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BY E-MAIL AND OVERNIGHT COURIER

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Director Clifford J. White III
U.S. Trustee Program
20 Massachusetts Avenue, N.W., 8th Floor
Washington, D.C. 20530

Re: The United States Trustee Program's Proposed Guidelines for Reviewing Applications for Compensation & Reimbursement <u>of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases</u>

Dear Director White:

The United States Trustee Program (the "***U.S. Trustee***") published for review and comment a draft of proposed guidelines dated November 4, 2011, to govern compensation and reimbursement of professionals in larger chapter 11 bankruptcy cases (the "***Proposed Guidelines***").[1] This letter summarizes comments of Weil, Gotshal & Manges LLP ("***Weil***") to the Proposed Guidelines and contains suggestions that may assist the U.S. Trustee in ensuring that professional compensation is reasonable and necessary.

Congress's overarching goal in enacting Section 330 of the Bankruptcy Code, which authorizes compensation and reimbursement of professionals, was to lure competent and capable professionals into the bankruptcy arena by allowing compensation comparable to the compensation of non-bankruptcy professionals.[2] By eliminating the concept of "economy of administration" and adopting section 330, Congress recognized that "on average the gain to the estate of employing able,

[1] *Draft for Public Comment, Guidelines for Reviewing Applications for Compensation & Reimbursement of Expenses Filed under 11 U.S.C. § 330 by Attorneys in Larger Chapter 11 Cases* (Nov. 4, 2011), http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/proposed/proposed_guidelines_and_exhibits.pdf.

[2] *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 330 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6286. *See also In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 849-51 (3d Cir. 1994) (discussing section 330 of the Bankruptcy Code and its legislative history).

experienced, expert counsel would outweigh the expense to the estate of doing so, and that unless the estate paid competitive sums it could not retain such counsel on a regular basis."[3]

Informed by the above Congressional policy, Weil supports the U.S. Trustee's goals of enhancing a transparent and consistent system governing the compensation and reimbursement of bankruptcy professionals as well as the U.S. Trustee's attempts at identifying areas of potential abuses in order to "[i]ncrease public confidence in the integrity of the bankruptcy compensation process."[4] These goals of transparency, consistency, and increasing public confidence, however, should be balanced with practical considerations, such as efficiency and cost-effectiveness, particularly in the context of larger chapter 11 cases. Further, the need for additional or new guidelines should be based upon the empirical demonstration of pervasive abuse, which the Proposed Guidelines do not identify or address. The fact that fees and expenses in larger chapter 11 cases in the aggregate are substantial in dollar amounts does not show abuse. In fact, the number of larger chapter 11 cases filed each year may not exceed twenty-five to fifty cases: Query whether pervasive abuse can be established in this context and whether the stringent requirements directed toward larger chapter 11 cases are thus justified for such broad application.

Particularly during the inception of a case, lawyers and law firms involved in larger bankruptcy cases and mega-bankruptcy cases[5] perform numerous critical tasks and deal with pressing time constraints. The size, complexity, and pace of the Lehman Brothers bankruptcy, for example, was unprecedented. Weil attorneys were required to be available on a twenty-four-hour-a-day, seven-days-a-week basis. In order to address the needs of Lehman, Weil had to marshal its global resources, as well as create a large, effective team and devote a substantial portion of its production capacity to serve the debtors' needs, while simultaneously fulfilling its professional responsibilities to preexisting clients.

Large chapter 11 cases typically require crisis management. In planned filings, the post-filing triage phase may be short, whereas in unplanned filings, the triage phase may be long and may require extraordinary measures. In addition to the triage phase at the beginning of a case, there are frequently other points in the case when attorneys are operating under intense time demands (e.g., sales

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[3] *In re Busy Beaver*, 19 F.3d at 850.

[4] Proposed Guidelines at B(2)(h).

[5] The working definition of a mega-bankruptcy case is "an extremely large case with: (1) at least 1,000 creditors; (2) $100 million or more in assets; (3) a great amount of court activity as evidenced by a large number of docket entries; (4) a large number of attorneys who have made an appearance of record; and (5) regional and/or national media attention". Laura B. Bartell, *A Guide to the Judicial Management of Bankruptcy Mega-Cases*, 5 (Fed. Jud. Ctr., 2d ed. 2009), http://www.fjc.gov/public/pdf.nsf/lookup/BkMega21.pdf/$file/BkMega21.pdf (quoting *Guide to Judiciary Policies and Procedures* § 19.01).

of substantially all assets, confirmation, etc.). As a result, bankruptcy lawyers often must balance the need to prepare detailed time records that comply with best practices of contemporaneous billing under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the applicable local rules, and the current fee guidelines of the U.S. Trustee (the "***1996 U.S. Trustee Guidelines***"),[6] with the need to address the crisis at hand. As the Court noted in *In re Motors Liquidation*, "[R]ecording the time associated with [tasks], while essential, must nevertheless be performed in a way that gives due account to the underlying responsibilities to be performed and . . . those underlying responsibilities ultimately are more important than incremental detail in timekeeping."[7]

The goals of transparency, consistency, and increasing public confidence, therefore, must be balanced against the imposition of new onerous and invasive procedures that may prove more cost-causing than cost-saving for the estate. The 1996 U.S. Trustee Guidelines rely, in part, on the framework of general oversight and on the well-established and respected duty of legal professionals to self-monitor their time entries reasonably, efficiently, and accurately for all matters, whether bankruptcy or non-bankruptcy. This tenet should remain a cornerstone of the Proposed Guidelines going forward and be factored into development of the new fee guidelines.

