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DEPARTMENT OF JUSTICE

28 CFR Part 58

Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies by United States Trustees

Docket No: EOUST 102

RIN 1105-AB17

AGENCY: Executive Office for United States Trustees ("EOUST"), Justice.

ACTION: Final rule.

SUMMARY: This final rule ("rule") sets forth procedures and criteria United States Trustees shall use when determining whether applicants seeking to become and remain approved nonprofit budget and credit counseling agencies ("credit counseling agencies" or "agencies") satisfy all prerequisites of the United States Code, as implemented under this rule. Under the current law, an individual may not be a debtor under title 11 of the United States Code, unless during the 180-day period preceding the date of filing a bankruptcy petition, the individual receives adequate counseling from a credit counseling agency that is approved by the United States Trustee. The current law enumerates mandatory prerequisites and minimum standards applicants seeking to become approved credit counseling agencies must meet. Under this rule, United States Trustees will approve applicants for inclusion on publicly available agency lists in one or more federal judicial districts if an applicant establishes it meets all the requirements of the United States Code, as implemented under this rule. After obtaining such approval, a credit

counseling agency shall be authorized to provide credit counseling in a federal judicial district during the time the agency remains approved.

EOUST intends to add to its regulations governing credit counseling agencies, two new provisions not previously included in the proposed rule on this subject. A new section 58.17(c)(11) will require agencies to notify the United States Trustee of certain actions pursuant to 11 U.S.C. § 111(g)(2) or other consumer protection statutes, such as an entry of judgment or mediation award, or the agency's entry into a settlement order, consent decree, or assurance of voluntary compliance. The second provision will amend section 58.20(j) to require an agency to assist an individual with limited English proficiency by expeditiously directing the individual to an agency that can provide counseling in the language of the individual's choice. Because these provisions were not discussed in the proposed rule published on February 1, 2008, EOUST will publish another Notice of Proposed Rulemaking requesting public comment with respect to these two provisions.

EFFECTIVE DATE: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: EOUST, 441 G Street, N.W., Suite 6150, Washington, D.C., 20530.

FOR FURTHER INFORMATION CONTACT: Doreen Solomon, Assistant Director for Oversight on (202) 307-2829 (not a toll-free number), Wendy Tien, Deputy Assistant Director for Oversight on (202) 307-3698 (not a toll-free number), or Larry Wahlquist, Office of the General Counsel on (202) 307-1399 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

On July 5, 2006, EOUST published an interim final rule entitled *Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies and Approval of Providers of a Personal Financial Management Instructional Course by United States Trustees* ("Interim Final Rule"). 71 Fed. Reg. 38,076 (July 5, 2006). Due to the necessity of quickly establishing a regulation to govern the credit counseling application process, EOUST promulgated the Interim Final Rule rather than a notice of proposed rulemaking ("proposed rule"). On February 1, 2008, at 73 Fed. Reg. 6,062, EOUST published a proposed rule on this topic in an effort to maximize public input, rather than publishing a final rule after publication of the Interim Final Rule. Before the comment period closed on April 1, 2008, EOUST received forty seven comments. The comments received and EOUST's responses are discussed below. This rule finalizes the proposed rule with changes that, in some cases, reduce the burden on credit counseling agencies while maintaining adequate protections for consumers.

This rule implements the credit counseling sections of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 37, 38 (April 20, 2005), which are codified at 11 U.S.C. §§ 109(h) and 111. Effective October 17, 2005, an individual may not be a debtor under title 11 of the United States Code unless during the 180-day period preceding the date of filing a bankruptcy petition, the individual receives adequate counseling from an approved credit counseling agency. 11 U.S.C. §§ 109(h)(1) and 111; *see also* H.R. Rep. 109-31, pt. 1 at 2 (providing that the Bankruptcy Code "requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences").

Section 111(b) of title 11, United States Code, governs the approval by United States Trustees of credit counseling agencies for inclusion under 11 U.S.C. § 111(a)(1) on publicly available agency lists in one or more United States district courts. Section 111 of title 11 provides that, in applicable jurisdictions, a United States Trustee may approve an application to become an approved credit counseling agency only after the United States Trustee has thoroughly reviewed the applicant's (a) qualifications, and (b) services. 11 U.S.C. § 111(b)(1). A United States Trustee has statutory authority to require an applicant to provide information with respect to such review. *Id*. EOUST reserves the right to publish on its public website non-confidential business information relating to credit counseling agencies, including contact information, counseling services provided, language support services offered, and fees charged for services.

After completing that thorough review, a United States Trustee may approve a credit counseling agency only if the agency establishes that it fully satisfies all requisite standards. 11 U.S.C. § 111(b). Among other things, an applicant must establish it will (a) provide qualified counselors, (b) maintain adequate provision for safekeeping and payment of client funds, (c) provide adequate counseling with respect to client credit problems, and (d) deal responsibly and effectively with other matters relating to the quality, effectiveness, and financial security of the services it provides. 11 U.S.C. § 111(c)(1).

This rule will implement those statutory requirements. By doing so, the rule will help clients obtain adequate counseling from competent credit counseling agencies, and help safeguard their funds. It also will provide an appropriate mechanism by which entities can apply under section 111 of title 11 to become approved credit counseling agencies, and will enable

such applicants to attempt to meet their burden of establishing that they should be approved by United States Trustees under 11 U.S.C. § 111.

Summary of Changes in Final Rule

The final rule modifies the proposed rule by making it: (1) less burdensome on credit counseling agencies; and (2) by providing technical or clarifying modifications. The modifications are summarized according to their classification below. A parenthetical reference to the regulatory text has been added to assist the reader in locating the relevant provisions of the rule. In addition, where applicable, a reference to the comment providing a more detailed explanation of these changes is included:

Modifications to Make the Final Rule Less Burdensome on Credit Counseling Agencies

- The definition of "material change" has been revised to eliminate staff other than the management or counselors of an agency (§ 58.12(b)(27) - comment # B9).
- An agency is not required to negotiate an alternative payment schedule with creditors regarding unsecured consumer debt as provided in 11 U.S.C. § 502(k). Instead, if an agency does not provide this service, the agency shall disclose that it may refer clients to other approved agencies that do provide this service, and that clients may incur additional fees in connection with such referrals (§ 58.20(l)(9) - comment # B24).
- An agency may disclose to clients and potential clients that, to the extent it is approved as a provider of a personal financial management instructional course pursuant to 11 U.S.C. § 111(d), the United States Trustee has reviewed those debtor education services (§ 58.20(l)(11) - comment # B23).

- The reference to "any applicable law" in the prohibition that an agency take no action to limit clients from bringing claims against the agency as provided in 11 U.S.C. § 111(g)(2) has been deleted (§ 58.20(p)(6) - comment # B27).
- The rule has been revised to add a rebuttable presumption that a client lacks the ability to pay the counseling fee if the client's current household income is less than 150 percent of the poverty guidelines updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. § 9902(2), as adjusted from time to time, for a household or family of the size involved in the fee determination (§ 58.21(b)(1) - comment # B31).
- The United States Trustee is required to review the basis for the mandatory fee waiver policy one year after the effective date of the rule, and then periodically, but not less frequently than every four years (§ 58.21(b)(2) - comment # B31).
- The requirement that, for an agency to send a credit counseling certificate to a client's attorney, the client must make the request in writing to the agency has been deleted (§ 58.22(a) - comment # B32).
- The rule has been revised to delete the requirement that agencies attach a budget analysis to the credit counseling certificate (§ 58.22(b) - comment # B34).
- The requirement that an agency provide original signatures on certificates, in recognition of electronic filing in the bankruptcy courts and the technology used to generate certificates, has been deleted (§ 58.22(l)(2) - comment # B35).
- The rule has been amended to set forth new procedures for approved agencies that cease to offer debt repayment plan (DRP) services to new clients. This amendment reduces the

burden on approved agencies that make the business decision to cease offering DRP services to new clients, but continue to provide services to existing clients by enabling them to decrease their bonding and insurance requirements. In other words, an agency must continue to meet the rule's current bonding and insurance requirements with respect to existing plans only. An approved agency that neither offers DRP services to new clients nor continues to service existing plans, having transferred those plans to other agencies or obtained a waiver from EOUST pursuant to the rule (as set forth in § 58.23(f)), is not subject to the bonding and insurance requirements (§ 58.23(d), (f) - comment # B40).

Technical or Clarifying Modifications

- The definition of "client" has been revised to mean an individual who both seeks and receives counseling services from an approved agency, rather than an individual who only seeks but does not receive such services (§ 58.12(b)(11) - comment # B4).
- The definition of "criminal background check" has been revised to require an agency to obtain background checks for a counselor in each state where the counselor has resided or worked during the preceding five years (§ 58.12(b)(14) - comment # B25).
- The definition of "limited English proficiency" has been revised to be consistent with that used by the Civil Rights Division of the Department of Justice (§ 58.12(b)(26) - comment # B8).
- The definition of "material change" has been amended to include a change in language services provided by the agency. Agencies are already required to inform the United States Trustee of the languages they provide when applying for approval. This

clarification emphasizes the importance of notifying the United States Trustee whenever an agency adds or removes a language from its available services (§ 58.12(b)(27)).

- A new definition, "potential client," has been added to describe an individual who seeks, but does not receive, counseling services from an approved agency (§ 58.12(b)(31) - comment # B12).
- The rule has been amended to clarify that when disclosing its fee policy, an agency must disclose its policy, if any, concerning fees associated with generating a credit counseling certificate prior to rendering any counseling services (§ 58.20(l)(1) - comment # B22).
- The rule has been amended to clarify that the requirement that an agency disclose its policy on fees prior to offering services includes Internet based credit counseling. In other words, an agency that publishes information on the Internet concerning its fees must include its policy enabling clients to obtain counseling for free or at reduced rates based upon the client's lack of ability to pay. This is not an additional burden on agencies as the proposed rule requires agencies to disclose their fee polices prior to providing services; the final rule makes it clear that this requirement includes Internet based credit counseling (§ 58.20(l)(2)).
- The rule has been amended to clarify that an agency's duty to disclose its fee policy before providing counseling services includes disclosing the agency's policy to provide free bilingual instruction to any limited English proficient client. This is not an additional burden on agencies as the proposed rule requires agencies to disclose their fee polices prior to providing services; the final rule makes it clear that this requirement

includes disclosing agencies' fee policies regarding services for limited English proficient individuals (§ 58.20(l)(3)).

- The rule has been amended to clarify that an agency's duty to maintain records regarding limited English proficiency individuals includes maintaining records regarding the methods of delivery of counseling services, the types of languages and methods of delivery requested by clients and potential clients, the number of clients served, and the number of referrals made to other agencies. Because the proposed rule already requires agencies to maintain records regarding the delivery of services to limited English proficiency individuals, this is not an additional burden in the final rule. Rather, the final rule makes clearer what is expected of agencies in terms of record-keeping for limited English proficient individuals (§ 58.20(o)(5)).
- The rule has been amended to clarify that Internet and automated telephone counseling are not complete until the client has engaged in interaction with a counselor following the automated portion of the counseling (§ 58.22(a) - comment # B33).
- The rule has been amended to clarify that certificates must bear not only the date, but also the time and the time zone when counseling services were completed by the client (§ 58.22(n)(3) - comment # B36).
- The rule has been amended to correct non-substantive stylistic, numbering and typographical errors.

Discussion of Public Comments

EOUST received forty seven comments on the proposed rule. Many of the comments contained several sub-comments. EOUST appreciates the comments and has considered each

comment carefully. EOUST's responses to the comments are discussed below, either in the "General Comments" section or in the "Section-by-Section Analysis."

A. General Comments

1. Cost of the Rule to Credit Counseling Agencies

Comment: EOUST received several comments that the rule will make it more expensive for credit counseling agencies to operate and that they will pass the costs on to clients.

Response: EOUST recognizes that the rule may cause agencies to incur additional costs, but those costs are minimal. Additionally, the extra costs for such measures as procedures to verify a debtor's identity, the requirement that agencies provide additional counseling after completion or termination of a debt repayment plan at no additional cost to the debtor, and mandatory disclosure of the agency's fee policy, are sufficiently important to protect consumers to warrant the extra costs to the agency.

2. Mandatory Nature of Credit Counseling

Comment: EOUST received one comment that credit counseling should not be mandatory.

Response: Pursuant to the BAPCPA, Congress specifically requires individual debtors to complete credit counseling before filing bankruptcy. This requirement is codified at 11 U.S.C. § 109(h). EOUST does not have the authority to waive this statutory requirement.

3. Micro-management of Agency's Day-To-Day Operations

Comment: One comment stated that the power to ensure a credit counseling agency's compliance with the statute and regulations should not become a micro-management of the agency's day-to-day operations.

Response: EOUST concludes that the rule obtains the appropriate balance between ensuring compliance with the law and preserving a credit counseling agency's operational autonomy.

4. Preemption

Comment: One comment noted that the rule omits language stating that nothing in the rule preempts state law, and requested that such preemption language be restored.

Response: The omission of the preemption language does not constitute an expression, from the standpoint of EOUST, that the rule preempts state law to the extent of any conflict between the rule and state law. No inference should be drawn from the omission.

B. Comments on Specific Subsections of the Proposed Rule

1. Use of the Terms Accreditation and Certification [§ 58.12(b)(1), (b)(2) and (b)(13)]

Comment: EOUST received two comments that the rule erroneously uses the terms accreditation and certification interchangeably, when accreditation refers to organizations and certification refers to individuals.

Response: EOUST has reviewed the rule carefully and found no instances where accreditation was used to refer to individuals and certification was used to refer to organizations. In a few instances, an agency representative must sign a certification attesting to a particular fact or facts; these instances, however, do not use the term erroneously.

2. Definition of Adequate Counseling - Repayment Plans [§ 58.12(b)(3)]

Comment: One comment stated that the definition for adequate counseling should be revised to ensure counseling includes offering repayment plans when clients qualify.

Response: This change is unnecessary. The definition of "adequate counseling" includes counseling services, which explicitly provide consumers the opportunity to participate in repayment plans.

