REMARKS OF

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Introduction

Thank you for inviting me to be your luncheon speaker today. You are very gracious to invite me and other officials of the United States Trustee Program ("USTP" or "Program") to attend your annual meeting each year. As I said last November, I have found that each of these meetings helps to inform us in carrying out our broad responsibilities in the bankruptcy system.

I will confine my remarks today to a status report on the revised fee guidelines formally titled "Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under Section 330 by Attorneys in Large Chapter 11 Cases" ("Guidelines") that we expect to finalize and promulgate early next year. We believe these Guidelines are well-grounded in the reality of modern-day bankruptcy practice.

The Guidelines are an important statement of the United States Trustee Program's policy governing our review of the fee applications of attorneys in large chapter 11 cases. They do not and cannot supersede statutes, rules, or court orders. They do, however, communicate to professionals and the general public the criteria used by United States Trustees in the review of fee applications, the USTP's expectations of professionals, and possible bases for our objections to the payment of fees and reimbursement of expenses.

In developing the Guidelines, the Program has followed an exceptionally open and transparent process that we believe has been highly successful. We have listened carefully, and we have modified the Guidelines where we thought improvements could be made.

The Guidelines are mandated under the 1994 amendments to the Bankruptcy Code. The Guidelines are not subject to the notice-and-comment process of the Administrative Procedure Act. Nevertheless, given the importance of these Guidelines to the bankruptcy system and the extraordinary amount of interest in them, we solicited public views last November and conducted a public meeting in June. After carefully considering all input, last Friday we posted updated Guidelines for additional comment through November 23rd. We are taking this additional step so we can benefit from feedback on changes made from the November 2011 version.

The NBC was a valuable source of information and insight as we developed the Guidelines. From outreach meetings prior to the initial posting, to formal comments, to responses to questions at the public meeting, the NBC has informed the debate. Your actions reflect well on your charter to serve the public interest by providing impartial and expert analysis on issues of urgent importance to the bankruptcy system. In particular, I am grateful to Rich Levin and Don Bernstein, as well as others of you who participated constructively in the comment process. When we held a public meeting on the Guidelines back in June, Rich provided very helpful oral comments and also patiently responded to questions. The final product will be better informed because of NBC's participation in this process.

Objectives of the Fee Guidelines

These Guidelines are stage one of a multi-stage effort to revise the existing fee guidelines published in 1996. Over the past 16 years, there have been significant changes in the legal industry and the complexity of business bankruptcy reorganization cases. Simply put, the existing guidelines required updating. We decided to tackle the process in stages, starting with these Guidelines for compensation for attorneys in large chapter 11 cases. Other revisions to the existing guidelines will follow after this first stage is completed.

Beyond the simple need to modernize the guidelines, we had other objectives to which we remain committed. All of these objectives are grounded in the need to faithfully apply the Bankruptcy Code provisions governing the award of professional fees. Foremost among those objectives are: (1) to ensure that the same client-driven market forces that apply outside of bankruptcy also apply in bankruptcy, as the law requires; and (2) to enhance disclosure and transparency in the billing process.

Highlights of Public Comments and Guidelines Revisions

We received a diverse range of comments on the November 2011 draft of the Guidelines. In our posting of the updated Guidelines last Friday, we include a comprehensive analysis of significant comments and describe any revisions we made in response. It is noteworthy that the Guidelines have been somewhat controversial among bankruptcy lawyers, but they appear to be far less controversial in other quarters. A good example of that is shown by the support of the Guidelines by both the Managed Funds Association and the editorial board of the New York Times.

The comments from the bankruptcy community can be placed into three general categories, although many comments fell into more than one category. First, there were views such as those expressed by a group of 119 law firms who jointly signed a letter in opposition to the Guidelines. Those law firms essentially said the USTP has no authority to promulgate the Guidelines as drafted and, even if we did, the fee review process is working well and does not require much improvement. Members of a committee of the American Bar Association also fell into this group, but later submitted supplemental comments that contained constructive suggestions. Other commenters suggested that the Guidelines should reflect an even more robust oversight of the fee process. And, finally, some commenters, most especially the NBC, offered specific suggestions within the framework contained in the November 2011 proposed Guidelines.