Moreover, a client has the undeniable right to engage counsel of his or her choice; a principle recognized in bankruptcy cases.[8] Debtor's management does not relinquish its responsibilities to manage costs simply because the company is in bankruptcy. Debtors consider costs of counsel, taking into account experience and expertise of counsel, as well as rates. A client's right of choice as well as the Congressional policy of attracting talented professionals to the bankruptcy practice by providing them with their customary rates – rejecting the "economy of administration" standard – should inform the U.S. Trustee in the adoption of its new guidelines.

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[6] *See generally Guidelines for Reviewing Applications for Compensation (Fee Guidelines)*, *reprinted in* 28 C.F.R. Part 58, Appendix (1996), http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm.

[7] *In re Motors Liq. Co.*, Case No. 09-50026 (REG), Hr'g Tr. 20:13-18, July 6, 2010 (ECF No. 6369).

[8] *See, e.g.*, *Hassett v. McColley* (*In re O.P.M. Leasing Servs., Inc.*), 16 B.R. 932, 941 (Bankr. S.D.N.Y. 1982) ("A trustee is entitled to engage attorneys of his own choice, subject to the court's approval.").

I. Thematic Issues

Weil identifies three primary areas of concern in the Proposed Guidelines.[9] First, the Proposed Guidelines suggest that bankruptcy professionals should apply billing practices and policies for non-bankruptcy matters to bankruptcy matters, although bankruptcy matters and clients differ in material respects from typical non-bankruptcy matters. Second, if the section on the preparation of budgets is understood to be mandatory, the Proposed Guidelines require that professionals forecast fees and expenses through budgets where, in many cases (e.g., a free fall chapter 11 case), the professional may have limited control or visibility as to the potential dynamics of the case and, in turn, the fees and expenses to be incurred. Third, in stark contrast to the stated intent of achieving parity between bankruptcy and non-bankruptcy billing policies and practices, the Proposed Guidelines impose disclosure, certification, and reporting requirements that are inapplicable in the non-bankruptcy context, unnecessarily burden clients, and create unintended consequences that could undermine the integrity of the practice.

A. Application of Non-Bankruptcy Policies and Practices

In applying the Proposed Guidelines, the U.S. Trustee purports to "[e]nsure bankruptcy professional fees are subject to the same client-driven market forces, scrutiny, and accountability that apply in non-bankruptcy engagements."[10] In furtherance of this goal, the Proposed Guidelines require chapter 11 professionals to disclose specified data points related to their non-bankruptcy billing policies and practices. It appears this disclosure is sought to enable the U.S. Trustee to determine the reasonableness and necessity of the fees and expenses by, among other things, comparing the billing rates "to the market measured both by the professional's own billing practices for bankruptcy and non-bankruptcy engagements and those of its peers . . . ."[11] The disclosure of such proprietary information, however, is not typically provided in a non-bankruptcy environment. Rate determination is proprietary information and a firm by firm management decision based on a variety of proprietary factors, including the need to remain competitive in the marketplace. Law firms – if their rates are found to be higher than those of their peers – should not be made to arbitrarily reduce their rates to comply with the rates

[9] On the outset, Weil notes that there is basis for the observation that certain aspects of the Proposed Guidelines go beyond the statutory authority of the Executive Office of the U.S. Trustee to adopt procedural guidelines under 28 U.S.C. § 586(a)(3)(A). For example, the Proposed Guidelines impose substantive obligations on both the professionals and the clients in the form of mandating rate disclosures and verified statements. *See, e.g.*, Proposed Guidelines at C(3)(*l*)(vii)-(ix), m; C(8). In this comment letter, however, Weil focuses on the three primary areas of concern discussed *infra*.

[10] Proposed Guidelines at B(2)(a).

[11] *Id.* at B(4)(a).

charged by other firms. Neither the Bankruptcy Code nor case law provides a basis for such arbitrary reduction in rates.[12] The notion that management of distressed companies do not consider billing rates in selecting counsel is not supported by Weil's experience.

The Proposed Guidelines require a firm to disclose, for both bankruptcy and non-bankruptcy matters, the highest, lowest, and average hourly billing rate for the preceding twelve months for each professional and paraprofessional working on the applicable bankruptcy matter.[13] The Proposed Guidelines also require a firm to disclose, in an application for employment and in the fee application subject to review, whether (a) the firm charged clients at hourly rates more or less than those set forth in the application for employment or fee application for estate-billed bankruptcy matters, other bankruptcy matters, and non-bankruptcy matters;[14] (b) whether the firm offered clients or agreed to variations from standard or customary billing rates, fees, terms, or arrangements;[15] and (c) if a firm has a prior or existing relationship with a client, whether the terms of the proposed postpetition retention application differ from the prior retention.[16] A firm must also disclose and compare summary billing data among professionals in the bankruptcy practice group with all other practice groups of the firm, including summary billing data for the highest, lowest, and average billing rate for professionals within a given experience level or position (although the summary billing data comparison is not required for every individual in the firm).[17] Finally, the Proposed Guidelines require disclosure of (a) each professional's hourly rate increases during the application period; (b) the number of rate increases of each professional since the inception of the case; and (c) the effect of rate increases since the order approving retention on the fee application.[18]

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[12] *See In re Motors Liq. Co.*, Case No. 09-50026 (REG), Hr'g Tr. 28:11-29:22; 28:1, Apr. 29, 2010 (ECF No. 5699) (where the court refused to discount the rates charged by lawyers to the debtors and to the creditors' committee, rejecting the argument that the reductions were justified because "other firms might have lower hourly rates and/or voluntarily offered the discount").

[13] Proposed Guidelines at C(3)(*l*)(viii).

[14] *Id.* at C(7)(a), (b); E(1)(d), (e).

[15] *Id.* at C(7)(c), (d); E(1)(b), (c).