3. Adequate Counseling - Alternatives to Bankruptcy [§ 58.12(b)(3)]

Comment: One comment recommended adequate counseling be revised to require counselors to detail the nature of alternatives to bankruptcy if they exist.

Response: This change is unnecessary. The definition of "adequate counseling" includes counseling services, which requires counselors to explain, among other things, all reasonable alternatives to resolve a client's credit problems. Alternatives to bankruptcy should be discussed with clients as a matter of course.

4. Definition of Client [§ 58.12(b)(11)]

Comment: One comment stated that the definition of "client" is too broad, and should not include a person who merely inquires about services.

Response: EOUST concurs and has adopted this technical modification by revising the definition of "client" to include only individuals who both seek and receive services from an approved credit counseling agency. The term "client" does not include "potential clients," who are defined separately as those who seek, but do not receive, counseling services from an approved agency. An individual may be both a client of the agency from which he or she seeks and ultimately receives counseling services, and a potential client of other agencies from whom he or she seeks, but ultimately does not receive, counseling services.

5. Definition of Counseling Services - Generally [§ 58.12(b)(12)]

Comment: Several comments objected to the proposed rule's definition of "counseling services" to the extent it individualizes the services, asserting that these requirements exceed the scope of the prepetition briefing requirements in 11 U.S.C. § 109(h). The comments argued that 11 U.S.C. §109(h) mandates only a group briefing outlining opportunities for available credit counseling and does not require individuals to obtain counseling per se. They urged that EOUST narrow the definition of "counseling services" to parallel the statutory requirements imposed by 11 U.S.C. § 109(h).

Response: Upon review of 11 U.S.C. §§ 109(h) and 111(c), the purposes underlying the BAPCPA, and the relevant case law, EOUST has determined that the "briefing" described in 11 U.S.C. § 109(h) and the credit counseling described in the proposed rule are synonymous. Accordingly, EOUST declines to amend the proposed rule to limit the definition of "counseling services" to exclude credit counseling sessions. Furthermore, EOUST has determined that, for 11 U.S.C. § 109(h) to be consistent with 11 U.S.C. § 111(c), counseling services must address the individual client's financial circumstances. Section 111(c)(2)(E) requires "adequate counseling with respect to a client's credit problems that includes an analysis of such client's current financial condition, factors that caused such financial condition, and how such a client can develop a plan to respond to the problems without incurring negative amortization of debt." 11 U.S.C. § 111(c)(2)(E). Accordingly, the proposed rule's requirement that "counseling services" include a written analysis of each client's current financial condition is consistent with the statutory mandate. EOUST does not require that such analysis take any particular written form; for example, the agency may convey the written analysis via electronic mail.

To the extent 11 U.S.C. § 109(h) authorizes "group" briefings, EOUST interprets the statute to permit couples to attend credit counseling sessions jointly. This interpretation is consistent with 11 U.S.C. § 111(c) and accommodates spouses who intend to file joint petitions. Furthermore, EOUST permits group credit counseling sessions by telephone, provided that each individual client also receives adequate individualized counseling with respect to his or her credit problems, including an analysis of such client's current financial condition, the factors that caused such financial condition, and how such a client can develop a plan to respond to the problems without incurring negative amortization of debt, consistent with the requirements of 11 U.S.C. § 111(c)(2)(E).

6. Definition of Counseling Services - Length of Time [§ 58.12(b)(12)]

Comment: EOUST received several comments that a minimum length requirement of 60 minutes for a credit counseling session is too long, that such a minimum length requirement will increase costs, and that EOUST lacks the authority to specify a minimum length of time for a counseling session.

Response: The rule does not require all counseling sessions to last 60 minutes. Section 58.12(b)(12) states the counseling services "are typically of at least 60 minutes in duration." This requirement means that most counseling sessions should last approximately 60 minutes, but that, in some instances, less or more time may be appropriate.

7. Definition of Counseling Services - Written Analysis [§ 58.12(b)(12)]

Comment: EOUST received one comment that a written analysis should not be required and that electronic or verbal analysis should be sufficient.

Response: Written analysis is necessary to protect consumers and to verify that the agency provided a substantive analysis of the consumer's financial situation. The agency may provide the client this analysis via e-mail, but it must be written.

8. Definition of Limited English Proficiency [§ 58.12(b)(26)]

Comment: EOUST received one comment seeking revision of this definition to clarify its meaning.

Response: EOUST concurs that a technical modification is necessary and has revised the definition of the term to match that used by the Civil Rights Division of the Department of Justice, as set forth in Notice, Guidance to Federal Financial Assistance Recipients Regarding Title VI, Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002). Though the wording is slightly different, the meaning of limited English proficiency is essentially the same, i.e. individuals who do not speak English as their primary language or who have difficulty understanding English.

9. Definition of Material Change [§ 58.12(b)(27)]

Comment: One comment stated that staff changes should be deleted from the definition of material change since the requirement is unnecessarily burdensome.

Response: EOUST agrees that this requirement may be overly burdensome. Not every change in staff requires EOUST notification. The purpose of this requirement is to ensure that EOUST remains aware of changes in key personnel. Because the definition of "material change" already specifies notification for changes in management, the rule has been modified to change "staff" to "counselors" and thereby reduce the burden on credit counseling agencies.

10. Definition of Median Family Income

Comment: One comment noted that the rule defines the term "median family income," but then does not use it in the rule.

Response: EOUST has deleted the definition of median family income from the rule.

11. Definition of Nonprofit [§ 58.12(b)(29)]

Comment: EOUST received one comment suggesting that the definition of "nonprofit" require that the credit counseling agency has been approved by the IRS for tax purposes under section 501(c)(3) of the Internal Revenue Code.

Response: 11 U.S.C. § 111 requires a credit counseling agency to be organized as a nonprofit entity, but does not require tax exempt status. Organization as a nonprofit entity is a matter of state law, and nonprofit organizations do not necessarily qualify for 501(c)(3) tax-exempt status, which is a matter of federal law. When determining whether an agency constitutes a nonprofit entity, EOUST takes into consideration whether an agency has been approved or rejected for 501(c)(3) status, and requires an agency to notify EOUST if 501(c)(3) status is revoked, but tax-exempt status is not required under the statute to operate as a nonprofit entity.

12. Definition of Potential Client [§ 58.12(b)(31)]

Comment: One comment stated that the rule refers to the term "potential client" numerous times, but does not define the term.

Response: EOUST concurs that a technical modification is necessary and has added a definition of "potential client" in the final rule. A "potential client" is an individual who seeks, but does not receive, counseling services from an approved agency. An individual may be both a client of the agency from which he or she seeks and ultimately receives counseling services, and

a potential client of other agencies from whom he or she seeks, but ultimately does not receive, counseling services.

13. Definition of Referral Fees [§ 58.12(b)(33)]

Comment: One comment stated that the definition of referral fees contains a loophole that would allow an entity to charge a referral fee merely by calling it something else.

Response: EOUST has deleted the definition of "locator," eliminating any concerns that a loophole exists in the definition of referral fees. The revised definition of "referral fees" prohibits the transfer or passage of any money or other consideration between an agency and another entity as consideration or in exchange for the referral of clients for counseling services. The sole exception is for fees paid under a fair share agreement, as defined elsewhere in the rule.

14. Disclosure of Revocation of 501(c)(3) Status [§§ 58.17(c), 58.24(c)(3) and (d)]

Comment: EOUST received several comments that an agency should not have to disclose to EOUST when the IRS revokes its tax-exempt status because the statute does not require tax-exempt status. Accordingly, revocation does not bear on the credit counseling agency's qualifications as an approved credit counseling agency.

Response: The review process to ensure the approval of only qualified nonprofit credit counseling agencies requires consideration of changes in an agency's 501(c)(3) status. While it is true that tax-exempt status is not required for approval, any revocation of that status is relevant in determining an agency's initial or ongoing qualifications and fitness for approval. In particular, if the IRS revoked an agency's nonprofit status due to a determination that the agency is operating for profit, such a determination may disqualify the agency. Accordingly, revocation

of an agency's 501(c)(3) tax-exempt status, though not dispositive, may bear on the agency's qualification and fitness for approval by the United States Trustee.

15. Prohibition on Legal Advice [§§ 58.12(b)(25), 58.20(b)]

Comment: Several comments expressed concern about the rule's reference to 11 U.S.C. § 110(e)(2) when defining legal advice. Some of the comments stated that 11 U.S.C. § 110(e)(2)'s definition of legal advice is overly broad when applied to credit counselors because it includes bankruptcy procedures and rights. Because counselors are expected to explain the basic principles of bankruptcy to clients in the course of providing counseling services, the comments expressed concern that the very act of counseling could cause counselors to give "legal advice" in violation of the rule's prohibition. Another comment supported an absolute ban on the provision of legal advice by counselors.

Response: Because of the differences among the states concerning the definition of the unauthorized practice of law, and the resulting difficulty in defining "legal advice," EOUST concluded the most appropriate approach is to adopt the definition Congress provided in 11 U.S.C. § 110(e)(2). EOUST is sensitive to the concern that a counselor's explanation of bankruptcy principles to clients may be considered "legal advice," but interprets 11 U.S.C. § 110(e)(2) to mean that counselors shall not advise clients concerning the application of bankruptcy laws, principles, or procedures to a particular individual's circumstances, may not recommend that a particular individual should proceed in bankruptcy, and may not describe how bankruptcy laws, principles, or procedures would affect a particular individual's case in the event of a bankruptcy filing. Rather, the counselor may explain basic bankruptcy principles and how such procedures are applied generally.

16. Board Directors [§ 58.20(c) and (d)]

Comment: EOUST received one comment that board directors should not be classified as debt relief agencies. EOUST also received one comment that attorneys who practice bankruptcy law or whose firms practice bankruptcy law should not be allowed to serve as directors or officers of a credit counseling agency.

Response: Board directors, as such, are not classified as debt relief agencies unless they meet the definition of debt relief agencies in 11 U.S.C. § 101(12A). Furthermore, so long as attorneys meet the requirements of 11 U.S.C. § 111 and this rule, which require directors, officers and board members to be independent and not to receive any remuneration based on the credit counseling services performed by the agency, EOUST declines to adopt a blanket rule prohibiting attorneys who practice bankruptcy from serving in positions of authority in a credit counseling agency.

17. Counselor Qualifications [§ 58.20(f)]

Comment: One comment supported the rule's requirements concerning counselor qualifications and another comment expressed the opinion that the requirements need to be strengthened. Yet another comment stated the rule failed to allow for a training period for inexperienced counselors.

Response: The counselor qualification requirements are meant to ensure that counselors possess sufficient expertise in financial matters to provide substantive counseling to consumers. Accordingly, inexperienced counselors either must complete a financial course of study or must work a minimum of six months in a related area to ensure they are qualified to act as counselors. Based upon experience administering the Interim Final Rule and its interactions with agencies,

EOUST concluded the requirements enunciated in this rule are sufficient to ensure that counselors will be qualified to counsel consumers.

18. Verification of Identity [§ 58.20(h)]

Comment: EOUST received two comments concerning identity verification. One expressed the opinion that verification of client identity in the context of Internet and telephone counseling is impossible, and another questioned why no comparable verification is required for in-person counseling.

Response: Establishing an individual's identity in the context of telephone and Internet counseling may pose difficulties. This does not, however, obviate identity verification requirements. Indeed, many agencies already have implemented effective identity verification procedures. For in-person counseling, an individual may present his or her driver's license, or similar photo identification, to establish his or her identity. Because the counselor is physically present and can confirm that the photo in the driver's license matches the client, this identification procedure is sufficient for in-person counseling. In the case of Internet and telephone counseling the individual is not in the counselor's physical presence and additional measures are necessary to confirm the individual's identity.

19. Toll-Free Telephone Numbers [§ 58.20(i)]

Comment: One comment stated that credit counseling agencies should not be required to provide toll-free telephone numbers to all callers.

Response: Telephone counseling commonly lasts 60 to 90 minutes. For individuals experiencing financial difficulties, the cost of such a phone call may constitute an undue burden.

This cost should be borne by the credit counseling agency, which can spread the cost among many different clients.

20. Special Needs [§ 58.20(k)]

Comment: One comment stated that "special needs" should be a defined term.

Response: The term "special needs" is in the public vernacular and commonly refers to people with disabilities. No further clarification is necessary.

21. Disclosures - Debt Repayment Plans (DRPs) [§ 58.20(*l*)]

Comment: EOUST received one comment that credit counseling agencies should disclose the percentage of all clients participating in DRPs, and the percentage of clients who complete DRPs.

Response: Credit counseling agencies currently are required to report to EOUST the number of clients enrolled in a DRP and the number of clients who completed a DRP in Appendix E to the credit counseling application. This appendix must be submitted to EOUST twice a year.

22. Disclosures - Additional Fees [§ 58.20(*l*)(1)]

Comment: EOUST received one comment requesting clarification of the requirement that, when an agency charges a separate fee for the certificate in addition to counseling, the client must consent in writing. The comment sought clarification in the case of telephone and Internet counseling, and suggested that clients be able to consent verbally or electronically in such cases.

Response: EOUST concludes that the rule should not have specific instructions for circumstances that arise infrequently as most agencies do not charge a separate fee for the issuance of the certificate. Accordingly, the rule has been amended to strike the specific and

additional instructions for credit counseling agencies that charge separate fees for certificates (§ 58.22(g) of the proposed rule). Instead, the final rule requires the general disclosures to include disclosure of all fees, including any additional fees for certificates. This is not an additional burden on agencies as the proposed rule, and Interim Final Rule, already require agencies to disclose their fee policy before rendering services.

23. Mandatory Disclosures [§ 58.20(*l*)]

Comment: EOUST received two comments concerning the number of mandatory disclosures. One comment stated that the number of mandatory disclosures is excessive and should be reduced to avoid confusing clients; the comment suggested deleting paragraphs 58.20(*l*)(4), (5), and (7) as unnecessary, and allowing mandatory disclosures made pursuant to paragraphs (6), (8), and (12) to be given during the counseling session rather than before. Another comment, however, recommended adding complaint procedures.

