

Comments of the
National Association of Consumer Bankruptcy Attorneys
and the National Consumer Law Center

Regarding
the United States Trustee's Notice of Proposed Rulemaking
on Application Procedures for Approval of Providers of a Personal
Financial Management Instructional Course.

United States Department of Justice
28 C.F.R. Part 58
Docket No. EOUST 104

The National Association of Consumer Bankruptcy Attorneys¹ and the National Consumer Law Center² on behalf of its low-income clients make the following recommendations regarding the notice of proposed rulemaking on the application procedures and criteria for approval of providers of personal financial management instructional courses.

Before focusing on areas of concern, we want to express our support for many of the proposed rules. We appreciate the Trustee's willingness to listen to consumer voices in developing these proposals. In particular, we support the mandatory and early disclosure of fee policies and information on how a debtor may obtain free or reduced cost services. We also support the presumptively reasonable fee established by the rule as well as the process that places the burden on the provider who seeks to establish a higher fee to demonstrate that that higher fee is reasonable. The comments below focus on key areas where we believe additional changes or clarification are necessary to ensure that consumers are protected throughout the debtor education process.

¹ Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,200 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. The NACBA membership has a vital interest in the proposed rule as NACBA members represent a large number of the individual debtors who file consumer cases nationally.

² The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people. NCLC works with thousands of legal servicers, government and private attorneys, as well as community groups and organizations, from all states that represent low-income and elderly individuals on consumer issues. In addition, NCLC publishes and annually supplements practice treatises which describe the law currently applicable to all types of consumer transactions, including Consumer Bankruptcy Law and Practice (8th ed. 2006 and Supp.).

Fee Waivers.

Section 111(d)(1)(E) provides that those who furnish the personal financial management course must provide services without regard to ability to pay. Section 58.33 of the proposed rule requires providers to disclose their fee policy and policies enabling debtors to obtain the instructional course at free or reduced rates. The rule requires that this disclosure take place “[p]rior to providing any information to or obtaining any information from the debtor.”

Debtors who do not have the ability to pay face a variety of obstacles. In some instances, agency representatives have stated that there is no way to obtain a fee waiver if the certificate is needed on an expedited basis. In other cases, agencies have acknowledged that a fee waiver/reduced rate is possible, but will not disclose the criteria for the reduction/waiver and will not inform consumers if they are eligible to receive a reduction until AFTER the completion of the course. Currently, several providers require debtors to “register” before any information is provided regarding the fee structure or fee waivers. Failure to notify consumers about fees being charged and their statutory rights to obtain fee waivers in the event they are unable to pay can have the effect of denying debtors their rights under the Code.

We commend the UST for requiring mandatory and early disclosures regarding fee waivers or reduced fee courses. However, the information related to fee waivers is included among a list of eight, potentially lengthy, items that must be disclosed. We are concerned that the information regarding the availability of reduced fees or free courses will be lost among the other required disclosures. Therefore, we recommend that the provisions related to fees be made more prominent, either by requiring larger type size or by setting the fee information apart in some visual way. Additionally, provider websites should make this information clearly available wherever the cost of the program is discussed. A review of several websites for approved providers reveals that many do not mention the availability of a fee reduction/waivers where the cost of the program is mentioned.

Language Barriers to Access.

For debtors with limited English ability, satisfying the credit counseling and personal financial management course requirements is a significant barrier to accessing bankruptcy system and obtaining a discharge. Many approved agencies and providers have no ability to provide services in a language other than English. Consequently, debtors in many districts do not have access to meaningful services.

Section 58.33(i) of the proposed rule entitled “Language services to debtors” falls short of addressing the hurdles faced by debtors with limited English proficiency. Currently, providers that are unable to provide an instructional course to a debtor due to the debtor’s limited English proficiency are only required to employ “best efforts” in referring the debtor to another provider. Because the provision of language-appropriate services is not mandatory, providers may simply “pass the buck” and leave debtors without meaningful access to the necessary courses. We recommend that the EOUST require agencies to provide language-appropriate services or ensure that the debtor is

referred to others who provide them. Such services should be provided without additional charge. Alternatively, borrowers without meaningful access to language appropriate services should be granted waivers from the course requirement.

Reporting of Section 111(g)(2) Actions.

Section 111(g)(2) creates an express private right of action for debtors against nonprofit budget and credit counseling agencies that willfully or negligently fail to comply with the requirements of the statute. Many of these agencies provide both pre-filing credit counseling and personal financial management courses. The individual enforcement mechanism of section 111(g)(2) is not only designed to provide relief to injured debtors, but also to assist the EOUST in identifying problems with agencies and providers. However section 58.30 of the proposed rule, which provides a list of events that must be reported to the EOUST, does not include these actions as reportable events.

We recommend that an additional subsection in 58.30 be added that would require course providers to notify the EOUST of any actions taken against them pursuant to section 111(g)(2) or any other consumer protection statutes.

Content of Personal Financial Management Course

Completion of a personal financial management course is required for a debtor to obtain a discharge in chapter 7 or chapter 13. Section 111(d) requires providers to have “learning materials and teaching methodologies designed to assist debtors in understanding personal financial management.” This broad statutory requirement is further detailed in section 58.32 of the proposed rule. Despite the fact that most, if not all, persons taking the personal financial management course will be debtors in bankruptcy, the learning materials and methodologies requirements contain no reference to bankruptcy.

Debtors in bankruptcy face unique financial management obligations and challenges during and after their bankruptcy case. Failure to acknowledge this reality is a tremendous shortcoming in the proposed rule. We recommend that the content of the course address challenges faced specifically by bankruptcy debtors.

Fees for Certificates or Replacement Certificates

Section 58.35 permits a provider to charge a separate fee for a certificate or replacement certificate if certain conditions are satisfied. Since most, if not all, persons participating in the financial management course are bankruptcy debtors who need a certificate to obtain a discharge, we oppose a separate fee for the issuance of a certificate or replacement certificate.

Referral Fees

Referral fees are payments made by providers to other parties as quid pro quo for referring customers. They are essentially a marketing expense. Referral fees raise the cost to debtors because providers must charge more to cover the cost. Section

58.33(c)(2) prohibits referral fees except payments to a “locator.” “Locator” is broadly defined as any entity that assists a debtor in finding an approved provider for the purpose of taking a course, unless the entity is the provider of the course itself. The broad definition of “locator” renders the prohibition on referral almost meaningless. The prohibition applies to no one but the entity providing the service. Thus a provider could receive a referral fee for referring the debtor to another provider that provides language appropriate services.

As referral fees in consumer transactions have often been the source of abuse, we oppose any rule that permits such fees.

Very truly yours,

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