[16] *Id.* at E(1)(g).

[17] *Id.* at E(2).

[18] *Id.* at C(3)(*l*)(ix), (m).

The required information does not achieve the U.S. Trustee's underlying objective of providing comparable and competitive compensation for professionals. Publishing raw data without a full explanation of the proprietary considerations around setting rates would not serve to increase public confidence; rather, it would create fodder for public criticism, debate, and litigation opportunities for those interested in obstructing the progress of a particular case. Firms may have a variety of reasons for charging greater or lesser fees in non-bankruptcy matters, which reasons cannot be determined by looking at the single data point of highest or lowest hourly billing rates in a given twelve-month period. For example, a firm may be engaged on a contingency basis. If the contingency occurs, the attorney may charge a higher-than-average billing rate or may not bill by the hour at all. If the contingency fails, the attorney may charge an equally lower-than-average billing rate. Firms may also charge premium billing in areas of particular expertise or discount billing for long-term clients with large volumes of work. Alternative fee arrangements vary and may depend on several factors, including, among other things, volume of work, nature of work, duration of client relationship, consistency of assignments and workflow, as well as payment terms. In each varying fee arrangement, the outlier data points of highest and lowest rate billed do not provide a meaningful measure as to whether the rate a professional charges for non-bankruptcy matters is commensurate with the rate charged for bankruptcy matters.

The disclosure of whether the firm offers non-bankruptcy clients variations in customary billing rates, fees, terms, or arrangements does not provide a meaningful measure of whether the terms provided to a bankruptcy client are commensurate. In certain instances, such variations are not permitted or are strongly discouraged in a chapter 11 case (e.g., success fee/contingency fee arrangements). As noted above, the variations offered to non-bankruptcy clients do not provide a conclusive point of comparison to determine whether a professional's fees are reasonable. Moreover, there is no basis to require professionals to provide fee arrangements to bankruptcy clients where clients have not negotiated for such arrangements.[19]

Even disclosure of the average billable rate has issues. Specifically, disclosure of confidential rate information is unprecedented in professional practice as it effectively requires any firm with a restructuring practice to disclose significant information related to its non-bankruptcy practices. Competitors (especially those in non-bankruptcy practice areas not subject to disclosure requirements) may use the disclosed information to gain an unfair advantage. In the worst case, this may cause firms with smaller bankruptcy practices to refuse to represent parties whose professionals' fees are subject to public disclosure rather than risk competitive disadvantage to larger non-bankruptcy practice areas. This would, in turn, harm the competitiveness of the bankruptcy bar.

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[19] *In re Motors Liq. Co.*, Case No. 09-50026 (REG), Hr'g Tr. 28:11-29:22, Apr. 29, 2010 (ECF No. 5699) (holding there is no basis in either the Bankruptcy Code or case law requiring professionals to discount their fees even if they provide such discounts to non-bankruptcy clients).

Weil suggests that, rather than requiring disclosure of rate increases under all circumstances, it is more reasonable and cost-effective to require the filing of a declaration in cases of an annual rate increase (exclusive of standard seniority step ups) of more than 10%. Another check for reasonableness of annual increases is whether the increased rates are charged in similar recently filed chapter 11 cases of the same firm. Comparable chapter 11 cases would more accurately reflect the reasonableness of rate increases, as such cases would more likely reflect rate increases due to inflation or the cost of increased overhead across the industry as a whole.

In attempting to achieve parity between bankruptcy and non-bankruptcy billing practices, the Proposed Guidelines also do not appear to address the issue that a significant portion of the work in larger chapter 11 cases is related to non-bankruptcy matters and could occur even absent bankruptcy. For example, in *General Growth Properties*, Weil served as the debtors' primary counsel in the Urban litigation, a complex non-bankruptcy dispute[20] and also handled complex corporate and real estate transactions that facilitated the company's emergence from bankruptcy. In addition, transactions in larger chapter 11 cases are generally more time-consuming not only because of their interrelation and complexity, but also because they occur against the backdrop of a chapter 11 proceeding, which may result in more litigation, negotiation, and complication than is typical for such deals in a consensual context outside of bankruptcy. A comparison of non-bankruptcy fees versus bankruptcy fees may also not accurately represent the incremental additional cost of performing transactions in a chapter 11 case, such as preparation of plans of reorganization and disclosure statements, motion practice for court approvals, coordination with interested parties, or any of the other tasks necessitated by the chapter 11 process.

Further, using non-bankruptcy billing policies and practices as a standard for determining the reasonableness of their bankruptcy counterparts does not consider a simple distinction between the two categories: the payment process and cycle are different for non-bankruptcy clients compared to bankruptcy clients. Rather than a monthly fee process with a holdback of a set percentage of fees in the bankruptcy context, non-bankruptcy billing arrangements vary from billing every two weeks with an offset against a retainer, to monthly invoices paid within ten days, to a variety of other arrangements. In most non-bankruptcy billing arrangements, there are no holdbacks and payment is prompt. The reality is that the current arduous billing and disclosure requirements, costly nature of holdbacks, and potential adversarial nature of the fee application process inherently increase the administrative costs and burdens of representing debtors and committees. The Proposed Guidelines add to these burdens with little perceived benefit to the bankruptcy system.

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[20] *See Fourth Interim and Final Application of Weil, Gotshal & Manges LLP, Attorneys for the Reorganized Debtors, for Allowance of Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred During (I) the Fourth Interim Compensation Period of July 1, 2010 Through October 21, 2010, and (II) the Final Compensation Period of April 16, 2009 Through October 21, 2010, In re Gen. Growth Props.*, at ¶ 69, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. Feb. 7, 2011), ECF No. 6664.