EOUST also received a comment recommending that, to the extent a credit counseling agency is also approved as a provider of a personal financial management instructional course pursuant to 11 U.S.C. § 111(d), the agency be able to state that the United States Trustee has reviewed those services.

Response: While there are a number of disclosures, they are necessary to protect consumers. Section 111(c)(2)(D) requires the inclusion of paragraphs (4), (5) and (6). 11 U.S.C. § 111(c)(2)(D). Paragraph (7) alerts consumers that agencies do not accept or give referral fees to increase consumer confidence in the integrity of the credit counseling industry. Paragraphs (8) and (12) inform consumers that the agency must provide a certificate promptly, and that a certificate will be provided only if the individual completes the credit counseling. This

disclosure is particularly important to eliminate misunderstandings between the agency and client, and to make clear to clients that they must complete credit counseling before receiving a credit counseling certificate.

Though the proposed rule did not prohibit agencies from informing consumers that they were also, where applicable, approved debtor education providers, the rule did not expressly allow it. To reduce a restriction on agencies, paragraph (*l*)(11) has been revised to permit a credit counseling agency to disclose that, to the extent that an agency is also approved as a provider of a personal financial management instructional course pursuant to 11 U.S.C. § 111(d), the United States Trustee has reviewed those debtor education services.

Credit counseling agencies already are obligated to develop complaint procedures. Requiring disclosure of such procedures before providing services is not necessary, especially since additional disclosures could dilute the effectiveness of those already required.

24. Section 502(k) [§ 58.20(*l*)(9)]

Comment: Several comments objected to the requirement that agencies provide each client the opportunity to have the agency negotiate an alternative payment schedule as contemplated in 11 U.S.C. § 502(k). The comments stated that this is often unnecessary, will increase costs, and will possibly subject the agencies to additional state regulation.

Response: EOUST concurs and has modified the rule to reduce the burden on agencies. Sections 109, 111, and 502(k) do not confer upon debtors the absolute right to negotiate alternative repayment schedules with creditors, nor do they require agencies to negotiate alternative payment schedules on behalf of clients. Agencies who, in their business discretion, decide not to provide this service and wish to refer clients to another agency for negotiation of

alternative payment schedules must refer clients to other approved agencies that provide the service. Accordingly, the rule has been revised to eliminate the requirement that agencies offer this service and instead requires agencies to disclose whether or not they provide this service and any additional fees clients may incur upon referral to another approved agency.

25. Background Checks [§ 58.20(n)]

Comment: EOUST received several comments concerning background checks. One comment stated that agencies should be able to choose between state and federal criminal background checks for counselors due to cost. Another comment stated the FBI background check should encompass the counselor's entire criminal history, and, where only the state background check is available, the background check should encompass all states where the counselor lived during the preceding two years, rather than the past five years. Two comments recommended that EOUST require criminal background checks of all employees.

Response: EOUST recognizes that agencies incur costs associated with conducting background checks. The cost of complying with the background check requirement, however, is warranted because counselors are privy to clients' private financial information, and, in some cases, handle client funds. A five-year state history, encompassing all states where the counselor has resided or worked, as opposed to a two-year history, is necessary to ensure that the counselor has not committed any crimes involving fraud, dishonesty, or false statements within the recent past. Investigation of the preceding two years is insufficient to ensure an individual qualifies as a counselor. The final rule clarifies the proposed rule's five-year background check requirement to mean agencies should conduct a state background check for each state in which a counselor has either lived or worked during the preceding five years.

However, EOUST declines to require criminal background checks of all employees. Such a requirement would place an undue burden on agencies and is unwarranted for employees, such as clerical and janitorial staff, who have no substantive contact with consumers or client funds. Furthermore, the final rule's background check is designed to strike an appropriate balance ensuring consumers are protected without imposing too high a burden on individuals attempting to reintegrate into society. *See* Letter from Eric H. Holder, Jr., Att'y Gen., Dep't of Justice, to State Attorneys General (Apr. 18, 2011) (concerning collateral consequences of criminal convictions) (on file with the Department of Justice, Civil Rights Division). Maintaining this balance, section 58.20(n)(2) of this rule generally prohibits credit counseling agencies from employing as a counselor a person who has been convicted of a felony or crime of dishonesty, but allows for waiver of this prohibition by the United States Trustee if circumstances warrant a waiver. Written requests for waivers of this prohibition should be directed to the EOUST.

26. Recordkeeping Requirements [§ 58.20(o)]

Comment: EOUST received several comments concerning recordkeeping requirements. A number of comments sought to limit the recordkeeping requirements to actual clients only, as opposed to actual and potential clients; in addition, one comment sought to reduce the retention period for hard copies of signed certificates from the two years set forth in the rule to 180 days.

Response: Certain recordkeeping requirements, such as the requirement to maintain records concerning the numbers of potential clients who seek counseling in languages other than English, are necessary to advance the underlying purpose of the statute and to assist the EOUST in ensuring that counseling services are available to the broadest range of consumers.

Accordingly, the final rule retains most recordkeeping requirements regarding "potential clients," but eliminates the recordkeeping requirements as to "potential clients" in two instances - namely, concerning ethical obligations of directors, officers, trustees, and supervisors concerning the financial decisions potential clients make after requesting counseling services, and the prohibition of bundling or tying agreements as to potential clients. In those instances, the reference to "potential clients" does not advance a legitimate regulatory objective.

The requirement that agencies retain hard copies of signed certificates for two years has been deleted. The final rule no longer requires agencies to provide original signatures on certificates in recognition of electronic filing in the bankruptcy courts and the technology used to generate certificates. Copies of such certificates shall be retained for 180 days from the date of issuance.

27. Additional Minimum Requirements [§ 58.20(p)6)]

Comment: One comment objected to the rule's requirement that agencies take no action to limit clients from bringing claims against agencies "under any applicable law, including but not limited to 11 U.S.C. § 111(g)(2)." The comment expressed the opinion that the phrase "any applicable law" exceeds the scope of section 111(g)(2).

Response: To reduce the burden on credit counseling agencies, the rule has been amended to strike the reference to "any applicable law."

28. Advertising [§ 58.20(p)(8)]

Comment: EOUST received one comment suggesting that the phrase "approval does not endorse or assure the quality of an Agency's services" should be deleted. The comment claimed

advertising is protected speech and the quoted phrase raises doubts in the mind of the consumer concerning the meaning of approval.

Response: This disclaimer is necessary to inform consumers that, although the agency is approved to issue credit counseling certificates, such approval does not constitute a government guarantee or endorsement of the quality of the agency's services. This disclaimer protects consumers who otherwise might infer that approval means all agency actions automatically carry the approval or endorsement of the federal government. In addition, after obtaining approval, a credit counseling agency may change its business practices or employ unqualified counselors and EOUST may not learn of these changes in quality immediately. Finally, advertising constitutes commercial speech and is subject to regulations that directly advance a substantial governmental interest, provided there exists a reasonable fit between the regulations and the governmental interest. As EOUST has a substantial interest in ensuring that the public is not misled regarding the meaning of agency approval, and as the disclaimer is narrowly tailored to advance EOUST's interest without otherwise controlling or otherwise limiting the content of a credit counseling agency's advertisements, the disclaimer is reasonable.

29. Exposure to Commercial Advertising and Sale of Personal Information

[§ 58.20(p)(10)]

Comment: One comment stated the protections in § 58.20(p)(10) are insufficient, and that agencies should not be permitted to market any services or sell any information to consumers.

Response: No change is necessary. As written, the rule prohibits agencies from marketing any product during the counseling services. In addition, the rule strictly forbids

agencies from selling a consumer's information without the consumer's prior written consent. Strengthening this prohibition by prohibiting agencies from selling a consumer's information, even when the consumer consents, would infringe on the rights of consumers to make informed decisions and to consent voluntarily to commercial agreements.

30. Fees [§ 58.21(a)]

Comment: EOUST received numerous comments regarding the determination of reasonable fees. Comments spanned suggestions for the dollar amount of a reasonable fee, ranging from $60 to $100; to suggestions that a fee, to be reasonable, should be charged per counseling session regardless of whether one debtor or a married couple attends the session; to suggestions that the proposed $50 reasonable fee is unreasonable and should be adjusted for regional variations; to suggestions that the EOUST should review the amount of the reasonable fee annually, rather than every four years. A number of comments stated that the establishment of a fixed reasonable fee runs afoul of the market economy, and that competition will keep fees low while taking regional variations and cost changes into account. One comment expressed the concern that the proposed reasonable fee and fee waiver requirements would render it unable to cover the costs of providing counseling services. Another comment criticized the determination that fees in excess of $50 per client were unreasonable, stating that, if EOUST places limits on reasonable counseling fees, EOUST should limit all other fees incurred in a bankruptcy case, including, without limitation, attorney's fees, filing fees, and court fees.

Response: EOUST has considered carefully the comments concerning both the amount of a reasonable fee and the policies underlying the establishment of a fixed fee, both in the context of the policies underlying the statute and taking into account the experiences of approved

agencies since passage of the Interim Final Rule, and has determined: (a) fees in excess of $50 per person are not presumptively reasonable; (b) EOUST shall review the amount of the presumptively reasonable fee one year after the effective date of the rule, and then periodically, but not less frequently than every four years; (c) agencies may request permission to charge a larger fee, which EOUST will consider on a case-by-case basis; and (d) whether a credit counseling agency charges fees for a counseling session per individual or per couple is within the business discretion of the agency.

EOUST acknowledges that local variations in income, cost of living, overhead, inflation, and other factors may influence and lead to inter-agency differences in determining the reasonableness of counseling fees. However, based on EOUST's experience with approved agencies, the $50 presumptively reasonable fee adequately incorporates the costs associated with complying with the statute and rule, taking into account the requirement that agencies operate as nonprofit entities, and taking into account the increasing prevalence of telephone and Internet counseling, both of which are associated with lower costs than in-person counseling. The rule permits agencies to exceed the presumptively reasonable fee after receiving approval from EOUST by demonstrating, at a minimum, that its costs for delivering the counseling services justify the requested fee. The agency bears the burden of establishing that its proposed fee is reasonable. Such requests may occur at the time of the agency's annual re-application for approval to provide counseling services, or at any other time the agency deems necessary. Agencies that have previously submitted requests to charge more than $50, and have been granted permission to do so, will not be required to resubmit such requests if the agency continues to charge that fee in the same amount. Of course, any new requests must be submitted

to EOUST for approval. EOUST does not have authority to approve fees for attorneys or other professionals in the same manner as credit counseling agencies, and lacks authority to limit such professional fees and court costs.

31. Fee Waivers [§ 58.21(b)]

Comment: EOUST received numerous comments concerning the requirement that agencies offer counseling services at a reduced cost, or waive the fee entirely, for clients who are financially unable to pay. The proposed rule requires agencies to waive or reduce fees for clients whose income is less than 150 percent of the poverty guidelines updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. § 9902(2), as adjusted from time to time, for a household or family of the size involved in the fee determination (the "poverty level").

While one comment expressed concern that the association between the poverty level and the determination of a client's ability to pay necessitated further study and assessment of financial impact on the agencies, another comment objected to the use of 150 percent of the poverty level as a mandatory fee waiver requirement, arguing that the 150 percent standard was unsustainable and would lead to severe agency financial losses. One comment cautioned that a nationwide objective standard would unduly impact agencies in areas with higher concentrations of low income clients. Another comment suggested permitting or implementing a schedule of discounts for clients whose incomes fall below the poverty guidelines, but who can afford to pay some amount, while yet another comment suggested not only that a client should bear the burden of demonstrating inability to pay, but that a client should affirmatively request the fee waiver. One comment criticized mandatory fee waivers as an "unfunded mandate."

Response: Based on these comments and EOUST's existing fee waiver data, EOUST has revised the rule to reduce the burden on agencies while still maintaining adequate protection for consumers. EOUST acknowledges that standardization may not take into account local differences, and may have a disparate impact on agencies located in geographic areas of concentrated low income. Although a credit counseling agency may apply to EOUST to increase its counseling fee, such fee increases ultimately shift the fee burden to those clients more able to pay.

Furthermore, a mandatory fee waiver for clients with income at or below 150 percent of the poverty level likely would result in a substantial increase in the number of fee waivers granted. Although some commentators urged EOUST to adopt rigid criteria requiring agencies to offer services without charge, such an inflexible rule would be inconsistent with similar court practices concerning waiver of court filing fees for *in forma pauperis* debtors that do not require the wholesale waiver of filing fees for all debtors with incomes below a certain income level. Under BAPCPA, debtors earning less than 150 percent of the poverty level are eligible to apply for a waiver of the court filing fee and the court determines whether an eligible debtor has the ability to pay the filing fee. Not all debtors who are eligible for a waiver of the filing fee apply, and not all debtors who apply are eligible. Fewer than two percent of debtors ultimately obtain a waiver of court filing fees. In comparison, based on available data from 2005, approximately 30 percent of chapter 7 debtors are eligible to apply for a waiver of the court filing fee. If EOUST were to require agencies to adopt a mandatory fee waiver policy with respect to all such debtors, some agencies could suffer severe financial losses that would render them unable to provide services, reducing capacity to serve the overall debtor population. As of July 2009, according to

self-reporting by approved credit counseling agencies, without the proposed mandatory fee waiver, 10.8 percent of certificates were issued at no cost, with another 22.1 percent issued at reduced cost.

In response to these concerns, EOUST has adopted a rebuttable presumption of a mandatory fee waiver or fee reduction policy for clients whose income is less than the poverty level, based on the *in forma pauperis* standard set forth in 28 U.S.C. § 1930(f)(1). Under this rebuttable presumption policy, instead of waiving the fee entirely, an agency may charge a client a reduced fee if the agency determines that the client does, in fact, have the ability to pay some of the fee; the amount may be determined using a sliding scale, of the agency's design, that takes into account the client's financial circumstances. If the agency determines that the client has the ability to pay some of the fee, there is no minimum amount by which the agency should reduce the fee; the amount of fee reduction is entirely dependent upon the client's ability to pay as determined by the client's financial circumstances. This rebuttable presumption satisfies the statutory mandate that counseling services be provided without regard to a client's ability to pay the fee while taking into account the agency's need to generate sufficient income from fees to cover operational costs. Accordingly, this policy establishes a uniform, objective standard by which agencies, clients, and EOUST can evaluate client entitlement to a fee waiver or a fee reduction depending on each particular client's ability to pay.