By and large, the comments provided a deep reservoir of thoughtful analysis that the Program drew upon as we revised the recently published version. By opening up the process for public review, we gained valuable new information. This updated version of the Guidelines has improved markedly because of the open process we have followed.

Let me summarize several areas of commentary and our response. A more comprehensive analysis of the comments is contained in the November 2012 version that is now posted.

(1) Threshold for Cases Covered by the Guidelines: On the threshold issue of coverage of the Guidelines, most commenters agreed that distinctions should be made between the largest cases and other cases. Unfortunately, neither bankruptcy literature nor the comments received provided a solid empirical basis for setting a break point. Almost all commenters acknowledged there was no obvious dividing line. We set the initial $50 million threshold based upon a review of reported sizes of cases filed in districts around the country.

A variety of alternative criteria were suggested. One comment suggested that the Guidelines reach only those cases with five attributes, to wit: more than $250 million in assets; more than $50 million in unencumbered assets; more than $250 million in unsecured debt; at least 250 unsecured creditors, but not including present and former employees; and more than $50 million of syndicated debt for borrowed money. While we suspect that a handful of cases nationwide might satisfy these criteria, the petition itself does not contain the necessary information to determine whether any particular case would satisfy those requirements.

After additional analysis, we have modified the threshold criteria to cases with $50 million or more in assets and $50 million or more in liabilities, aggregated for jointly administered cases. We also have excluded single-asset real estate cases from the Guidelines coverage. By adjusting the threshold criteria, we will exclude less complex cases and endeavor to exclude administrative insolvencies. Based on data for the period 2009 to 2011, the revised Guidelines will cover approximately 180 chapter 11 cases a year, with about one-half of those cases filed in either the District of Delaware or the Southern District of New York.

(2) Market Rate for Comparable Services: We received the most commentary on the provisions that may be considered the linchpin of the new Guidelines that is, disclosures required to demonstrate that rates charged reflect market rates outside of bankruptcy.

The Program first posited that law firms may be charging premium rates for bankruptcy services in an article published in the ABI Journal in December 2010. This was followed by a presentation at a plenary session of the ABI Winter Leadership Conference that same month. Although the objective of the Guidelines is simply to ensure that statutory requirements are being honored, the Guidelines development process has only heightened our concern that bankruptcy lawyers in large chapter 11 cases sometimes charge amounts above what they could charge non-bankruptcy clients. The law does not permit that. And under the new Guidelines, parties and the courts will have the information necessary to determine when that occurs.

The Guidelines process had made it increasingly apparent that law firms possess a great deal of billing information that could be, but is not, presented in fee applications. Without that information, it is difficult to determine if law firms are charging comparable rates for bankruptcy

services. Fortunately, the evidence is now clear that the necessary information already is collected and is reasonably retrievable.

Some commenters have suggested we are interfering with the marketplace by seeking to impose new disclosure requirements. Frankly, these commenters have it backwards. Under the Guidelines, professionals provide more information so that the market rates will, in fact, prevail. These Guidelines promote a fair, competitive, market-driven fee structure. These Guidelines will allow better policing of the law and help ensure market-driven pricing for legal services.

Another key point of contention pertains to balancing the need for disclosure of billing practices and rates against law firms' legitimate proprietary concerns. On this point, the NBC was especially helpful. Some commenters simply suggested that any additional disclosures were an inappropriate infringement on the proprietary interests of law firms and that a lawyer's boilerplate certification that comparable rates were being charged should satisfy the courts, United States Trustees, and other parties. The NBC, however, provided more specific suggestions that helped us to improve the Guidelines.

Among other things, the NBC suggested streamlining the comparable rate information. Instead of highest, lowest, and average rate per timekeeper category, the NBC suggested providing a single average, or "blended," rate charged by law firms or selected offices of law firms. This approach would take into account non-hourly, alternative rate structures. It also would allow a direct comparison between the blended rate charged in bankruptcy and non-bankruptcy matters. The NBC also requested a "safe harbor" so that law firms providing the prescribed information generally can avoid subsequent demands for additional data. We have incorporated much of the substance of the NBC's alternative solution into the currently posted version of the Guidelines.