The U.S. Trustee may be better served relying on market forces and on the underlying sophistication of debtors and their creditors. If a firm's rates and/or fee arrangements are not commensurate with the "market" for both bankruptcy and non-bankruptcy matters, the firm is at a competitive disadvantage to other firms seeking the engagement. Debtors and creditors are sophisticated parties capable of exercising business judgment in evaluating the costs and benefits of retaining professionals, including, whether the professional's fees and fee arrangements are commensurate with the firm's expertise and competence. Although one can appreciate the U.S. Trustee's intent to create a secondary "gut check" of professional fees, the U.S. Trustee is equally served by comparing professional fees and fee arrangements across comparable bankruptcy cases rather than requiring additional onerous disclosures. The notion that bankruptcy practitioners overcharge their debtor clients because they are price insensitive is misplaced; rate discussions are regularly a part of debtor pitches. Likewise, in Weil's creditor representation, the same rates are used and willingly paid.

B. Imposition of Budgets

A key feature of the Proposed Guidelines concerns budgets and staffing plans: *If* a professional adopts budgets and staffing plans, the U.S. Trustee will consider such budgets and staffing plans in reviewing applications for compensation.[21] As a preliminary matter, the Proposed Guidelines should be clarified to state whether the preparation of budgets and staffing plans are (a) mandatory, (b) optional, or (c) although optional, could render the fee application under review subject to objections. Currently, the Proposed Guidelines use the word "if", suggesting that budgets and staffing plans are optional.

If the preparation of budgets and staffing plans are mandatory under the Proposed Guidelines (whether or not the client requires it), then professionals will be required to prepare excruciatingly detailed fee applications as well as exercise extraordinary foresight in a process that is inherently unpredictable. Pursuant to the Proposed Guidelines, in the initial stages of a chapter 11 case (while professionals focus on stabilizing the debtor's business and operations), a firm is expected to staff a chapter 11 case and estimate the hours to be spent and subdivide such hours and staffing among twenty-four project categories, each with twenty subcategories (although budgeting need not be done at the sub-category level).[22] Further, although the budgets are not binding, the Proposed Guidelines

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[21] Proposed Guidelines at C(6)(a).

[22] *Id.* at Exs. A, D. Moreover, Exhibit A of the Proposed Guidelines ultimately requires attorneys to choose among a combined 480 categories and subcategories when recording their time. This requirement imposes another unreasonable and impractical burden on attorneys. In a large case involving multiple discrete tasks, an attorney may spend more time considering and recording time for the appropriate project category and subcategory rather than performing the underlying substantive task. Contrary to the aim of the Proposed Guidelines in achieving parity among bankruptcy and non-bankruptcy billing practices, the requirements imposed

require that professionals explain variations of more than 10% and any staffing changes.[23]

Myriad facts and circumstances contribute to the uniqueness of each bankruptcy case, with moments of crisis needing to be addressed at different times. Although it is possible to prepare budgets and staffing plans for short-term prepackaged and prearranged chapter 11 cases (assuming such cases go according to plan), it is an exercise in futility to apply such budgets and staffing plans to a free fall chapter 11 case. There are two reasons why budgets in a free fall chapter 11 would be inherently inaccurate. First, all creditors and equity interest holders are parties in interest and may object to motions filed by the debtors or may file their own motions. If parties dispute an issue, litigation will ensue and additional fees will be incurred. There is no way to budget for actions that may or may not be taken by third parties. Second, the needs of a debtor can change radically as the case progresses. It is not possible to foresee at the outset of the case all the relief that may need to be sought in order to protect the business of a company in chapter 11. Moreover, to prepare budgets that assume litigation on every front in order to ensure compliance with fee guidelines would unnecessarily alarm clients and create tension in the attorney-client relationship. The ability to build consensus in difficult situations is one of the skills that denotes a talented bankruptcy professional. Forcing a professional to budget for failure is not a helpful exercise.

Even outside of bankruptcy, litigation budgets have proven to be of limited value for similar reasons. It is impossible to predict every development that could affect the progress of a litigation, including the conduct of adversaries. Moreover, there is no meaningful way to determine how adversarial parties will behave in a bankruptcy case and, in many cases, it is not even possible to identify the potential adversaries. Given that creditors frequently sell claims in the bankruptcy context, even a meaningful understanding of the identities of parties, their positions, and their proclivity to litigate at the outset of a case may prove useless shortly thereafter.

Changes in the economy or financial markets may open or foreclose possible reorganization options (e.g., the sale process and the availability of exit financing) or may cause a debtor to amend a chapter 11 plan multiple times or pursue different alternatives. In each case, fees will vary depending on the options available to a debtor and the volatility (or lack thereof) of the markets and other external factors. With only a 10% margin of error, it is unlikely that any budget will provide meaningful guidance on whether fees are reasonable.

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in Exhibit A achieve the opposite result: Categories and subcategories in non-bankruptcy billing codes do not have this large a number, nor do non-bankruptcy clients require their attorneys to record in such detail. Although Weil lauds the U.S. Trustee's intent of achieving consistency in billing practices, the unreasonable imposition of 480 project categories and subcategories is not a feasible method of reaching this goal.

[23] *Id.* at C(6)(a), (c), (d).

Likewise, staffing changes depend on a variety of factors, including changes due to maternity leave, disability leave, the demands of other clients or matters, departures, and the staffing demands of the case. Detailing each change is unduly burdensome and, in some instances, infringes the individual's right to privacy. The focus should be on whether there is a core team that is utilized throughout the case.