Furthermore, because agencies obtain personal financial information from clients in the context of performing the analysis of the client's financial condition required by 11 U.S.C. § 111(c)(2)(E), a fee waiver or fee reduction policy based on a comparison of the client's household income against the poverty level can be performed with ease. Having just reviewed

the client's financial information, a credit counseling agency is in the best position to make a determination whether the client is eligible for a fee waiver or fee reduction. The agency makes the determination of whether to grant the fee waiver or fee reduction when the agency is counseling the client; the agency need not consult with EOUST before making its determination. EOUST will review an agency's fee waiver policies and statistics during the agency's annual review or during a quality of service review. Finally, because the poverty level is updated periodically and takes into account the client's household size, this policy accounts for nationwide changes in the cost of living over time.

Establishing a presumptively mandatory but rebuttable fee waiver or fee reduction policy for clients whose household income falls at or below 150 percent of the poverty level recognizes agencies' need to generate sufficient income from fees to cover operational costs in light of the statutory mandate. To the extent a credit counseling agency believes the fee waiver policy set forth in the rule adversely impacts its financial viability, the agency may apply to EOUST to increase its fee. The agency shall demonstrate that its costs of delivering counseling services (including opportunity costs associated with waived or foregone fees) justify the proposed fee. The rates of both full and partial fee waivers based on client income levels, and the mechanisms by which agencies implement the rebuttable presumption, are subject to EOUST scrutiny during the annual application review for each approved agency and during quality of service reviews to assess compliance with 11 U.S.C. § 111 and this final rule.

To permit EOUST to periodically evaluate the cost and business impact of this mandatory fee waiver policy on clients and agencies, and determine whether agencies are applying the mandatory fee waiver policy uniformly and fairly, the rule has been amended to add

a new section, § 58.21(b)(2), requiring the United States Trustee to review the basis for the mandatory fee waiver policy one year after the effective date of the rule, and then periodically, but not less frequently than every four years. When reviewing the basis for the mandatory fee waiver or fee reduction policy, EOUST may consider the impact on both agencies and clients by evaluating data from agencies concerning the counseling fees, increases to such fees, and rates of total and partial fee waiver. By retaining the mandatory, objective fee waiver policy but requiring its periodic review, EOUST advances the statutory mandate that counseling services be provided without regard to the client's ability to pay, while enabling EOUST to revisit the objective standard in light of agency operational costs and impact on clients. The reasonableness of agency determinations will continue to be subject to EOUST oversight during the application process, during on-site reviews, and in the course of resolving specific complaints.

32. Delivery of Certificates – To Whom [§ 58.22(a)]

Comment: EOUST received several comments concerning delivery of certificates to a client's attorney. The proposed rule required a client to authorize, in writing, the delivery of the credit counseling certificate to the client's attorney. The comments expressed the opinion that requiring a client to provide written consent to a credit counseling agency is inefficient, particularly when the client receives counseling by telephone or Internet. In such instances, the comments provide that mail transmission of written consent to a credit counseling agency delays the delivery of the certificate. Rather than requiring written consent, the rule should permit the client to verbally authorize the agency to send the certificate to the client's attorney.

Response: EOUST agrees that written consent to deliver a certificate to a client's attorney is unnecessary and unduly impedes the efficiency of telephone and Internet counseling.

Accordingly, the rule has been revised to permit verbal authorization to send a certificate to a client's attorney. In the case of Internet counseling, electronic mail authorization or an electronic affirmation (such as a radio button or a box on a web page) is sufficient.

33. Delivery of Certificates – Time [§ 58.22(a) and (c)]

Comment: Several comments objected to the requirement that a credit counseling agency deliver the certificate to a client within one business day of completion of counseling; three comments suggested that agencies should have three business days to deliver the certificate. Several comments expressed uncertainty about the meaning of the word "deliver." Some comments suggested that three business days were necessary to complete delivery by mail, while others suggested that electronic mail is an appropriate delivery method.

One comment also sought clarification about when Internet counseling is "complete" and suggested that completion should be defined specifically. The comment noted that, in the case of Internet counseling, agencies and clients are uncertain whether counseling is considered complete when the client finishes the online course or whether further interaction with a counselor is necessary.

Response: The requirement that a credit counseling agency send the certificate to a client within one business day accords the agency adequate time and is commercially reasonable. The term "deliver" has been changed to "send" to encompass a wide range of transmission methods. To the extent a credit counseling agency is unable to send the certificate within the specified time because of extenuating circumstances, such as problems with generating or printing the certificate, illness of the counselor, or other circumstances beyond the agency's control, EOUST can evaluate such incidents on a case-by-case basis.

The rule also has been revised to clarify that, in the case of Internet counseling and automated telephone counseling, counseling is not complete until the client has engaged in interaction with a counselor, whether by electronic mail, live chat, or telephone, following the automated portion of the counseling session. Personal interaction has utility as a means of verifying and confirming client identity, and is necessary to meet the statutory objectives set forth in 11 U.S.C. § 111(c)(2)(E) that agencies assess each client's current financial condition, the factors that caused such financial condition, and how the client can develop a plan to respond to those problems.

34. Certificates – Budget Analysis [§ 58.22(b)]

Comment: Two comments objected to the requirement that the budget analysis the counselor prepares for the client be attached to the certificate. One comment suggested that, because of the nature of prebankruptcy counseling, data contained in such a budget analysis may be unreliable and, if filed with the bankruptcy court, may prejudice the debtor client. Another comment expressed the opinion that requiring attachment of the budget analysis to the certificate may violate client privacy.

Response: EOUST agrees that 11 U.S.C. §§ 109 and 521 do not require the agency to attach the budget analysis to the credit counseling certificate. Accordingly, the final rule deletes this requirement and reduces the burden on credit counseling agencies.

35. Certificates – Original Signature [§ 58.22(*l*)(2)]

Comment: Several comments objected to the requirement that certificates generated for electronic filing must be generated in paper form as well and must bear the original signature of

the counselor. The comments criticized the requirement as expensive and time-consuming, and noted that the rule contains precautions against creation of forged or fraudulent certificates.

Response: EOUST agrees and has reduced the burden on credit counseling agencies by deleting the requirement that, when a certificate is generated for electronic filing with the court, the agency must provide the client a paper certificate bearing the counselor's original signature as well.

36. Certificates - Time of Completion [§ 58.22(n)(3)]

Comment: One comment noted that certificates should contain not only the date but also the time that counseling was completed.

Response: EOUST concurs that a technical modification is necessary and has revised the rule to require certificates to contain both the date and the time that counseling was completed; the time must include the time zone. This technical modification does not impose an additional burden as the proposed rule required certificates to contain the date of completion. Including the time and time zone is a minor modification to the date on the certificate.

37. Certificates - Legal Name [§ 58.22(o)]

Comment: EOUST received several comments concerning the display of two names on the certificate when a third party (such as an attorney-in-fact acting under a valid power of attorney) completes counseling on behalf of the client. The comment expressed doubt that a certificate can display two names rather than one. Several comments expressed the opinion that, rather than leaving open the possibility that a third party can complete counseling on behalf of the client under certain circumstances, the rule expressly should prohibit third parties from taking counseling on behalf of clients.

Response: Certificates may display more than one name (e.g., John Doe, as Attorney-In-Fact for Jane Doe). No clarification is necessary to permit such a display, and the display of both names removes the need for agencies to engage in legal analysis concerning the proper party to list on the certificate, while providing full disclosure to courts and other parties concerning the client's participation in counseling.

Furthermore, EOUST declines to prohibit third parties from completing counseling on behalf of a client under appropriate circumstances, such as under a valid power of attorney sufficient to authorize the individual to file a bankruptcy petition on behalf of a client. To the extent state law authorizes powers of attorney, EOUST does not object to the completion of counseling by duly authorized attorneys-in-fact on behalf of clients.

38. Fees - Additional Counseling [§ 58.22(p)]

Comment: EOUST received a comment that, if a client seeks pre-bankruptcy counseling from an approved agency and enters into a DRP, and then the client decides to file for bankruptcy more than 180 days after the initial counseling session, the agency should be entitled to additional compensation for further counseling services.

Response: EOUST disagrees and no change has been made to the rule. Because the pursuit of alternatives to bankruptcy is one of the principal goals of the BAPCPA, debtors who pursued bankruptcy alternatives in the spirit of the BAPCPA, such as DRPs, should not be penalized for doing so by paying twice for credit counseling. Rather, agencies must provide additional counseling sufficient to enable the client to comply with the statutory requirement at no additional cost to the client.

39. Debt Repayment Plans [§ 58.23(d), (e) and (f)]

Comment: One comment expressed uncertainty why the rule includes financial requirements (including bonding and insurance requirements) for agencies offering DRPs.

Response: Because DRPs are an alternative to bankruptcy and require a credit counseling agency to handle client funds, EOUST seeks to ensure that agencies offering DRPs safeguard client funds and fulfill fiduciary obligations toward clients. Accordingly, the rule contains financial bonding and insurance requirements for any agency offering DRPs to protect client funds and to ensure that disbursements on behalf of clients are made.

40. Surety Bond Percentage [§ 58.23(d) and (f)]

Comment: EOUST received two comments suggesting that the surety bond percentage should be higher for first time applicants.

Response: EOUST declines to adopt this requirement, finding that the current bonding requirements are sufficient for all applicants, including first-time applicants. However, EOUST has determined that DRP client protection may continue to be necessary, under certain circumstances, in the event an approved credit counseling agency ceases to offer DRP services to individuals who received counseling from such agency pursuant to 11 U.S.C. § 109(h). Although such agencies need not maintain EOUST approved bonds and insurance if they transfer their existing DRP clients to other approved agencies within a specified period of time, to the extent such agencies continue to service the DRP accounts of these existing clients after ceasing to offer DRP services to new clients, they must continue to maintain sufficient bonding and insurance requirements to protect client funds and to ensure that disbursements on behalf of clients are made for the life of those clients' DRP terms.

Executive Order 12866

This rule has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review," section 1(b), The Principles of Regulation. The Department has determined that this rule is a "significant regulatory action." Accordingly, this rule has been reviewed by the Office of Management and Budget ("OMB").

The Department has also assessed both the costs and benefits of this rule as required by section 1(b)(6) and has made a reasoned determination that the benefits of this regulation justify its costs. The costs considered in this regulation include the required costs for the submission of an application. Costs considered also include the cost of establishing and maintaining the approved list in each federal judicial district. In an effort to minimize the burden on applicants, the application keeps the number of items on the application to a minimum.

The costs to an applicant of submitting an application will be minimal. The anticipated costs are the photocopying and mailing of the requested records, along with the salaries of the employees who complete the applications. Based upon the available information, experience with the credit counseling industry, and informal communications with credit counseling agencies, EOUST anticipates that the cost for submitting an application should equal approximately $500 per application for agencies. This cost is not new. It is the same cost that credit counseling agencies incurred when applying under the Interim Final Rule.

Agencies that offer DRPs also must obtain a surety bond in the amount of either (1) two percent of the agency's disbursements made during the twelve months immediately prior to the submission of the application from all trust accounts attributable to the federal judicial districts (or, if not feasible to determine, the states) in which the agency seeks approval from the United

States Trustee; or (2) equal to the average daily balance maintained for the six months immediately prior to submission of the application in all trust accounts attributable to the federal judicial districts (or, if not feasible to determine, the states) in which the agency seeks approval from the United States Trustee. In addition, credit counseling agencies that offer debt repayment plans must obtain employee fidelity insurance in a face amount equal to 50 percent of the surety bond. Credit counseling agencies are entitled to receive a credit for any state surety bond or employee fidelity insurance already obtained.

Although credit counseling agencies may charge a fee for providing the credit counseling services in accordance with this rule, agencies must provide credit counseling without regard to a client's ability to pay the fee. Based upon the available information, current practice of many credit counseling agencies, experience with the credit counseling industry, and communications with credit counseling agencies, EOUST presumes $50 to be a reasonable fee for credit counseling. The United States Government Accountability Office, after conducting a study on credit counseling, found that $50 was the typical rate charged by credit counseling agencies and that industry observers and consumer advocates considered this amount to be reasonable.

The amount presumed to be reasonable for credit counseling fees will be reviewed one year after the effective date of this rule and then periodically, but not less frequently than every four years. The amount presumed to be reasonable will be published by notice in the Federal Register and identified on the EOUST website. In addition, all credit counseling agencies must waive or reduce the fee if the client demonstrates a lack of ability to pay the fee, which shall be presumed if the client's current household income is less than 150 percent of the poverty level, as adjusted from time to time, for a household or family of the size involved in the fee

determination. A credit counseling agency may rebut this presumption if it determines, based on income information provided by the client in connection with counseling services, that the client is able to pay the fee in a reduced amount. Please refer to the Regulatory Flexibility Act section for more analysis on the surety bond and insurance requirements, and for a discussion on fees and fee waivers.

Additionally, credit counseling agencies will incur *de minimus* recordkeeping costs. For instance, an agency will be required to maintain various records, such as records on which it relied in submitting its application; copies of the semi-annual reports; financial statements; ordinary business records; records on counseling services provided in languages other than English; fees; fee waiver and fee reduction statistics; complaints; and records enabling the agency to issue replacement certificates. All of these records combined should not equal more than a few pages or megabytes of information. Moreover, the increased specificity in this rule regarding records retention requirements reduce the burden on agencies because the Interim Final Rule required agencies to maintain business records, but did not specify which records needed to be kept, nor for how long. With implementation of this rule, agencies no longer need to keep every record for an unspecified amount of time in case such records are requested during an annual review or quality of service review.

