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DEPARTMENT OF JUSTICE
28 CFR Part 58

Application Procedures and Criteria for Approval of Providers of a Personal Financial Management Instructional Course by United States Trustees

Docket No: EOUST 104

RIN: 1105-AB31

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 providers of a personal financial management instructional course (“providers”) satisfy all prerequisites of the United States Code, as implemented under this rule. Under the current law, individual debtors must participate in an instructional course concerning personal financial management (“instructional course” or “debtor education”) before receiving a discharge of debts. The current law enumerates mandatory prerequisites and minimum standards applicants seeking to become approved providers must meet. Under this rule, United States Trustees will approve applicants for inclusion on publicly available provider 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 provider shall be authorized to

provide an instructional course in a federal judicial district during the time the provider remains approved.

EOUST intends to add to its regulations governing debtor education providers, two new provisions not previously included in the proposed rule. The first provision will amend section 58.30(c)(5) to require providers 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 provider's entry into a settlement order, consent decree, or assurance of voluntary compliance. The second provision will amend section 58.33(i) to require a provider to assist an individual with limited English proficiency by expeditiously directing the individual to a provider that can provide instruction in the language of the individual's choice. Because these provisions were not discussed in the proposed rule published on November 14, 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 debtor education application process, EOUST promulgated the Interim Final Rule rather than a notice of proposed rulemaking (“proposed rule”). On November 14, 2008, at 73 Fed. Reg. 67,435, 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 January 13, 2009, EOUST received eleven 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 providers while maintaining adequate protection for debtors.

This rule implements the debtor education 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. § 111. Effective October 17, 2005, individual debtors under chapters 7, 13, and in some instances chapter 11, must receive from an approved provider debtor education before they may receive a discharge of their debts. 11 U.S.C. §§ 111, 727(a)(11), 1141(d)(3), 1328(g)(1).

Section 111(b) of title 11, United States Code, governs the approval by United States Trustees of debtor education providers for inclusion under 11 U.S.C. § 111(a)(1) on publicly

available provider 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 provider only after the United States Trustee has thoroughly reviewed the applicant's (a) qualifications, and (b) instructional course. 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. 11 U.S.C. § 111(b)(1). EOUST reserves the right to publish on its public website non-confidential business information relating to debtor education providers, including contact information, services provided, language support services offered, and fees charged for services.

After completing that thorough review, a United States Trustee may approve a debtor education provider only if the provider 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 trained personnel with adequate experience in providing effective instruction and services, (b) provide learning materials and teaching methodologies designed to assist debtors in understanding personal financial management, (c) if applicable, provide adequate facilities for providing an instructional course, (d) prepare and retain reasonable records to permit evaluation of the effectiveness of an instructional course, and (e) if a fee is charged, charge a reasonable fee, and provide services without regard to ability to pay the fee. 11 U.S.C. § 111(d)(1).

This rule will implement those statutory requirements. By accomplishing that, the rule will help debtors obtain effective instruction from competent providers. It also will provide an appropriate mechanism by which applicants can apply for approval under section 111 of title 11

to become approved providers, and will enable such applicants to attempt to meet their burden of establishing 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 providers; 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 number, where a more detailed explanation of these changes is discussed, is included:

Modifications to Make the Final Rule Less Burdensome on Providers

- The definition of “material change” has been revised to eliminate staff other than the provider’s management or instructors (§ 58.25(b)(22) - comment # B6).
- A provider may disclose to debtors that, to the extent the provider is approved as a nonprofit budget and credit counseling agency pursuant to 11 U.S.C. § 111(c), the United States Trustee has reviewed those credit counseling services (§ 58.33(k)(8) - comment # B23).
- The reference to “any applicable law” in the prohibition that a provider take no action to limit debtors from bringing claims against the provider as provided in 11 U.S.C. § 111(g)(2) has been deleted (§ 58.33(n)(5) - comment # B25).
- The rule has been revised to add a rebuttable presumption that a debtor lacks the ability to pay the instructional fee if the debtor’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 (§ 58.34(b)(1) - comment # B28).