The existing process for reviewing fee applications better serves the U.S. Trustee, as it provides the benefit of hindsight in determining whether the hours spent for services rendered by a professional are reasonable. If the hours are excessive, the U.S. Trustee may object. A non-binding budget subject to numerous externalities does not change the underlying analysis of whether a professional's fees are reasonable.[24] With a number of checks already in place, the additional costs of preparing, reviewing, and defending budgets outweigh the marginal benefit of such budgets. Predicting the outcome of a chapter 11 case, therefore, is an art better left to distressed debt investors, rather than professionals who operate at the direction of their clients and who may incur additional fees as a reaction to their clients' adversaries.

To the extent that budgeting provisions are adopted, however, Weil offers the following suggestions: (a) the variance rule should apply to the aggregate amount budgeted, rather than the category codes; (b) the budgets should be provided as an information tool, rather than as a basis for objection; (c) budgets should be prepared on a quarterly basis without specificity of staffing; and (d) the budgeting period should commence on the third month anniversary of the case when challenges are more identifiable and more readily estimated. The rationale underlying these suggestions is based on the practical realities of larger chapter 11 cases. With respect to variance, by way of example, if the debtor is pursuing alternative paths of either a reorganization or a sale, then the budget may reflect equal time on these paths, but the actual time may vary significantly once a single path is chosen. As discussed in detail above, budgets in this context are speculative and both debtor and committee work can be largely reactive. Consequently, while a budget may inform those reviewing fees, it should not be a basis for an objection. If an unexpected issue arises in a case, it must be addressed – whether or not it was included in the budget.

C. Verified Statements from Clients

Clients have traditionally played a significant role in the fee process in both bankruptcy and non-bankruptcy contexts. The Proposed Guidelines, however, impose obligations on clients beyond the usual review process by requiring that clients affirm statements, subject to the penalties of perjury. The verified statements, moreover, require the input of professionals whom the Proposed Guidelines seek to regulate.

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[24] Ultimately, the determination of reasonableness rests in the court's sound discretion, with due deference to established case law applying Section 330 of the Bankruptcy Code.

Specifically, the Proposed Guidelines require clients to affirm, among other things, (a) whether the client took steps to ensure compensation comparable with non-bankruptcy engagements and (b) whether the client reviewed the application to ensure reasonableness of fees and appropriateness of staffing.[25] Clients must also affirm whether they have reviewed a budget and staffing plan and whether they have discussed with the professional any variances of 10% or more in the budget.[26]

As a preliminary matter, particularly in the Southern District of New York, fee applicants are already required to provide a monthly fee statement to certain parties who are given standing to object to the applicant's compensation. These parties are, among others, (a) the debtor; (b) debtor's counsel; (c) counsel to all official committees; (d) the U.S. Trustee; and (e) counsel to all postpetition lenders or their agents.[27] Moreover, the 1996 U.S. Trustee Guidelines already provide a client review mechanism, because the fee application should contain a statement that the client was given the opportunity to review the application and should indicate whether the client has approved the requested amount.[28]

Client verification as contemplated under the Proposed Guidelines does not appear to add value. Imposing an intermediate layer to the review process appears superfluous (particularly if there is an existing fee committee), and given the time demands imposed by a bankruptcy filing – clients are confronted with both their regular work load and their bankruptcy work load – it is overly burdensome to impose an additional obligation that clients engage in a verification process for each estate-compensated professional every four months.[29]

Verified statements may also inadvertently alter the dynamic of the relationship between the client and the attorney. If the relationship sours, the client may use the requirement of a verified statement to pressure the professional to more vigorously advocate or pursue options that may be imprudent (e.g., retention bonuses for management). In the most extreme circumstances, a client may refuse to deliver a verified statement in order to ensure that counsel does not expend resources

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[25] Proposed Guidelines at C(8)(c)-(e).

[26] *Id.* at C(8)(a)-(b).

[27] *Order Establishing Procedures for Monthly Compensation and Reimbursement of Expenses of Professionals*, M-412 (Dec. 21, 2010) (amending Gen. Order M-389).

[28] *Guidelines for Reviewing Applications for Compensation (Fee Guidelines)* § (b)(1)(v), *reprinted in* 28 C.F.R. Part 58, Appendix (1996).

[29] *See* Proposed Guidelines at C(3)(j) (interim applications are typically filed within a 120-day period).

investigating conduct that is unpopular with management but consistent with counsel's duties as an officer of the court.

Where clients have no previous experience with the chapter 11 process, they will have no independent basis to make many of the requisite statements without the advice of the professional. For example, if a debtor retains bankruptcy counsel that did not previously serve as corporate counsel, the debtor will be unable to compare compensation for bankruptcy engagements versus non-bankruptcy engagements.[30] Similarly, a client may not have prior experience with the bankruptcy process to determine whether the fees incurred in relation to drafting a plan and disclosure statement were reasonable and whether the task was appropriately staffed. The same principle applies with regard to any budget or staffing plan, as a debtor would have no basis to evaluate whether a budget or staffing plan is reasonable. Instead of reviewing such matters, a debtor's (and a committee's) time would be more efficiently utilized by focusing on reorganizing the debtor and, with respect to the debtor, operating its business.

Rather than relying on a client's verified statement, the U.S. Trustee is better served by continuing its independent analysis of the reasonableness of professional fees and expenses. The U.S. Trustee is a party in interest in all chapter 11 cases and continually monitors the fees and expenses of professionals. As a result, the U.S. Trustee has the requisite experience and expertise to objectively evaluate whether fees and expenses incurred are reasonable and necessary.

II. Specific Requirements under the Proposed Guidelines

Weil's comments to specific requirements of the Proposed Guidelines are classified under two primary categories: (a) specific items "typically not compensable outside of bankruptcy," which are only required in the bankruptcy context and (b) the proposed requirements are not cost-effective.