The number of credit counseling agencies that ultimately will apply for approval is unknown, though EOUST currently has approved approximately 170 agencies. The annual hour burden on agencies is estimated to be 10 hours. This estimate is based on consultations with individuals in the credit counseling industry, and experience with credit counseling agencies who completed the initial applications. EOUST consulted with the Federal Trade Commission and

with the Internal Revenue Service in drafting this rule and concludes that the rule does not have an adverse effect upon either agency.

The benefits of this rule include the development of standards that increase consumer protections, such as a limit on the presumption of reasonable fees, the requirement that agencies provide adequate disclosures concerning agencies' policies, and the preservation of clients' rights under 11 U.S.C. § 502(k). This rule also provides for greater supervision by the United States Trustee to ensure agencies employ proper procedures to safeguard client funds. These benefits justify its costs in complying with Congress' mandate that a list of approved credit counseling agencies be established. Pub. L. No. 109-8, § 106(e)(1).

Executive Order 13132

This rule will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by OMB in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501 to 3520, and assigned OMB control number 1105-0084 for form EOUST-CC1, the "*Application for Approval as a Nonprofit Budget and Credit Counseling Agency*." The Department notes that full notice and comment opportunities were provided to the general public through the Paperwork

Reduction Act process, and that the applications and associated requirements were modified to take into account the concerns of those who commented in this process.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. § 605(b), the Director has reviewed this rule and, by approving it, certifies that, although it will affect a substantial number of small entities, the rule will not have a significant economic impact upon them. In 2006, when EOUST conducted a survey of the 119 credit counseling agencies that were approved at the time of the survey, 98 agencies responded to the survey, and 82 (or 84 percent) of those agencies qualified as small businesses under the Small Business Administration's guidelines. *See* 13 C.F.R. § 121.201. Of the 82 agencies that qualified as small businesses, 91 percent of them reported that the cost to obtain a surety bond and insurance in accordance with specifications enunciated in the proposed rule amounted to less than one percent of gross revenue. Additionally, 90 percent of the agencies that qualified as small businesses reported that the cost was less than one percent of total expenditures. For the remaining ten percent of agencies, only three agencies reported the surety bond and insurance requirements equaled more than two percent of gross revenue; five reported that they equaled more than two percent of total expenditures, only one of which reported the surety bond and insurance requirements equaled three percent of gross revenue and expenditures. From this data, it is apparent that the surety bond and insurance requirements do not impose a significant economic impact on a substantial number of small entities.

This rule also sets forth guidance concerning the reasonable fee a credit counseling agency may charge (a presumptively reasonable fee of $50), and the criteria for determining fee

waiver eligibility (presumed eligibility at household income of 150 percent of the poverty level). EOUST sought to establish formal guidance concerning fees, fee waivers and fee reductions based on a client's "ability to pay the fee" using objective criteria, taking into account the potential financial impact on the agencies as well as the needs of clients. 11 U.S.C. § 111(c)(2)(B).

After carefully evaluating the credit counseling industry, EOUST based its fee guidance on current industry practice. Nearly 90 percent of approved credit counseling agencies charge $50 or less. According to a U.S. Government Accountability Office ("GAO") report in 2007, the mean fee for credit counseling among all agencies was $47. *See* U.S. Gov't Accountability Office, GAO-07-203, Bankruptcy Reform: Value of Credit Counseling Requirement is Not Clear 30 (2007) (the "GAO Report"). As of 2011, the mean fee for credit counseling among all agencies is $48. Among the ten largest credit counseling agencies (by certificate volume), nearly all charge $50 or less in fees. Only one of the ten largest agencies charges more than $50 (the agency in question charges $55 for counseling in person with a $10 discount for counseling by Internet). Three of the ten largest agencies charge substantially less than $50: one charges $36; another charges $30 ($50 for telephone counseling); and yet another charges $25. According to EOUST records, fee policies have not changed among the ten largest agencies since 2006.

In 2011, EOUST took a random sampling of ten credit counseling agencies that were not among the ten largest agencies to determine these agencies' fees. Of these ten agencies, nine charge $50 and the other agency charges $25. Accordingly, a $50 presumptively reasonable fee not only strikes an appropriate balance between the financial condition of prospective debtors and the financial viability of approved credit counseling agencies, but constitutes general

practice in the credit counseling industry. Thus, establishing a presumptively reasonable fee of $50 does not impose a significant economic impact on credit counseling agencies. Rather, it embodies a fee structure already widespread in the industry.

Regarding fee waivers, similar to the requirement to charge "reasonable" fees, the requirement to waive fees when a client cannot pay is mandated by statute. 11 U.S.C. § 111(c)(2)(B). With respect to the development of the fee waiver standard, the GAO undertook a study concerning, among other things, the incidence of fee waivers based on ability to pay. The GAO noted that the Interim Final Rule did not provide specific guidance on the criteria agencies should use to determine a client's ability to pay. *See* GAO Report at 29-32. The GAO noted variations in the rate of fee waivers and recommended that EOUST adopt clearer guidance to agencies to reduce uncertainty among agencies concerning appropriate fee waiver criteria, to improve transparency concerning EOUST's assessment of fee waiver policies, and to increase the availability of fee waivers by setting clear minimum benchmarks for ability to pay. *Id*. at 32, 40-41.

Among the ten largest credit counseling agencies, eight use household income at or below 150 percent of the poverty level as the threshold for determining eligibility for a fee waiver. One agency considers the debtor's income, housing status, and existence of severe hardship. The other agency uses household income at or below 100 percent of the poverty level as the threshold for determining eligibility for a fee waiver. In 2011, EOUST took a random sampling of ten credit counseling agencies that were not among the ten largest agencies to determine these agencies' fee waiver policies. Seven of the agencies use the 150 percent of poverty level standard; one uses the *in forma pauperis* or *pro bono* standard without specifying

150 percent; one uses 125 percent of the poverty level; and one uses 100 percent of the poverty level as the threshold for determining eligibility for a fee waiver.

In the proposed rule, EOUST proposed a bright-line standard establishing entitlement to a fee waiver for clients with household income equal to or less than 150 percent of the poverty level. That standard was based on the *in forma pauperis* standard set forth in 28 U.S.C. § 1930(f)(1), which permits the bankruptcy court to waive filing fees for eligible individuals. The proposed rule standard did not grant agencies the discretion to determine whether clients otherwise were able to pay the fees.

Subsequently, EOUST received and considered comments to the proposed rule. EOUST agreed that implementation of the proposed standardized fee waiver raised some policy concerns. Because standardization fails to take into account local differences, disparate impact on agencies may result when agencies located in geographic areas of concentrated low income individuals are required to grant fee waivers at a higher rate than those in more affluent areas. Although an agency may apply to EOUST to increase its counseling fee by demonstrating that its costs of delivering services (including opportunity costs associated with waived or reduced fees) justify the proposed fee, increases in fees ultimately shift the fee burden to those clients more able to pay. As of July 2009, according to self-reporting by approved credit counseling agencies, without the proposed mandatory fee waiver, 10.8 percent of certificates were issued at no cost, with another 22.1 percent issued at reduced cost. In comparison, based on available data from 2005, approximately 30 percent of chapter 7 debtors were eligible to apply for a waiver of the court filing fee pursuant to the 150 percent *in forma pauperis* standard. Based on this analysis, EOUST concluded that if agencies were subject to a mandatory fee waiver policy with respect to

all such debtors based on the *in forma pauperis* standard, some agencies might suffer financial losses that would render them unable to provide services, reducing capacity to serve the overall potential debtor population.

Accordingly, EOUST revised this rule to include a rebuttable presumption to the objective fee waiver standard. In adopting the presumption, EOUST seeks to balance the need for an objective fee waiver standard and complying with 11 U.S.C. § 111(c)(2)(B) with agencies' need to collect adequate fees for services provided. Under the rebuttable presumption, a client with household income equal to or less than 150 percent of the poverty level is presumptively entitled to a fee waiver, but the agency may determine, based on information it receives during the counseling session, that the client actually is able to pay the fee in part. In that case, the agency may charge the client a reduced fee, taking into account the client's actual ability to pay. This rebuttable presumption balances the need for an objective fee waiver standard, consumer protection, and the need to ensure agency compliance with the Bankruptcy Code with the agencies' need to collect adequate fees.

Additionally, although EOUST considered indexing fee waivers to client income, EOUST determined that such an indexing system fails to take into account the variation in ability to pay for clients at the same income level. For example, two clients may have income at 150 percent of the poverty level, but one client lives in a rent-free home and has few expenses while the other has significant expenses, such as accumulated medical debts or child support payments. An inflexible indexing standard does not take into account the individual's actual ability to pay the fee, as set forth in 11 U.S.C. § 111(c)(2)(B). EOUST concluded that each agency should determine each client's eligibility based on the client's individual financial circumstances.

Unfunded Mandates Reform Act of 1995

This rule does not require the preparation of an assessment statement in accordance with the Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1531. This rule does not include a federal mandate that may result in the annual expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of more than the annual threshold established by the Act ($100 million). Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801 *et seq*. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, and innovation; or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Privacy Act Statement

Section 111 of title 11, United States Code, authorizes the collection of this information. The primary use of this information is by the United States Trustee to approve nonprofit budget and credit counseling agencies. The United States Trustee will not share this information with any other entity unless authorized under the Privacy Act, 5 U.S.C. § 552a *et seq*. EOUST has published a System of Records Notice that delineates the routine use exceptions authorizing disclosure of information. 71 Fed. Reg. 59,818, 59,827 (October 11, 2006), JUSTICE/UST-005, Credit Counseling and Debtor Education Files and Associated Records.

Public Law 104-134 (April 26, 1996) requires that any person doing business with the federal government furnish a Social Security Number or Tax Identification Number. This is an amendment to section 7701 of title 31, United States Code. Furnishing the Social Security Number and other data is voluntary, but failure to do so may delay or prevent action on the application.

List of Subjects in 28 CFR Part 58

Administrative practice and procedure, Bankruptcy, Credit and debts

Accordingly, for the reasons set forth in the preamble, Part 58 of chapter I of title 28 of the Code of Federal Regulations is amended as follows:

PART 58--[AMENDED]

1. The authority citation for Part 58 continues to read as follows:

Authority: 5 U.S.C. 301, 552; 11 U.S.C. 109(h), 111, 521(b), 727(a)(11), 1141(d)(3), 1202, 1302, 1328(g), 28 U.S.C. 509, 510, 586, 589b.

2. Sections 58.12 through 58.14 are added to read as follows:

§ 58.12 Definitions.

(a) The following definitions apply to §§ 58.12 through and including 58.24 of this Part and the applications and other materials agencies submit in an effort to establish they meet the requirements necessary to become an approved nonprofit budget and credit counseling agency.

(b) These terms shall have these meanings: (1) The term "accreditation" means the recognition or endorsement that an accrediting organization bestows upon an agency because the accrediting organization has determined the agency meets or exceeds all the accrediting organization's standards;

(2) The term “accrediting organization” means either an entity that provides accreditation to agencies or provides certification to counselors, provided, however, that an accrediting organization shall:

(i) Not be an agency or affiliate of any agency; and

(ii) Be deemed acceptable by the United States Trustee;

(3) The term “adequate counseling” means the actual receipt by a client from an approved agency of all counseling services, and all other applicable services, rights, and protections specified in:

(i) 11 U.S.C. 109(h);

(ii) 11 U.S.C. 111; and

(iii) This part;

(4) The term “affiliate of an agency” includes:

(i) Every entity that is an affiliate of the agency, as the term “affiliate” is defined in 11 U.S.C. 101(2), except that the word “agency” shall be substituted for the word “debtor” in 11 U.S.C. 101(2);

(ii) Each of an agency’s officers and each of an agency’s directors; and

(iii) Every relative of an agency’s officers and every relative of an agency’s directors;

(5) The term “agency” and the term “budget and credit counseling agency” shall each mean a nonprofit organization that is applying under this part for United States Trustee approval to be included on a publicly available list in one or more United States district courts, as

authorized by 11 U.S.C. 111(a)(1), and shall also mean, whenever appropriate, an approved agency;

(6) The term "application" means the application and related forms, including appendices, approved by the Office of Management and Budget as form EOUST-CC1, *Application for Approval as a Nonprofit Budget and Credit Counseling Agency*, as it shall be amended from time to time;

(7) The term "approved agency" means an agency currently approved by a United States Trustee under 11 U.S.C. 111 as an approved nonprofit budget and credit counseling agency eligible to be included on one or more lists maintained under 11 U.S.C. 111(a)(1);

(8) The term "approved list" means the list of agencies currently approved by a United States Trustee under 11 U.S.C. 111, as currently published on the United States Trustee Program's Internet site, which is located on the United States Department of Justice's Internet site;

(9) The term "audited financial statements" means financial reports audited by independent certified public accountants in accordance with generally accepted accounting principles as defined by the American Institute of Certified Public Accountants;

(10) The term "certificate" means the certificate identified in 11 U.S.C. 521(b)(1) that an approved agency shall provide to a client after the client completes counseling services;

(11) The term "client" means an individual who both seeks and receives (or sought and received) counseling services from an approved agency;

(12) The term "counseling services" means all counseling required by 11 U.S.C.