The disclosures are now modified to contain blended average hourly rates billed or collected in either the prior fiscal year or rolling year. These data are requested by category of professional, such as partner, associate, and counsel. Full service law firms should exclude bankruptcy engagements from the rate calculation, and bankruptcy boutiques should exclude bankruptcy work billed to bankruptcy estates. We also exclude pro bono and other such work from the calculations. We believe this more streamlined approach takes into account alternative, non-hourly fee structures and allows the reviewer to determine whether the lawyer is charging more than is charged for engagements paid outside section 330.

We did leave intact the requirement that there be a certification that the rates charged to a client in bankruptcy were not higher than rates charged to that client prior to the bankruptcy filing. In most large cases, discounts and other reduced fee arrangements provided to a client should be extended through the bankruptcy. The United States Trustees will strongly object when a higher rate is sought to be paid by the estate. From time to time, we hear reports of such premium charges, and we hope these Guidelines will curtail such practices.

Finally, we also adopted the NBC suggestion for a "safe harbor," but with a clear statement that the United States Trustee may seek additional information or file an objection based upon the facts and circumstances of a particular case.

(3) Budgets for Debtor and Official Committee Counsel: Next, we received a wide range of views on the issue of preparing and filing budgets for anticipated legal work.

To be candid, many of the comments reflected unfamiliarity with the text of the Guidelines. For example, some of the critiques were directed against provisions absent from the Guidelines. There was a misperception that the Guidelines called for budgets to be filed in advance of a fee application, that the budgets could not be revised throughout the case, and that privileged information would have to be divulged.

We also received incisive comments that helped us appreciate the differences between preparing a budget privately for your client versus preparing a budget that ultimately would be viewed by all parties in interest.

We have addressed these concerns by making some modifications to the November 2011 version of the Guidelines. But we were not persuaded that bankruptcy is unique and should be exempt from common budgeting practices that are regularly required by clients outside of bankruptcy and are even required of wage earners who file for chapter 13 bankruptcy relief. Moreover, professionals routinely prepare budgets in connection with cash collateral and DIP financing orders in chapter 11 cases, large and small. We continue to believe that there is a need to bring greater discipline to the fee process and to improve the disclosure of likely costs.

Even though there was opposition from major law firms and the ABA to budgets, we retained this provision, but with clarifications and modification. The current iteration of the Guidelines calls upon United States Trustees in most cases to obtain consent or a court order imposing a budget process on debtor and committee counsel. Among other things, the process should involve the client and counsel agreeing upon a budget and filing the budget with the court retrospectively with the fee application.

We retain the provision that any upward deviation in the budget exceeding 10 percent should be specially explained in the fee application. We also added precatory language suggesting that debtor and committee counsel share their budgets to enhance efficiency throughout the case. Counsel should state in the application whether such sharing occurred.

(4) Task-Based Billing and Project Codes: It is abundantly clear that law firm billing systems are sophisticated and capable of producing much more relevant information than currently required in bankruptcy fee applications. Nonetheless, there was much resistance to proposed expansion of the current project categories.

The additional categories prescribed in the first published draft of the Guidelines were drawn almost entirely from project and activity codes developed by the American Bar Association that have been in widespread use for many years. Nonetheless, in light of practical concerns expressed by some law firms, we have largely deleted any additional project codes and activity codes.

(5) Co-Counsel for Routine Work: Some commenters, including the NBC, suggested that the Guidelines endorse the employment of co-counsel to handle "commoditized" or more routine work, such as preference actions and claims objections. These commenters made a very strong case that large and more expensive law firms may be essential for the successful outcome of a highly complex case, but the more routine work that also must performed in such a case can be more efficiently handled by bankruptcy boutiques or firms with lower overhead and a lower fee structure. These comments were provocative and well reasoned.

The current version of the Guidelines now expressly endorses the employment of co-counsel to handle commoditized work at a lower cost.

(6) Disclosure and Approval of Rate Increases: Some law firms objected to the review of individual timekeeper rate increases during the fee review process. We did not accommodate that opposition because increases imposed during a case may be very significant. For example, in one prominent case, rate increases account for more than 10 percent, or $50 million, of the fees sought by one firm alone.