A. Non-Bankruptcy Versus Bankruptcy Tasks

Although the Proposed Guidelines attempt to ensure that fees and fee policies for bankruptcy matters are commensurate with non-bankruptcy matters, the Proposed Guidelines impose a

[30] Weil is aware that the information required in the "Statement from the Professional" section of the Proposed Guidelines at C(7) may assist the client in comparing fees charged in a bankruptcy engagement versus a non-bankruptcy engagement. Although, according to the Proposed Guidelines, yes or no answers are sufficient in most cases, the professional may explain or clarify answers to questions posed concerning rates charged in estate-billed bankruptcy engagements, other bankruptcy engagements, and other non-bankruptcy engagements. The problem with C(7), however, is that it cures the flaws of the client verified statement requirement by imposing over-disclosure.

number of disclosure and reporting requirements that are atypical of non-bankruptcy matters. A closer examination of the underlying tasks for which disclosure and reporting requirements are imposed reveal that many such tasks are unique to bankruptcy matters, making the comparison to non-bankruptcy standards incommensurable.

1. Review of Bills for Privilege and Confidentiality

Because time records are public and subject to review by potential adversaries (e.g., a creditors' committee reviews a debtor's professionals' fee applications and vice-versa), it is common practice for bankruptcy professionals to review time entries to ensure they are properly redacted for privileged and confidential information. The Proposed Guidelines provide that professionals should be aware that billing records are public and that the cost of redacting bills or invoices for privileged or proprietary information may be objected to as non-compensable.[31] In contrast to the Proposed Guidelines, courts have ruled that counsel may choose from several options with regard to time entries: (a) make detailed time entries, but file them under seal; (b) make detailed time entries, redact them, and publicly file the redacted entries; or (c) record less detail for sensitive time entries.[32] Moreover, in contrast to time entries in the bankruptcy context that are publicly filed, there is no such public-filing requirement for billing records in non-bankruptcy matters and, when the attorney submits the invoices to the client, these invoices are already subject to the attorney-client privilege.

2. Contesting or Litigating Fee Objections

The Proposed Guidelines provide that the U.S. 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."[33] As a preliminary matter, outside of bankruptcy, non-clients such as creditors neither receive notice of, nor are given standing to object to, fees that attorneys charge their clients. Consideration should be given to the fact that the cost of litigating fee objections is a cost that is unique to the bankruptcy process.

Bankruptcy courts have ruled on the issues of contesting or litigating fee objections. For example, bankruptcy courts have recognized that professionals should not be penalized by the costs of defending meritless objections because refusing to compensate professionals in the defense of fee

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[31] Proposed Guidelines at B(4)(e)(i).

[32] *See In re Motors Liq. Co.*, Case No. 09-50026 (REG), Hr'g Tr. 10:2-10, July 6, 2010 (ECF No. 6369).

[33] Proposed Guidelines at (B)(4)(j).

awards would (a) dilute fee awards and (b) encourage the filing of frivolous objections.[34] If the outcome is a split decision or if the fee applicant fails to substantially prevail, the applicant should bear the costs of defending the objection, in accordance with the "American Rule."[35] If the fee applicant substantially prevails, however, the court should authorize payment of the costs of defending the suit.[36] The Proposed Guidelines purport to be U.S. Trustee statements of policies that "do not supersede local rules, court orders, or other controlling authority but complement them to the extent possible."[37] Contrary to this statement, however, the U.S. Trustee set its own non-bankruptcy standard in evaluating whether the cost of contesting or litigating fee objections is compensable, rather than deferring to case law.

B. Requirements That Are Not Cost-Effective

1. Recording Time in Half-Hour or Whole-Hour Increments[38]

According to the Proposed Guidelines, if entries reflect a disproportionate number of tasks performed in half-hour or whole-hour increments, the U.S. Trustee may object to the entries as being lumped together or inaccurately billed.[39] The U.S. Trustee extrapolates that if a professional or a paraprofessional has a certain percentage of his or her hours recorded in 1.0 or 0.5 increments, then that individual must be rounding those amounts upward to the nearest half-hour. The extrapolation that timekeepers are inaccurately recording their time ignores that certain tasks – attendance at regularly scheduled meetings, complex legal research, discovery-related document review, staffing data rooms, document coding and others – frequently result in time entries ending in ".0" or ".5" by virtue of the nature of the task. Attorneys calendar meetings and activities by establishing starting times on the hour

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[34] *In re Motors Liq. Co.*, Case No. 09-50026 (REG), at 1-2 (Bankr. S.D.N.Y. Nov. 23, 2010) (ECF No. 7896); *CCT Commc'ns, Inc.*, 2010 Bankr. LEXIS 2947, at *21-22 (Bankr. S.D.N.Y. Aug. 24, 2010).

[35] *In re Motors Liq. Co.*, Case No. 09-50026 (REG), at 2 (citing *CCT Commc'ns, Inc.*, 2010 Bankr. LEXIS 2947, at *21; *St. Rita's Assocs. Private Placement, L.P.*, 260 B.R. 650, 652 (Bankr. W.D.N.Y. 2001)).

[36] *Id.*

[37] Proposed Guidelines at A(3).

[38] *Id.* at C(5)(c). *See also id.* at B(4)(f) (providing that the U.S. Trustee will consider "whether the application contains entries over .5 hours without discrete tasks [being] separately identified and billed."). Notably, lumping time entries is common practice in non-bankruptcy matters, which highlights the conflict in the U.S. Trustee's goal of ensuring parity between bankruptcy and non-bankruptcy billing practices. As noted *supra* at II.A., there are a number of billing practices that are unique to bankruptcy matters. Using non-bankruptcy billing practices as the standard for determining the reasonableness of the compensable amount is incommensurable.

