Debtor Regarding Customary Compensation and Other Efforts to Control Fees

The third alternative would be for the general counsel or other officer of the debtor responsible for supervising outside counsel and monitoring and controlling legal costs of outside counsel to provide a certificate outlining the steps that such responsible officer took (i) to ensure that the law firm's compensation was at the "market" and (ii) to maintain control over fees as the responsible officer would do outside of a chapter 11 case. For example, the responsible officer would have to certify whether he/she had conducted "due diligence" to satisfy himself or herself that the hourly rates being charged were comparable to those that would have been charged by other comparable firms, and the steps that the responsible officer took to make that determination. The responsible officer could, if appropriate, certify that he/she had interviewed a number of firms (identifying the number) and either determined that the rate being offered by the law firm that was hired was a "market rate" or, if not market, had either determined that special circumstances warranted the retention of a particular firm (describing such circumstances), or, alternatively, had negotiated rates at a level which the responsible officer considered "market." The responsible officer would also have to certify what efforts have been made to control legal costs—for example, either negotiating lower

rates on routine matters, or delegating such matters to less expensive counsel. The point of this certification would be to demonstrate that the responsible officer had engaged in the same kinds of activities and analyses to control legal fees as would have been undertaken in a non-bankruptcy matter. Therefore, the certification should be appropriately detailed so as not to become boilerplate; and substantially similar certifications for the same law firm from different debtor clients might be flagged as suggesting that further investigation is warranted.

Compliance with this certification alternative (as well as compliance with the two other certification alternatives set forth above) should not require the disclosure of any information subject to the attorney-client privilege or the attorney work product privilege or require a waiver or modification of either privilege.

B. Scheduling an Early Status Conference with the US Trustee (and, Perhaps, the Court) Regarding Legal Fee Matters

It is reasonable to anticipate that estate-compensated professionals will challenge the Proposed Fee Guidelines and seek to have bankruptcy courts decline to enforce at least some of them. The NBC believes that the process of addressing such issues would be facilitated if the UST moved the bankruptcy court, early in the case, to hold a status conference at which the UST, any professional who is unable or unwilling to comply with all of the Proposed Fee Guidelines, and such professional's clients would be present and at which the court would determine the extent to which it will enforce any objected-to provision of the Proposed Fee Guidelines. The purpose of this status conference would not be to have the court decide whether a professional had in fact complied with the Proposed Fee Guidelines, but rather the extent to which the court will adopt them in the first instance. Such a status conference would provide the professionals early on with guidance in preparing their employment applications and subsequent fee applications (and, perhaps, as to whether to undertake the engagement at all), and could limit subsequent fee-related litigation.

Moreover, whether or not the Proposed Fee Guidelines are adopted, and, if so, regardless of their content, the concept of an early status conference might be helpful. One of the goals of the current proposals for client certification contained in Section C.8 of the Proposed Fee Guidelines seems to be to sensitize the client to the fact that the same market and other forces that operate in setting legal fees in non-bankruptcy matters should operate in bankruptcy matters, and to impress on the general counsel or other responsible officer that there should be at least as much attention paid to controlling legal costs in bankruptcy as there is outside of bankruptcy. However, a more effective method to further this goal than client certification might be to include a provision in the Proposed Fee Guidelines for a status conference among the UST, the general counsel of the debtor (or other officer responsible for supervising outside counsel and monitoring and controlling outside legal costs), the chairperson of the creditors committee and lead bankruptcy counsel for the debtor and the creditors committee very early in the case, where these points (and others) can be discussed and addressed interactively.

For example, such a status conference would provide an opportunity for the UST to find out what efforts have been and are being made to keep fees at a reasonable level that are comparable to the efforts that would have been made outside of chapter 11.

Similarly, the UST could discuss issues of budgeting and planning with the parties present. Further, the Proposed Fee Guidelines might include a provision for the UST to move the court for a status conference under Bankruptcy Code § 105(d)(1) ("to further the . . . economical resolution of the case"), at which the court could, if it elected to grant the motion, explain the court's expectations regarding legal fees (and their control). (Of course, if the court did not want such a status conference or consider it useful, it could simply deny the motion.) Such a status conference would not be in lieu of the requirement that the applicant provide the UST with evidence regarding "comparable compensation"—either in one of the "safe harbored" forms, or in some alternative form—but merely an additional means of attempting to encourage clients to continue to utilize, in the chapter 11 case, the same approaches to dealing with legal bills and controlling legal fees that the clients have used outside of bankruptcy.

No participant in the status conference should be required to disclose any information subject to the attorney-client privilege or the attorney work product privilege or to waive or modify either privilege.