Although we carefully considered law firm concerns, we have retained provisions that pertain to notice and approval of rate increases. We believe the court and parties should have the opportunity to consider whether the increases are reasonable. We recognize that case law on this matter may differ from district to district, and we will seek to challenge settled law where appropriate.

(7) Home Forum Rates: The group of 119 law firms who submitted comments strongly objected to a provision favoring the ability of a law firm to charge customary rates in its home forum, but disfavoring the ability of the law firm to charge higher rates in a case pending in a higher priced forum.

Frankly, we thought that a clear statement of approval for the "home forum" rate helped protect law firms in large metropolitan areas from being discriminated against when practicing in a smaller jurisdiction. The 119 law firms agreed that a lawyer working out of the New York office of a national law firm should be allowed to charge New York rates even when working on a matter in St. Louis. However, they also said that a lawyer in the firm's St. Louis office who is working on a matter pending in New York should be unbounded by the lower St. Louis rate and instead should be permitted to charge the higher New York rate. The rationale for this position was that the lawyer probably would have to travel to New York and the costs of working in New

York are higher. But that same rationale was not used to suggest lowering the rate when an attorney in New York works in St. Louis. We remain perplexed by the comment.

We retain the provision directing our offices to accept home forum rates and to object to rates above the attorney's home forum rate.

(8) Pre-Bankruptcy Legal Fees: Now, to the eighth and final provision I will highlight. During our initial outreach to the bankruptcy community about amending the Guidelines, we were told by some professionals that the public believes that bankruptcy fees are higher than they actually are because section 330 requires the approval of a substantial amount of fees that would have been incurred irrespective of the bankruptcy. We acted on this observation by including a provision in the Guidelines requesting disclosure of ordinary course, non-bankruptcy legal fees. With this additional disclosure, we believed reviewers and the public would better see the additional costs attributable to the bankruptcy process. However, not a single commenter endorsed this additional disclosure and some opposed it as overly burdensome. Accordingly, this provision is not included in the version of the Guidelines posted last week.

There are many other important aspects of the Guidelines that time does not permit me to highlight. For example, we clarify the need to submit billing records in an open and searchable electronic data format, and we clarify provisions in support of independent fee committees or individual examiners. All of these matters are explained in the document posted on our Web site.

Process Going Forward

Thanks to the diligence of my colleagues in the United States Trustee Program, and the participation of professionals, academics, and others in the process, we are nearing final publication of the Guidelines. The current version will remain open for public comment until November 23rd. We have taken this additional extraordinary step to ensure that we correctly incorporated those comments we endeavored to accommodate. We do not expect to revisit fundamental issues that we already considered.

We plan to post final Guidelines early next year with an effective date in mid-2013. The delayed effective date will provide ample opportunity for law firms to study the Guidelines and be prepared to follow them for all cases filed after the effective date. Although the process we are following includes this one additional comment period which I note is not customary even under the Administrative Procedure Act we still will issue the Guidelines in far less than one-half the time it takes on average for a federal regulation to move from inception to a final rule.

After this process is completed, USTP attorneys in districts throughout the country will vigorously enforce the Guidelines. We will be judicious and demonstrate reasonable flexibility, but it is important that the Guidelines be applied as national Guidelines. Of course, some litigants may challenge the Guidelines by asking the court not to follow them. We will be

prepared for those attacks and will defend the Guidelines in bankruptcy court and other fora. As appropriate, we will take disputes up the appellate chain. We believe these Guidelines are correct as a matter of law and they advance sound public policy as articulated by Congress in the Bankruptcy Code.

Conclusion

I am deeply grateful to the NBC for its thoughtful commentary and for the generosity of time given to this project by many NBC members. The constructive approach taken by the NBC exemplifies this organization's mission to rise above narrow interests in an effort to arrive at better public policy. Your analyses reflected wisdom and diligence. For that, all of us in the United States Trustee Program remain grateful.

We believe that consistent application of these Guidelines in districts throughout the country will help ensure that statutory standards are satisfied and will enhance public confidence in the integrity of the bankruptcy system. That result would be in the interests of all parties to the bankruptcy case, their professionals, and the general citizenry.

At this time, my colleagues from the Program and I would be pleased to answer any questions.

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