[39] *Id.* at C(5)(c).

or on the half-hour. It is often the case that meetings, calls, and other activities are cut short by the commencement of the next calendar event. Thus, it is inherently logical that more entries would end in ".0" or ".5" than other increments.

The Proposed Guidelines also ignore that billing in six-minute increments is imprecise in and of itself. Timekeepers round up or down depending on the nearest one-tenth of an hour increment, and timekeepers frequently do not bill at all for the many small tasks that arise in the course of the day. As such, any alleged rounding up is offset by all of the many instances when timekeepers round their time down or do not bill their time at all.

Moreover, given the reliance on e-mail in today's legal environment, professionals should be encouraged to create a lumped entry when they receive and/or send a large number of e-mails, rather than painstakingly recording a time entry for each e-mail, which could take longer than the actual e-mail for which time is recorded. Significantly, the practice of lumping e-mails in increments greater than ".5" hours has already received court approval, provided the descriptions in the lumped entry are sufficiently detailed[40] (e.g., time recorded as "0.7" for reviewing and responding to e-mail correspondence with client and plan sponsors regarding potential plan strategies).

2. *Estimate of Fees and Expenses Absent Bankruptcy*

The requirement that debtor's counsel provide the debtor with "[a]n estimate of the fees and expenses for which approval is sought that the debtor would have incurred even absent the bankruptcy"[41] raises a corollary to the issues discussed regarding client verified statements *supra* at I.C. As noted, regarding client verified statements, clients who have no previous experience with the chapter 11 process will not have an independent basis to make many of the requisite statements without the advice of the professional. Similarly, regarding the requirement that debtor's counsel provide an estimate of fees and expenses absent a bankruptcy filing, the professional would have no basis to determine whether the fees and expenses incurred are comparable to the non-bankruptcy scenario without an existing corporate relationship with the client. Even with an existing relationship, as bankruptcy frequently accelerates certain non-bankruptcy issues (e.g., claims litigation), the accuracy of the estimated fees and expenses is uncertain.

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[40] *In re Motors Liq. Co.*, Case No. 09-50026 (REG), Hr'g Tr. 20:4-18, July 6, 2010 (ECF No. 6369) ("[Weil responds] that in considering objections [relating to general e-mails], we have to be practical and that, given the task to be performed and especially the volume of the e-mails in question, the detail in the time entries was reasonable. With respect to Weil's point that we have to [be] practical in looking at issues of this character, I agree. . . . [R]ecording the time associated with [tasks] . . . while essential, must nevertheless be performed in a way that gives due account to the underlying responsibilities to be performed and the fact that those underlying responsibilities ultimately are more important than incremental detail in timekeeping.").

[41] Proposed Guidelines at C(3)(n).

Although requiring a comparison of the fees and expenses that would have been incurred outside of a bankruptcy context may, in some large cases, provide helpful information to the court and to the public in assessing the true incremental cost of restructuring in chapter 11, Weil suggests that, to the extent the U.S. Trustee adopts this aspect of the Proposed Guidelines, requiring such estimates should be left to the sound discretion of the bankruptcy courts on a case-by-case basis. For example, in compliance with Judge Allan L. Gropper's instructions in *General Growth Properties*, Weil's final fee application discussed certain transactions consummated by the debtors in their chapter 11 cases and analyzed the fees in a non-bankruptcy context for similar corporate transactions.[42] Weil's analysis showed that a substantial portion of the firm's total fees might have been incurred had the debtors not resorted to chapter 11 and instead accomplished a similar recapitalization out of court.[43] Rather than impose the substantial burden of generating this data to satisfy an across-the-board requirement that an estimate of fees and expenses absent bankruptcy be provided in every case, Weil suggests that a better approach is to leave the bankruptcy courts with the discretion and flexibility to have professionals submit this information on those occasions – particularly in very large cases – where it might prove helpful in evaluating the final fee applications.

3. Explanation of More than One Attendee at a Hearing or Conference

When more than one professional attends a hearing or a conference, the Proposed Guidelines require that the applicant explain the need for multiple attendees.[44] This requirement is contrary to established case law: In the Southern District of New York, for example, the bankruptcy court has stated that two or more lawyers billing their time attending the same conference is not unreasonable *per se*.[45] The requirement that a professional explain the need for multiple attendees appears to create a prima facie presumption that the time recorded for such multiple attendance is unreasonable. Rather than imposing an arbitrary numerical threshold for determining when an explanation for multiple attendees is necessary, the U.S. Trustee could require an explanation based on its preliminary review of the specific facts and circumstances of the case. Given that the Proposed Guidelines are aimed at reviewing fee applications in larger chapter 11 cases, the need for multiple

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[42] *Fourth Interim and Final Application of Weil, Gotshal & Manges LLP, Attorneys for the Reorganized Debtors, for Allowance of Compensation for Professional Services Rendered and Reimbursement of Actual and Necessary Expenses Incurred During (I) the Fourth Interim Compensation Period of July 1, 2010 Through October 21, 2010, and (II) the Final Compensation Period of April 16, 2009 Through October 21, 2010, In re Gen. Growth Props.*, at ¶¶ 63-72, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. Feb. 7, 2011), ECF No. 6664.

[43] *Id.* at ¶ 71.

[44] Proposed Guidelines at C(5)(g).

[45] *In re CCT Commc'ns, Inc.*, Case No. 07-10210 (SMB), 2010 Bankr. LEXIS 2947, at *25 (Bankr. S.D.N.Y. Aug. 24, 2010).

attendees at hearings or conferences would frequently be much greater: Larger cases (and particularly, mega-bankruptcy cases) require that different attorneys handle different motions and appear for different matters. Moreover, the additional time and resources that a professional expends in explaining why multiple attendees were required at a given trial or conference further tax the debtor's resources.