109(h) and 111, and this part including, without limitation, services that are typically of at least 60 minutes in duration and that shall at a minimum include:

(i) Performing on behalf of, and providing to, each client a written analysis of that client's current financial condition, which analysis shall include a budget analysis, consideration of all alternatives to resolve a client's credit problems, discussion of the factors that caused such financial condition, and identification of all methods by which the client can develop a plan to respond to the financial problems without incurring negative amortization of debt; and

(ii) Providing each client the opportunity to have the agency negotiate an alternative payment schedule with regard to each unsecured consumer debt under terms as set forth in 11 U.S.C. 502(k) or, if the client accepts this option and the agency is unable to provide this service, the agency shall refer the client to another approved agency in the appropriate federal judicial district that provides it;

(13) The term "counselor certification" means certification of a counselor by an accrediting organization because the accrediting organization has determined the counselor meets or exceeds all the accrediting organization's standards for counseling services or related areas, such as personal finance, budgeting, or credit or debt management;

(14) The term "criminal background check" means a report generated by a state law enforcement authority disclosing the entire state criminal history record, if any, of the counselor for whom the criminal background check is sought, for every state where the counselor has resided or worked during any part of the immediately preceding five years. If a criminal background check is not available for, or is not authorized by state law in, each of the states

where the counselor has resided or worked during any part of the immediately preceding five years, the agency shall instead obtain at least every five years a sworn statement from each counselor attesting to whether the counselor has been convicted of a felony, or a crime involving fraud, dishonesty, or false statements;

(15) The term "debt repayment plan" means any written document suggested, drafted, or reviewed by an approved agency that either proposes or implements any mechanism by which a client would make payments to any creditor or creditors if, during the time any such payments are being made, that creditor or those creditors would forbear from collecting or otherwise enforcing their claim or claims against the client; provided, however, that any such written document shall not constitute a debt repayment plan if the client would incur a negative amortization of debt under it;

(16) The term "Director" means the person designated or acting as the Director of the Executive Office for United States Trustees;

(17) The term "entity" shall have the meaning given that term in 11 U.S.C. 101(15);

(18) The term "fair share" means payments by a creditor to an approved agency for administering a debt repayment plan;

(19) The terms "fee" and "fee policy" each mean the aggregate of all fees, contributions, and payments an approved agency charges clients for providing counseling services; "fee policy" shall also mean the objective criteria the agency uses in determining whether to waive or reduce any fee, contribution, or payment;

(20) The term “final decision” means the written determination issued by the Director based upon the review of the United States Trustee’s decision either to deny an agency’s application or to remove an agency from the approved list;

(21) The term “financial benefit” means any interest equated with money or its equivalent, including, but not limited to, stocks, bonds, other investments, income, goods, services, or receivables;

(22) The term “governmental unit” shall have the meaning given that term in 11 U.S.C. 101(27);

(23) The term “independent contractor” means a person or entity who provides any goods or services to an approved agency other than as an employee and as to whom the approved agency does not:

(i) Direct or control the means or methods of delivery of the goods or services being provided;

(ii) Make financial decisions concerning the business aspects of the goods or services being provided; and

(iii) Have any common employees;

(24) The term “languages offered” means every language other than English in which an approved agency provides counseling services;

(25) The term “legal advice” shall have the meaning given that term in 11 U.S.C. 110(e)(2);

(26) The term “limited English proficiency” refers to individuals who:

(i) Do not speak English as their primary language; and

(ii) Have a limited ability to read, write, speak, or understand English;

(27) The term "material change" means, alternatively, any change:

(i) In the name, structure, principal contact, management, counselors, physical location, counseling services, fee policy, language services, or method of delivery of an approved agency; or

(ii) That renders inapplicable, inaccurate, incomplete, or misleading any statement an agency or approved agency previously made:

(A) In its application or related materials; or

(B) To the United States Trustee;

(28) The term "method of delivery" means one or more of the three methods by which an approved agency can provide some component of counseling services to its clients, including:

(i) "In person" delivery, which applies when a client primarily receives counseling services at a physical location with a credit counselor physically present in that location, and with the credit counselor providing oral and/or written communication to the client at the facility;

(ii) "Telephone" delivery, which applies when a client primarily receives counseling services by telephone; and

(iii) "Internet" delivery, which applies when a client primarily receives counseling services through an Internet website;

(29) The term "nonprofit" means, alternatively:

(i) An entity validly organized as a not-for-profit entity under applicable state or federal law, if that entity operates as a not-for-profit entity in full compliance with all applicable state and federal laws; or

(ii) A qualifying governmental unit;

(30) The term "notice" in § 58.24 means the written communication from the United States Trustee to an agency that its application to become an approved agency has been denied or to an approved agency that it is being removed from the approved list;

(31) The term "potential client" means an individual who seeks, but does not receive, counseling services from an approved agency.

(32) The term "qualifying government unit" means any governmental unit that, were it not a governmental unit, would qualify for tax-exempt status under 26 U.S.C. 501(c)(3), or would qualify as a nonprofit entity under applicable state law;

(33) The term "referral fees" means money or any other valuable consideration paid or transferred between an approved agency and another entity in return for that entity, directly or indirectly, identifying, referring, securing, or in any other way encouraging any client or potential client to receive counseling services from the approved agency; provided, however, that "referral fees" shall not include fees paid to the agency under a fair share agreement;

(34) The term "relative" shall have the meaning given that term in 11 U.S.C. 101(45);

(35) The term "request for review" means the written communication from an agency to the Director seeking review of the United States Trustee's decision either to deny the agency's application or to remove the agency from the approved list;

(36) The term “state” means state, commonwealth, district, or territory of the United States;

(37) The term “tax waiver” means a document sufficient to permit the Internal Revenue Service to release directly to the United States Trustee information about an agency;

(38) The term “trust account” means an account with a federally insured depository institution that is separated and segregated from operating accounts, which an approved agency shall maintain in its fiduciary capacity for the purpose of receiving and holding client funds entrusted to the approved agency; and

(39) The term “United States Trustee” means, alternatively:

(i) The Executive Office for United States Trustees;

(ii) A United States Trustee appointed under 28 U.S.C. § 581;

(iii) A person acting as a United States Trustee;

(iv) An employee of a United States Trustee; or

(v) Any other entity authorized by the Attorney General to act on behalf of the United States under this part.

§ 58.13 Procedures all agencies shall follow when applying to become approved agencies.

(a) An agency applying to become an approved agency shall obtain an application, including appendices, from the United States Trustee.

(b) The agency shall complete the application, including its appendices, and attach the required supporting documents requested in the application.

(c) The agency shall submit the original of the completed application, including completed appendices and the required supporting documents, to the United States Trustee at the address specified on the application form.

(d) The application shall be signed by an agency representative who is authorized under applicable law to sign on behalf of the applying agency.

(e) The signed application, completed appendices, and required supporting documents shall be accompanied by a writing, signed by the signatory of the application and executed on behalf of the signatory and the agency, certifying the application does not:

(1) Falsify, conceal, or cover up by any trick, scheme or device a material fact;

(2) Make any materially false, fictitious, or fraudulent statement or representation; or

(3) Make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

(f) The United States Trustee shall not consider an application, and it may be returned if:

(1) It is incomplete;

(2) It fails to include the completed appendices or all of the required supporting documents; or

(3) It is not accompanied by the certification identified in paragraph (e) of this section.

(g) The United States Trustee shall not consider an application on behalf of an agency, and it shall be returned if:

(1) It is submitted by any entity other than the agency; or

(2) Either the application or the accompanying certification is executed by any entity other than an agency representative who is authorized under applicable law to sign on behalf of the agency.

(h) By the act of submitting an application, an agency consents to the release and disclosure of its name, contact information, and non-confidential business information relating to the services it provides on the approved list should its application be approved.

§ 58.14 Automatic expiration of agencies' status as approved agencies.

(a) Except as provided in § 58.15(c), if an approved agency was not an approved agency immediately prior to the date it last obtained approval to be an approved agency, such an approved agency shall cease to be an approved agency six months from the date on which it was approved unless the United States Trustee approves an additional one year period.

(b) Except as provided in § 58.15(c), if an approved agency was an approved agency immediately prior to the date it last obtained approval to be an approved agency, such an agency shall cease to be an approved agency one year from the date on which it was last approved to be an approved agency unless the United States Trustee approves an additional one year period.

3. Sections 58.15 through 58.17 are revised to read as follows:

§ 58.15 Procedures all approved agencies shall follow when applying for approval to act as an approved agency for an additional one year period.

(a) To be considered for approval to act as an approved agency for an additional one year term, an approved agency shall reapply by complying with all the requirements specified for agencies under 11 U.S.C. 109(h) and 111, and under this part.

(b) Such an agency shall apply no later than 45 days prior to the expiration of its six month probationary period or annual period to be considered for approval for an additional one year period, unless a written extension is granted by the United States Trustee.

(c) An approved agency that has complied with all prerequisites for applying to act as an approved agency for an additional one year period may continue to operate as an approved agency while its application is under review by the United States Trustee, so long as either the application for an additional one year period is timely submitted, or an agency receives a written extension from the United States Trustee.

§ 58.16 Renewal for an additional one year period.

If an approved agency's application for an additional one year period is approved, such renewal period shall begin to run from the later of:

(a) The day after the expiration date of the immediately preceding approval period; or

(b) The actual date of approval of such renewal by the United States Trustee.

§ 58.17 Mandatory duty of approved agencies to notify United States Trustees of material changes.

(a) An approved agency shall immediately notify the United States Trustee in writing of any material change.

(b) An approved agency shall immediately notify the United States Trustee in writing of any failure by the approved agency to comply with any standard or requirement specified in 11 U.S.C. 109(h) or 111, this part, or the terms under which the United States Trustee approved it to act as an approved agency.

(c) An approved agency shall immediately notify the United States Trustee in writing of any of the following events:

(1) Notification by the Internal Revenue Service or by a state or local taxing authority that the approved agency has been selected for audit or examination regarding its tax-exempt status, or any notification of a compliance check by the Internal Revenue Service or by a state or local taxing authority;

(2) Revocation or termination of the approved agency's tax-exempt status by any governmental unit or by any judicial officer;

(3) Cessation of business by the approved agency or by any office of the agency, or withdrawal from any federal judicial district(s) where the approved agency is approved;

(4) Any investigation of, or any administrative or judicial action brought against, the approved agency by any governmental unit;

(5) Termination or cancellation of any surety bond or fidelity insurance;

(6) Any administrative or judicial action brought by any entity that seeks recovery against a surety bond or fidelity insurance;

(7) Any action by a governmental unit or a court to suspend or revoke the approved agency's articles of incorporation, or any license held by the approved agency, or any authorization necessary to engage in business;

(8) A suspension, or action to suspend, any accreditation held by the approved agency, or any withdrawal by the approved agency of any application for accreditation, or any denial of any application of the approved agency for accreditation;

(9) A change in the approved agency's nonprofit status under any applicable law;

(10) Any change in the banks or financial institutions used by the agency; and

(11) [reserved].

(d) An agency shall notify the United States Trustee in writing if any of the changes identified in paragraphs (a) through (c) of this section occur while its application to become an approved agency is pending before the United States Trustee.

(e) An approved agency whose name or other information appears incorrectly on the approved list shall immediately submit a written request to the United States Trustee asking that the information be corrected.

4. Sections 58.18 through 58.24 are added to read as follows:

§ 58.18 Mandatory duty of approved agencies to obtain prior consent of the United States Trustee before taking certain actions.

(a) By accepting the designation to act as an approved agency, an agency agrees to obtain approval from the United States Trustee, prior to making any of the following changes:

(1) Cancellation or change in the amount of the surety bond or employee fidelity bond or insurance;

(2) The engagement of an independent contractor to provide counseling services or to have access to, possession of, or control over client funds;

(3) Any increase in the fees, contributions, or payments received from clients for counseling services or a change in the agency's fee policy;

(4) Expansion into additional federal judicial districts;

(5) Any changes to the method of delivery the approved agency employs to provide counseling services; or

(6) Any changes in the approved agency's counseling services.

(b) An agency applying to become an approved agency shall also obtain approval from the United States Trustee before taking any action specified in paragraph (a) of this section. It shall do so by submitting an amended application. The agency's amended application shall be accompanied by a contemporaneously executed writing, signed by the signatory of the application, that makes the certifications specified in § 58.13(e).

(c) An approved agency shall not transfer or assign its United States Trustee approval to act as an approved agency.

§ 58.19 Continuing requirements for becoming and remaining approved agencies.

(a) To become an approved agency, an agency must affirmatively establish, to the satisfaction of the United States Trustee, that the agency at the time of approval:

(1) Satisfies every requirement of this part; and

(2) Provides adequate counseling to its clients.

(b) To remain an approved agency, an approved agency shall affirmatively establish, to the satisfaction of the United States Trustee, that the approved agency:

(1) Has satisfied every requirement of this part;

(2) Has provided adequate counseling to its clients; and

(3) Would continue to satisfy both paragraphs (b)(1) and (2) of this section in the future.

§ 58.20 Minimum qualifications agencies shall meet to become and remain approved agencies.

To meet the minimum qualifications set forth in § 58.19, and in addition to the other requirements set forth in this part, agencies and approved agencies shall comply with paragraphs (a) through (p) of this section on a continuing basis:

(a) Compliance with all laws. An agency shall comply with all applicable laws and regulations of the United States and each state in which the agency provides counseling services including, without limitation, all laws governing licensing and registration.

(b) Prohibition on legal advice. An agency shall not provide legal advice.

(c) Structure and organization. An agency shall:

(1) Be lawfully organized and operated as a nonprofit entity; and

(2) Have a board of directors, the majority of which:

(i) Are not relatives;

(ii) Are not employed by such agency; and

(ii) Will not directly or indirectly benefit financially from the outcome of the counseling services provided by such agency.

(d) Ethical standards. An agency shall:

(1) Not engage in any conduct or transaction, other than counseling services, that generates a direct or indirect financial benefit for any member of the board of directors or trustees, officer, supervisor, or any relative thereof;

(2) Ensure no member of the board of directors or trustees, officer, or supervisor receives any commissions, incentives, bonuses, or benefits (monetary or non-monetary) of any kind that are directly or indirectly based on the financial or legal decisions any client makes after requesting counseling services;

(3) Ensure no member of the board of directors or trustees, officer or supervisor is a relative of an employee of the United States Trustee, a trustee appointed under 28 U.S.C. 586(a)(1) or (b) for any federal judicial district where the agency is providing or is applying to provide counseling services, a federal judge in any federal judicial district where the agency is providing or is applying to provide counseling services, a federal court employee in any federal judicial district where the agency is providing or is applying to provide counseling services, or a certified public accountant that audits the agency's trust account;

(4) Not enter into any referral agreement or receive any financial benefit that involves the agency paying to or receiving from any entity or person referral fees for the referral of clients to or by the agency, except payments under a fair share agreement;

(5) Not enter into agreements involving counseling services that create a conflict of interest; and

(6) Not provide counseling services to a client with whom the agency has a lender-borrower relationship.