- 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 (§ 58.34(b)(2) - comment # B28).
- The requirement that, for a provider to send an instructional certificate to a debtor's attorney, the debtor must make the request in writing to the provider has been deleted (§ 58.35(a) - comment # B30).
- The requirement that providers provide original signatures on certificates, in recognition of electronic filing in the bankruptcy courts and the technology used to generate certificates, has been deleted (§ 58.35(j)(2) - comment # B34).
- The prohibition that providers not file certificates with the court has been deleted to enable providers to file certificates with the court should the Federal Rules of Bankruptcy Procedure be amended to authorize providers to file certificates with the court or to otherwise notify the bankruptcy court of course completion (§ 58.35(i) of the proposed rule).

Technical or Clarifying Modifications

- The definition of “debtor” has been revised to apply only to such debtors that have sought an instructional course from an approved provider (§ 58.25(b)(8) - comment # B2).
- 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 (§ 58.25(b)(21) - comment # B5).
- The definition of “material change” has been amended to include a change in language services provided by the provider. Providers 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 a provider adds or removes a language from its available services (§ 58.25(b)(22)).
- The rule has been amended to clarify that providers may not use direct mail or electronic mail solicitations to contact debtors, unless the solicitations include a prominent disclaimer stating, “This is an advertisement for services,” and to refrain from using seals or logos that may be confused easily with those used by any federal government agency (§ 58.33(c)(4) - comment # B14).
- The rule has been amended to clarify that a provider must disclose its policy, if any, concerning fees associated with generating an instructional certificate prior to rendering any instructional services (§ 58.33(k)(1) - comment # B32).

- The rule has been amended to clarify that approved providers who publish information on the Internet concerning their fees must include their policies enabling debtors to obtain an instructional course for free or at reduced rates based upon the debtor's lack of ability to pay. This is not an additional burden on providers as the proposed rule requires providers to disclose their fee polices prior to providing services; the final rule makes it clear that this requirement includes Internet based instruction (§ 58.33(k)(2)).
- The rule has been amended to clarify that a provider's duty to disclose its fee policy before providing services includes disclosing the provider's policy to provide free bilingual instruction to any limited English proficient debtor. This is not an additional burden on providers as the proposed rule requires providers to disclose their fee polices prior to providing services; the final rule makes it clear that this requirement includes disclosing providers' fee policies regarding services for limited English proficient individuals (§ 58.33(k)(3)).
- The rule has been amended to clarify that a provider's duty to maintain records regarding limited English proficiency debtors includes maintaining records regarding the methods of delivery of an instructional course, the types of languages and methods of delivery requested by debtors, the number of debtors served, and the number of referrals made to other providers. Because the proposed rule already requires providers 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 providers in terms of record-keeping for limited English proficient individuals (§ 58.33(m)(3)).

- The rule has been amended to clarify that certificates must bear not only the date, but also the time and the time zone when the instructional course was completed by the debtor. This technical modification does not impose an additional burden as the proposed rule requires certificates to contain the date of completion and including the time and time zone is a minor modification to the date on the certificate (§ 58.35(l)(3)).
- The rule has been amended to correct non-substantive stylistic, numbering and typographical errors.

Discussion of Public Comments

EOUST received eleven 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 Providers

Comment: EOUST received several comments that the rule will make it more expensive for providers to operate and that they will pass the costs on to debtors.

Response: EOUST recognizes that the rule may cause providers to incur additional costs, but those costs are minimal. Additionally, the extra costs for such measures as procedures to verify a debtor's identity, and mandatory disclosure of the provider's fee policy, are sufficiently important to protect consumers to warrant the extra costs to the provider.

B. Comments on Specific Subsections of the Proposed Rule

1. Use of the Terms Accreditation and Certification [§ 58.25(b)(1) and (2)]

Comment: EOUST received one comment that the rule erroneously uses the terms accreditation and certification interchangeably, when accreditation refers to organizations and certification refers to individuals. One other comment recommended an amendment to section 58.25(b)(2)(i) to accommodate providers who certify other, unrelated, providers.

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

No change to the rule is necessary to permit providers to certify unrelated providers.

Such a business practice is not permitted under the final rule.