4. "Reason for Expense"

The Proposed Guidelines list the required contents of expense applications, which list includes, among other things, a description of the expense (including pertinent details), the reason for the incurred expense, and a categorization of expenses according to the attached Exhibit A.[46] On the one hand, the reasons for most expenses should be self-evident and need not be explained, where for example, the professional requests reimbursement for local transportation charges to and from the courthouse in order to attend a hearing, or reimbursements for routine copying costs or routine messenger costs. On the other hand, detailing the reason for a non-routine expense (e.g., travel or miscellaneous expenses to cover hotel food and beverage charges[47]) may reasonably be the subject of further explanation.

Moreover, in accordance with Exhibit A of the Proposed Guidelines, the requirement that the expense summary be broken down by vendor is an onerous one. By way of example, meal expenses would require a separate "summary" entry for every restaurant, delivery service, or hotel meal used in the respective fee application period. Any benefit of providing such entries may prove too insignificant compared to the amount of time and cost expended in identifying and recording such entries.

5. Special Fee Review Procedures

The Proposed Guidelines provide that the U.S. Trustee may exercise discretion in recommending "a special fee review process, such as a fee review committee or an independent fee examiner."[48] On the outset, it is unclear whether the benefits outweigh the costs of appointing a fee review committee or an independent fee examiner. Notably, Lynn LoPucki, one of the most outspoken critics of bankruptcy legal fees, has described Weil's professional fees in the General Motors bankruptcy as "astonishingly low" given the size of the company.[49] Although a fee examiner was appointed in the

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[46] Proposed Guidelines at C(10).

[47] *See, e.g.*, *In re Motors Liq. Co.*, Case No. 09-50026 (REG), Hr'g Tr. 25:10-26:4, Apr. 29, 2010 (ECF No. 5699) (overruling the fee examiner's objection to miscellaneous expenses that debtor's counsel incurred with regard to creditor meetings, subject to a further explanation to the court on the details of the expenses).

[48] Proposed Guidelines at F.

[49] *See* Eric Morath, *GM Bankruptcy 'Unusually Inexpensive'*, *The Wall Street Journal Bankruptcy Beat* (July 26, 2011, 4:08 PM), http://blogs.wsj.com/bankruptcy/2011/07/26/gm-bankruptcy-unusually-inexpensive/.

case, LoPucki did not directly attribute the relatively low fees to such appointment; rather, LoPucki considered the structure of the reorganization as one of the reasons for the low professional fees in comparison to the magnitude of the bankruptcy.[50]

Although Weil is sympathetic to the magnitude of the tasks that confront the U.S. Trustee in reviewing fee applications in larger chapter 11 cases, the purpose of creating a fee review committee and appointing an independent fee examiner is to prevent abuse in the bankruptcy compensation process, a duty with which the U.S. Trustee is already entrusted. Contrary to the statement in the Proposed Guidelines acknowledging "whether a committee or examiner is appointed is ultimately the court's decision,"[51] thus deferring to the court's discretion with regard to the powers and duties of a fee review committee or examiner, the Proposed Guidelines, by using the words "can" and "should", appear to both grant the committee or examiner specific authority and to impose obligations on the committee or examiner. For example, the Proposed Guidelines provide that fee review committees and independent fee examiners (a) "can . . . establish other measures to assist the court and the professionals in complying with the Code, the Federal Rules of Bankruptcy Procedure, local rules or general orders, the Guidelines, and other controlling law within the jurisdiction"[52]; (b) "should establish guidelines and requirements for the preparation and submission of fee and expense budgets by the retained professionals"[53]; and (c) "should establish procedures to resolve fee disputes with retained professionals, while retaining the right to file and prosecute objections if disputes cannot be resolved."[54] The latter two examples raise an even more contentious issue because the cited guidelines grant a fee committee or examiner the authority to create policy through its guidelines, requirements, and procedures as well as impose upon professionals the responsibility to object to the guidelines, requirements, and procedures with which the professionals disagree. Weil suggests that the U.S. Trustee recommend the creation of a fee committee or the appointment of an examiner on a case-by-case basis rather than formulate specific guidelines concerning special fee review procedures. Ultimately, the appointment, authority, and obligations of a fee committee or examiner should be left within the sound discretion of the court.

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[50] *See id.* ("One possibility [for the relatively low fees] is that some of the costs were shifted to the operating auto maker, General Motors Co., which quickly emerged from bankruptcy th[r]ough a government-sponsored sale.").

[51] Proposed Guidelines at F.

[52] *Id.* at F(2).

[53] *Id.* at F(7).

[54] *Id.* at F(8).

III. Conclusion

Bankruptcy is a fluid practice. Attorney-client relationships require counsel to take positions that may be inconsistent with a client's desires. Firms under a general retainer are responsible for an ever-growing list of assignments that ebb and flow. Weil recognizes the U.S. Trustee's goal of increasing public confidence in the bankruptcy compensation process, but observes that procedures designed to force professionals to presage and explain why they are wrong in their predictions will result in the unintended consequence of undermining that goal. Although the U.S. Trustee and the constituents in the case may understand these uncertainties, the public may not. The U.S. Trustee, informed by the Congressional policy embodied in the enactment of section 330 of Bankruptcy Code and by the undeniable right of each client to choose his or her own counsel, must discharge its duties within the context of self-monitoring professionals and a framework of general oversight.

We appreciate the opportunity to comment on the Proposed Guidelines and we would be pleased to answer any questions you may have regarding these comments.

Respectfully submitted,

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