(e) Use of credit counselors. An agency shall have a credit counselor provide the counseling services to each of the agency's clients. The credit counselor shall interact with the client regarding the accuracy of the information obtained from the client and the alternatives

available to the client for dealing with his or her current financial situation, including the plan developed to address such financial situation.

(f) Credit counselor training, certification and experience. An agency shall:

(1) Use only counselors who possess adequate experience providing credit counseling, which shall mean that each counselor either:

(i) Holds a counselor certification and who has complied with all continuing education requirements necessary to maintain his or her counselor certification; or

(ii) Has successfully completed a course of study and worked a minimum of six months in a related area such as personal finance, budgeting, or credit or debt management. A course of study shall include training in counseling skills, personal finance, budgeting, or credit or debt management. A counselor shall also receive annual continuing education in the areas of counseling skills, personal finance, budgeting, or credit or debt management;

(2) Demonstrate adequate experience, background, and quality in providing credit counseling, which shall mean that, at a minimum, the agency shall either:

(i) Have experience in providing credit counseling for the two years immediately preceding the relevant application date; or

(ii) For each office providing counseling services, employ at least one supervisor who has met the qualifications in paragraph (f)(2)(i) of this section for no fewer than two of the five years preceding the relevant application date;

(3) If offering any component of counseling services by a telephone or Internet method of delivery, use only counselors who, in addition to all other requirements, demonstrate sufficient

experience and proficiency in providing such counseling services by those methods of delivery, including proficiency in employing verification procedures to ensure the person receiving the counseling services is the client, and to determine whether the client has completely received counseling services.

(g) No variation in services. An agency shall ensure that the type and quality of services do not vary based on a client's decision whether to obtain a certificate in lieu of other options that may or may not be suggested by the agency.

(h) Use of the telephone and the Internet to deliver a component of client services. An agency shall:

(1) Not provide any client diminished counseling services because the client receives any portion of those counseling services by telephone or Internet;

(2) Confirm the identity of the client before receiving counseling services by telephone or Internet by:

(i) Obtaining one or more unique personal identifiers from the client and assigning an individual access code, user ID, or password at the time of enrollment; and

(ii) Requiring the client to provide the appropriate access code, user ID, or password, and also one or more of the unique personal identifiers during the course of delivery of the counseling services.

(i) Services to hearing and hearing-impaired clients and potential clients. An agency shall furnish toll-free telephone numbers for both hearing and hearing-impaired clients and potential clients whenever telephone communication is required. The agency shall provide

telephone amplification, sign language services, or other communication methods for hearing-impaired clients or potential clients.

(j) [reserved].

(k) Services to clients and potential clients with special needs. An agency that provides any portion of its counseling in person shall comply with all federal, state and local laws governing facility accessibility. An agency shall also provide or arrange for communication assistance for clients or potential clients with special needs who have difficulty making their service needs known.

(l) Mandatory disclosures to clients and potential clients. Prior to providing any information to or obtaining any information from a client or potential client, and prior to rendering any counseling service, an agency shall disclose:

(1) The agency's fee policy, including any fees associated with generation of the certificate;

(2) The agency's policies enabling clients to obtain counseling services for free or at reduced rates based upon the client's lack of ability to pay. To the extent an agency publishes information concerning its fees on the Internet, such fee information must include the agency's policies enabling clients to obtain counseling for free or at reduced rates based upon the client's lack of ability to pay;

(3) The agency's policy to provide free bilingual counseling services or professional interpreter assistance to any limited English proficient client;

(4) The agency's funding sources;

(5) The counselors' qualifications;

(6) The potential impacts on credit reports of all alternatives the agency may discuss with the client;

(7) The agency's policy prohibiting it from paying or receiving referral fees for the referral of clients, except under a fair share agreement;

(8) The agency's obligation to provide a certificate to the client promptly upon the completion of counseling services;

(9) A statement that the client has the opportunity to negotiate an alternative payment schedule with regard to each unsecured consumer debt under terms as set forth in 11 U.S.C. 502(k), and a statement whether or not the agency will provide this service. If the agency does not provide this service, it shall disclose that it may refer the client to another approved agency, and shall disclose that clients may incur additional fees in connection with such a referral;

(10) The fact that the agency might disclose client information to the United States Trustee in connection with the United States Trustee's oversight of the agency, or during the investigation of complaints, during on-site visits, or during quality of service reviews;

(11) The fact that the United States Trustee has reviewed only the agency's credit counseling services (and, if applicable, its services as a provider of a personal financial management instructional course pursuant to 11 U.S.C. 111(d)), and the fact that the United States Trustee has neither reviewed nor approved any other services the agency provides to clients; and

(12) The fact that a client will receive a certificate only if the client completes counseling services.

(m) Complaint Procedures. An agency shall employ complaint procedures that adequately respond to clients' concerns.

(n) Background checks. An agency shall:

(1) Conduct a criminal background check at least every five years for each person providing credit counseling, and

(2) Not employ anyone as a counselor who has been convicted of any felony, or any crime involving fraud, dishonesty, or false statements, unless the United States Trustee determines circumstances warrant a waiver of this prohibition against employment.

(o) Agency records. An agency shall prepare and retain records that enable the United States Trustee to evaluate whether the agency is providing adequate counseling and acting in compliance with all applicable laws and this part. All records, including documents bearing original signatures, shall be maintained in either hard copy form or electronically in a format widely available commercially. Records that the agency shall prepare and retain for a minimum of two years, and permit review by the United States Trustee upon request, shall include:

(1) Upon the filing of an application for probationary approval, all information requested by the United States Trustee as an estimate, projected to the end of the probationary period, in the form requested by the United States Trustee;

(2) After probationary or annual approval, and for so long as the agency remains on the approved list, semi-annual reports of historical data (for the periods ending June 30 and

December 31 of each year), of the type and in the form requested by the United States Trustee; these reports shall be submitted within 30 days of the end of the applicable periods specified in this paragraph;

(3) Annual audited financial statements, including the audited balance sheet, statement of income and retained earnings, and statement of changes in financial condition;

(4) Books, accounts, and records to provide a clear and readily understandable record of all business conducted by the agency, including, without limitation, copies of all correspondence with or on behalf of the client, including the contract between the agency and the client and any amendments thereto;

(5) Records concerning the delivery of services to clients and potential clients with limited English proficiency and special needs, and to hearing-impaired clients and potential clients, including records:

(i) Of the number of such clients and potential clients, and the methods of delivery used with respect to such clients and potential clients;

(ii) Of which languages are offered or requested and the type of language support used or requested by such clients or potential clients (*e.g.*, bilingual instructor, in-person or telephone interpreter, translated web instruction);

(iii) Detailing the agency's provision of services to such clients and potential clients; and

(iv) Supporting any justification if the agency did not provide services to such potential clients, including the number of potential clients not served, the languages involved, and the number of referrals provided;

(6) Records concerning the delivery of counseling services to clients for free or at reduced rates based upon the client's lack of ability to pay, including records of the number of clients for whom the agency waived all of its fees under § 58.21(b)(1)(i), the number of clients for whom the agency waived all or part of its fees under § 58.21(b)(1)(ii), and the number of clients for whom the agency voluntarily waived all or part of its fees under § 58.21(c);

(7) Records of complaints and the agency's responses thereto;

(8) Records that enable the agency to verify the authenticity of certificates their clients file in bankruptcy cases; and

(9) Records that enable the agency to issue replacement certificates.

(p) Additional minimum requirements. An agency shall:

(1) Provide records to the United States Trustee upon request;

(2) Cooperate with the United States Trustee by allowing scheduled and unscheduled on-site visits, complaint investigations, or other reviews of the agency's qualifications to be an approved agency;

(3) Cooperate with the United States Trustee by promptly responding to questions or inquiries from the United States Trustee;

(4) Assist the United States Trustee in identifying and investigating suspected fraud and abuse by any party participating in the credit counseling or bankruptcy process;

(5) Not exclude any client or creditor from a debt repayment plan because the creditor declines to make a fair share contribution to the agency;

(6) Take no action that would limit, inhibit, or prevent a client from bringing an action or claim for damages against an agency, as provided in 11 U.S.C. 111(g)(2);

(7) Refer clients and prospective clients for counseling services only to agencies that have been approved by a United States Trustee to provide such services;

(8) Comply with the United States Trustee's directions on approved advertising, including without limitation those set forth in Appendix A to the application;

(9) Not disclose or provide to a credit reporting agency any information concerning whether a client has received or sought instruction concerning credit counseling or personal financial management from an agency;

(10) Not expose the client to commercial advertising as part of or during the client's receipt of any counseling services, and never market or sell financial products or services during the counseling session provided, however, this provision does not prohibit an agency from generally discussing all available financial products and services;

(11) Not sell information about any client or potential client to any third party without the client or potential client's prior written permission;

(12) If the agency is tax-exempt, submit a completed and signed tax waiver permitting and directing the Internal Revenue Service to provide the United States Trustee with access to the Internal Revenue Service's files relating to the agency;

(13) Comply with the requirements elsewhere in this part concerning fees for credit counseling services and fee waiver policies; and

(14) Comply with the requirements elsewhere in this part concerning certificates.

§ 58.21 Minimum requirements to become and remain approved agencies relating to fees.

(a) If a fee for, or relating to, credit counseling services is charged by an agency, such fee shall be reasonable:

(1) A fee of $50 or less for credit counseling services is presumed to be reasonable and an agency need not obtain prior approval of the United States Trustee to charge such a fee;

(2) A fee exceeding $50 for credit counseling services is not presumed to be reasonable and an agency must obtain prior approval from the United States Trustee to charge such a fee. The agency bears the burden of establishing that its proposed fee is reasonable. At a minimum, the agency must demonstrate that its cost for delivering such services justify the fee. An agency that previously received permission to charge a higher fee need not reapply for permission to charge that fee during the agency's annual review. Any new requests for permission to charge more than previously approved, however, must be submitted to EOUST for approval; and

(3) The United States Trustee shall review the amount of the fee set forth in paragraphs (a)(1) and (2) of this section one year after the effective date of this part and then periodically, but not less frequently than every four years, to determine the reasonableness of the fee. Fee amounts and any revisions thereto shall be determined by current costs, using a method of analysis consistent with widely accepted accounting principles and practices, and calculated in accordance with the provisions of federal law as applicable. Fee amounts and any revisions thereto shall be published in the Federal Register.

(b)(1) An agency shall waive the fee in whole or in part whenever a client demonstrates a lack of ability to pay the fee.

(i) A client presumptively lacks the ability to pay the fee if the client's household current income is less than 150 percent of the poverty guidelines updated periodically in the Federal Register by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2), as adjusted from time to time, for a household or family of the size involved in the fee determination.

(ii) The presumption shall be rebutted, and the agency may charge the client a reduced fee, if the agency determines, based on income information the client submits in connection with counseling services, that the client is able to pay the fee in a reduced amount. Nothing in this section requires an agency to charge a fee to clients whose household income exceeds the amount set forth in paragraph (b)(1)(i) of this section, or who are able to demonstrate ability to pay based on income as described in this section.

(iii) An agency shall disclose its fee policy, including the criteria on which it relies in determining a client's eligibility for reduced fees, and the agency's policy for collecting fees pursuant to paragraph (b)(1)(ii) of this section, in accordance with § 58.20(l)(2).

(2) The United States Trustee shall review the basis for the mandatory fee waiver policy set forth in paragraph (b)(1) of this section one year after the effective date of this part and then periodically, but not less frequently than every four years, to determine the impact of that fee waiver policy on clients and agencies. Any revisions to the mandatory fee waiver policy set forth in paragraph (b)(1) of this section shall be published in the Federal Register.

(c) Notwithstanding the requirements of paragraph (b) of this section, an agency may also waive fees based upon other considerations, including, but not limited to:

(1) The client's net worth;

(2) The percentage of the client's income from government assistance programs;

(3) Whether the client is receiving *pro bono* legal services in connection with a filed or anticipated bankruptcy case; or

(4) If the combined current monthly income, as defined in 11 U.S.C. 101(10A), of the client and his or her spouse, when multiplied times twelve, is equal to or less than the amounts set forth in 11 U.S.C. 707(b)(7).

(d) An agency shall not require a client to purchase counseling services in connection with the purchase of any other service offered by the agency.

§ 58.22 Minimum requirements to become and remain approved agencies relating to certificates.

(a) An approved agency shall send a certificate only to the client who took and completed the counseling services, except that an approved agency shall instead send a certificate to the attorney of a client who took and completed counseling services if the client specifically directs the agency to do so. In the case of Internet counseling and automated telephone counseling, counseling is not complete until the client has engaged in interaction with a counselor, whether by electronic mail, live chat, or telephone, following the automated portion of the counseling session.

(b) An approved agency shall attach to the certificate the client's debt repayment plan (if any).

(c) An approved agency shall send a certificate to a client no later than one business day after the client completed counseling services. If a client has completed counseling services, an agency may not withhold certificate issuance for any reason. An agency may not consider counseling services incomplete based solely on the client's failure to pay the fee.

(d) If an approved agency provides other financial counseling in addition to counseling services, and such other financial counseling satisfies the requirements for counseling services specified in 11 U.S.C. 109(h) and 111, and this part, a person completing such other financial counseling is a client and the approved agency shall send a certificate to the client no later than one business day after the client's request. The approved agency shall not charge the client any additional fee except any separate fee charged for the issuance of the certificate, in accordance with § 58.20(l)(1).

(e) An approved agency shall issue certificates only in the form approved by the United States Trustee, and shall generate the form using the Certificate Generating System maintained by the United States Trustee, except under exigent circumstances with notice to the United States Trustee.

(f) An approved agency shall have sufficient computer capabilities to issue certificates from the United States Trustee's Certificate Generating System.

(g) An approved agency shall issue a certificate to each client who completes counseling services. Spouses receiving counseling services jointly shall each receive a certificate.

(h) An approved agency shall issue a replacement certificate to a client who requests one.

(i) An approved agency shall not file certificates with the court.

(j) Only an authorized officer, supervisor or employee of an approved agency shall issue a certificate, and an approved agency shall not transfer or delegate authority to issue certificates to any other entity.

(k) An approved agency shall implement internal controls sufficient to prevent unauthorized issuance of certificates.

(l) An approved agency shall ensure the signature affixed to a certificate is that of an officer, supervisor or employee authorized to issue the certificate, in accordance with paragraph (j) of this section, which signature shall be either:

(1) An original signature; or

(2) In a format approved for electronic filing with the court (most typically in the form /s/ name of counselor).

(m) An approved agency shall affix to the certificate the exact name under which the approved agency is incorporated or organized.

(n) An approved agency shall identify on the certificate:

(1) The specific federal judicial district requested by the client;

(2) Whether counseling services were provided in person, by telephone or via the Internet;

(3) The date and time (including the time zone) on which counseling services were completed by the client; and

(4) The name of the counselor that provided the counseling services.

(o) An approved agency shall affix the client's full, accurate name to the certificate. If the counseling services are obtained by a client through a duly authorized representative, the certificate also shall set forth the name of the legal representative and legal capacity of that representative.

(p) If an individual enters into a debt repayment plan after completing credit counseling, upon the client's request after the completion or termination of the debt repayment plan, the approved agency shall:

(1) Provide such additional credit counseling as is necessary at such time to comply with the requirements specified in 11 U.S.C. 109(h) and 111, and this part, including reviewing the client's current financial condition and counseling the client regarding the alternatives to resolve the client's credit problems;

(2) Send a certificate to the client no later than one business day after the client completed such additional counseling; and

(3) Not charge the client any additional fee except any separate fee charged for the issuance of the certificate, in accordance with § 58.20(l)(1).

§ 58.23 Minimum financial requirements and bonding and insurance requirements for agencies offering debt repayment plans.

If an agency offers or has offered debt repayment plans, an agency shall possess adequate financial resources to provide continuing support services for such plans over the life of any debt repayment plan, and provide for the safekeeping of client funds, which shall include:

(a) Depositing all client funds into a deposit account, held in trust, at a federally insured depository institution. Each such trust account shall be established in a fiduciary capacity and shall be in full compliance with federal law such that each client's funds shall be protected by federal deposit insurance up to the maximum amount allowable by federal law.

(b) Keeping and maintaining books, accounts, and records to provide a clear and readily understandable record of all business conducted by the agency, including without limitation, all of the following:

(1) Separate files for each client's account that include copies of all correspondence with or on behalf of the client, including:

(i) All agreements with all entities, including the contract between the agency and the client and any amendments thereto;

(ii) The analysis of the client's budget;

(iii) Correspondence between the agency and the client's creditors;

(iv) The notice given to creditors of any debt repayment plan; and

(v) All written statements of account provided to the client and subsidiary ledgers concerning any debt repayment plan;

(2) A trust account general ledger reflecting all deposits to and disbursements from all trust accounts, which shall be kept current at all times;

(3) A reconciliation of the trust accounts, prepared at least once a month; and

(4) An operating account general ledger reflecting all of the agency's financial transactions involving the agency's operating account, which shall be kept current at least on a monthly basis.

(c) Allowing an independent certified public accounting firm to audit the trust accounts annually in accordance with generally accepted accounting principles as defined by the American Institute of Certified Public Accountants and any Statement of Work prepared by the United States Trustee, which audit shall include:

(1) A report of all trust account activity including:

(i) The balance of each trust account at the beginning and end of the period;

(ii) The total of all receipts from clients and disbursements to creditors during the reporting period;

(iii) The total of all disbursements to the agency; and

(iv) The reconciliation of each trust account;

(2) A report of all exceptions (*e.g.,* discrepancies, irregularities, and errors) found, regardless of materiality; and

(3) An evaluation of the agency's trust account internal controls and its computer operations to determine whether it provides a reasonable assurance that the trust funds are safeguarded against loss from unauthorized use or disposition.

(d) Obtaining a surety bond payable to the United States, as follows:

(1) Subject to the minimum amount of $5,000, the amount of such surety bond shall be the lesser of:

(i) Two percent of the agency's disbursements made during the twelve months immediately prior to submission of the application from all trust accounts attributable to the federal judicial districts (or, if not feasible to determine, the states) in which the agency seeks approval from the United States Trustee; or

(ii) Equal to the average daily balance maintained for the six months immediately prior to submission of the application in all trust accounts attributable to the federal judicial districts (or, if not feasible to determine, the states) in which the agency seeks approval from the United States Trustee;

(2) The agency may receive an offset or credit against the surety bond amount determined under paragraph (d)(1) of this section if:

(i) The agency has previously obtained a surety bond, or similar cash, securities, insurance (other than employee fidelity insurance), or letter of credit in compliance with the licensing requirements of the state in which the agency seeks approval from the United States Trustee;

(ii) Such surety bond, or similar cash, securities, insurance (other than employee fidelity insurance), or letter of credit provides protection for the clients of the agency;

(iii) Such surety bond, or similar cash, securities, insurance (other than employee fidelity insurance), or letter of credit, is written in favor of the state or the appropriate state agency; and

(iv) The amount of the offset or credit shall be the lesser of:

(A) The principal amount of such surety bond, or similar cash, securities, insurance (other than employee fidelity insurance), or letter of credit; or

(B) The surety bond amount determined under paragraph (d)(1) of this section;

(3) If an agency has contracted with an independent contractor to administer any part of its debt repayment plans:

(i) Except as provided in paragraphs (d)(3)(ii) and (d)(3)(iii) of this section, the independent contractor shall:

(A) Be an approved agency; or

(B) If the independent contractor is not an approved agency, then the independent contractor shall:

(*1*) Be specifically covered under the agency's surety bond required under paragraph (d)(1) of this section; or

(*2*) Have a surety bond that meets the requirements of paragraph (d)(1) of this section; and

(*3*) Agree in writing to allow the United States Trustee to audit the independent contractor's trust accounts for the debt repayment plans administered on behalf of the agency and to review the independent contractor's internal controls and administrative procedures;

(ii) If the independent contractor holds funds for transmission for five days or less, then the amount of the required surety bond under paragraph (d)(3)(i)(B) of this section shall be $500,000;

(iii) If the independent contractor performs only electronic fund transfers on the agency's behalf, then the independent contractor need not satisfy the requirements of paragraph (d)(3)(i)

of this section during such time as the independent contractor is authorized by the National Automated Clearing House Association to participate in the Automated Clearing House system.

(e) Obtaining either adequate employee bonding or fidelity insurance, as follows:

(1) Subject to the minimum amount set forth below, the amount of such bonding or fidelity insurance shall be 50 percent of the surety bond amount calculated under paragraph (d)(1) of this section, prior to any offset or credit that the agency may receive under paragraph (d)(2) of this section; provided, however, that at a minimum, the employee bond or fidelity insurance must be $5,000;

(2) An agency may receive an offset or credit against the employee bond or fidelity insurance amount determined under paragraph (e)(1) of this section if:

(i) The agency has previously obtained an employee bond or fidelity insurance in compliance with the requirements of a state in which the agency seeks approval from the United States Trustee; and

(ii) The deductible does not exceed a reasonable amount considering the financial resources of the agency; and

(iii) The amount of the offset or credit shall be the lesser of:

(A) The principal amount of such employee bond or fidelity insurance; or

(B) The employee bond or fidelity insurance amount determined under paragraph (e)(1) of this section.

(f) An agency that ceases to offer debt repayment plans to individuals who receive counseling from such agency pursuant to 11 U.S.C. 109(h) shall, concerning any debt repayment

plans it services that remain in existence with respect to such individuals as of the date it ceases to offer debt repayment plans to new clients, continue to comply with all of the requirements of this section.

(1) The agency may seek a waiver of the bonding and insurance requirements set forth in paragraphs (d) and (e) of this section if:

(i) The agency has in effect, as of the date it ceases to offer debt repayment plans, a written agreement to transfer all such debt repayment plans to another approved agency for servicing, provided that:

(A) Transfers to another approved agency pursuant to such agreements must be completed within 60 days of the date the agency ceases to offer debt repayment plans to individuals who receive counseling from such agency pursuant to 11 U.S.C. § 109(h); and

(B) The agency provides written notice to clients whose debt repayment plans it intends to transfer within the time described in paragraph (f)(1)(i)(A) of this section, identifying the approved agency to which the clients' plans will be transferred, any fees associated with servicing by the approved agency, and any fees associated with the transfer; or

(ii) In the reasonable determination of the United States Trustee, taking into account the facts and circumstances surrounding the agency's business and the terms of the bond, compliance with the bonding and insurance requirements set forth in paragraphs (d) and (e) of this section would impose an undue hardship on the agency.

§ 58.24 Procedures for obtaining final agency action on United States Trustees' decisions to deny agencies' applications and to remove approved agencies from the approved list.

(a) The United States Trustee shall remove an approved agency from the approved list whenever an approved agency requests its removal in writing.

(b) The United States Trustee may issue a decision to remove an approved agency from the approved list, and thereby terminate the approved agency's authorization to provide counseling services, at any time.

(c) The United States Trustee may issue a decision to deny an agency's application or to remove an agency from the approved list whenever the United States Trustee determines that the agency has failed to comply with the standards or requirements specified in 11 U.S.C. 109(h) or 111, this part, or the terms under which the United States Trustee designated it to act as an approved agency, including, but not limited to, finding any of the following:

(1) The agency is not employing adequate procedures for safekeeping of client funds or paying client funds, which could result in a loss to a client;

(2) The agency's surety bond has been canceled;

(3) Any entity has revoked the agency's nonprofit status, even if that revocation is subject to further administrative or judicial litigation, review or appeal;

(4) Any entity has suspended or revoked the agency's license to do business in any jurisdiction; or

(5) Any United States district court has removed the agency under 11 U.S.C. § 111(e).

(d) If the Internal Revenue Service revokes an agency's tax exempt status, the United States Trustee shall promptly commence an investigation to determine whether any of the factors set forth in paragraphs (c)(1) through (5) of this section exist.

(e) The United States Trustee shall provide to the agency in writing a notice of any decision either to:

(1) Deny the agency's application; or

(2) Remove the agency from the approved list.

(f) The notice shall state the reason(s) for the decision and shall reference any documents or communications relied upon in reaching the denial or removal decision. To the extent authorized by law, the United States Trustee shall provide to the agency copies of any such documents that were not supplied to the United States Trustee by the agency. The notice shall be sent to the agency by overnight courier, for delivery the next business day.

(g) Except as provided in paragraph (i) of this section, the notice shall advise the agency that the denial or removal decision shall become final agency action, and unreviewable, unless the agency submits in writing a request for review by the Director no later than 21 calendar days from the date of the notice to the agency.

(h) Except as provided in paragraph (i) of this section, the decision to deny an agency's application or remove an agency from the approved list shall take effect upon:

(1) The expiration of the agency's time to seek review from the Director, if the agency fails to timely seek review of a denial or removal decision; or

(2) The issuance by the Director of a final decision, if the agency timely seeks such review.

(i) The United States Trustee may provide that a decision to remove an agency from the approved list is effective immediately and deny the agency the right to provide counseling

services whenever the United States Trustee finds any of the factors set forth in paragraphs (c)(1) through (5) of this section.

(j) An agency's request for review shall be in writing and shall fully describe why the agency disagrees with the denial or removal decision, and shall be accompanied by all documents and materials the agency wants the Director to consider in reviewing the denial or removal decision. The agency shall send the original and one copy of the request for review, including all accompanying documents and materials, to the Office of the Director by overnight courier, for delivery the next business day. To be timely, a request for review shall be received at the Office of the Director no later than 21 calendar days from the date of the notice to the agency.

(k) The United States Trustee shall have 21 calendar days from the date of the agency's request for review to submit to the Director a written response regarding the matters raised in the agency's request for review. The United States Trustee shall provide a copy of this response to the agency by overnight courier, for delivery the next business day.

(l) The Director may seek additional information from any party in the manner and to the extent the Director deems appropriate.

(m) In reviewing the decision to deny an agency's application or remove an agency from the approved list, the Director shall determine:

(1) Whether the denial or removal decision is supported by the record; and

(2) Whether the denial or removal decision constitutes an appropriate exercise of discretion.

(n) Except as provided in paragraph (o) of this section, the Director shall issue a final decision no later than 60 calendar days from the receipt of the agency's request for review, unless the agency agrees to a longer period of time or the Director extends the deadline. The Director's final decision on the agency's request for review shall constitute final agency action.

(o) Whenever the United States Trustee provides under paragraph (i) of this section that a decision to remove an agency from the approved list is effective immediately, the Director shall issue a written decision no later than 15 calendar days from the receipt of the agency's request for review, unless the agency agrees to a longer period of time. The decision shall:

(1) Be limited to deciding whether the determination that the removal decision should take effect immediately was supported by the record and an appropriate exercise of discretion;

(2) Constitute final agency action only on the issue of whether the removal decision should take effect immediately; and

(3) Not constitute final agency action on the ultimate issue of whether the agency should be removed from the approved list; after issuing the decision, the Director shall issue a final decision by the deadline set forth in paragraph (n) of this section.

(p) In reaching a decision under paragraphs (n) and (o) of this section, the Director may specify a person to act as a reviewing official. The reviewing official's duties shall be specified by the Director on a case-by-case basis, and may include reviewing the record, obtaining additional information from the participants, providing the Director with written recommendations, and such other duties as the Director shall prescribe in a particular case.

(q) An agency that files a request for review shall bear its own costs and expenses, including counsel fees.

(r) When a decision to remove an agency from the approved list takes effect, the agency shall:

(1) Immediately cease providing counseling services to clients and shall not provide counseling services to potential clients;

(2) No later than three business days after the date of removal, send all certificates to all clients who completed counseling services prior to the agency's removal from the approved list;

(3) No later than three business days after the date of removal, return all fees to clients and potential clients who had paid for counseling services, but had not completely received them; and

(4) Transfer any debt repayment plans that the agency is administering to another approved agency.

(s) An agency must exhaust all administrative remedies before seeking redress in any court of competent jurisdiction.

Dated: _February 14, 2013_____

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Clifford J. White III
Director
Executive Office for United States Trustees

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