2. Definition of Debtor [§§ 58.25(b)(8) and 58.33(n)(10)]

Comment: EOUST received one comment recommending limiting the restriction on sale of information about debtors to those debtors who have received instruction from a provider, not all persons who have contacted a provider (§ 58.33(n)(10)).

Response: Providers cannot provide services to debtors who never seek an instructional course. Thus, the definition of “debtor” has been revised to apply only to such debtors that have sought an instructional course from an approved provider. The restriction on selling information about debtors, however, applies with equal force to debtors who seek, but ultimately do not receive, instructional services from a particular provider.

3. Definition of Effective Instruction [§ 58.25(b)(10)]

Comment: EOUST received one comment seeking the incorporation of a separate standard that does not incorporate the criteria set forth in 11 U.S.C. § 111(d)(2).

Response: EOUST has reviewed the statutory criteria, as incorporated in the definition, and has determined that the statutory criteria effectively set forth the standard for evaluating the quality of instruction.

4. Definition of Legal Advice [§§ 58.25(b)(20) and 58.33(b)]

Comment: One comment expressed concern about the rule’s reference to 11 U.S.C. § 110(e)(2) when defining legal advice. Because 11 U.S.C. § 110(e)(2) includes bankruptcy procedures and rights, and because debtors may ask instructors bankruptcy-related questions during an instructional course, the comment expressed concern that the very act of instruction could cause instructors and providers to give “legal advice” in violation of the rule’s prohibition.

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 an instructor's explanation of bankruptcy principles to debtors may be considered "legal advice," but interprets 11 U.S.C. § 110(e)(2) to mean that instructors shall not advise debtors concerning the application of bankruptcy laws, principles, or procedures to a particular individual's circumstances, and may not describe how bankruptcy laws, principles, or procedures would affect a particular individual's case. Rather, the instructor may explain basic bankruptcy principles and how such procedures are applied generally.

5. Definition of Limited English Proficiency [§ 58.25(b)(21)]

Comment: EOUST received four comments 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.

6. Definition of Material Change [§ 58.25(b)(22)]

Comment: Three comments stated that staff changes should be deleted from the definition of material change since the requirement is unnecessarily burdensome; one also sought to eliminate management from the definition of material change.

Response: EOUST agrees that this requirement may be overly burdensome, as it concerns staffing changes. 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 “staffing” to “instructors” and thereby reduce the burden on providers.

7. Definition of Referral Fees [§ 58.25(b)(26)]

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 a provider and another entity as consideration or in exchange for the referral of clients for instructional services.

8. Definition of Relative [§ 58.25(b)(27)]

Comment: EOUST received one comment requesting that the definition of “relative” be limited to the second degree of consanguinity.

Response: No change is necessary. The requirement does not impose a material burden on providers necessitating a change to the rule.

9. Mandatory Duty to Notify - Material Change [§ 58.30(a)]

Comment: One comment objected to the need to inform EOUST promptly of material changes, proposing that monthly notification is sufficient.

Response: No change is necessary. Because the material changes requiring notice to EOUST are specific and involve matters of public interest and consumer protection, such as cessation of the provider's business, revocation of a provider's articles of incorporation, or suspension of accreditation, EOUST requires immediate notice.

10. Mandatory Duty to Notify - Consumer Litigation [§ 58.30(c)]

Comment: One comment observed that, although 11 U.S.C. § 111(g)(2) confers a private right of action against nonprofit budget and credit counseling agencies who violate section 111, the proposed rule does not require providers to notify EOUST of such actions. The comment suggested an additional mandatory disclosure to EOUST requiring affirmative notification of actions pursuant to 11 U.S.C. § 111(g)(2) or other consumer protection statutes.

Response: The proposed change would enhance consumer protection by providing EOUST with information concerning private litigation based on consumer protection statutes and government enforcement actions. EOUST will publish a notice of proposed rulemaking to solicit public comments regarding whether EOUST should require notification of such actions.

11. Mandatory Duty to Notify - Inaccurate Information [§ 58.30(e)]

Comment: One comment objected to the requirement that a provider notify EOUST of inaccuracies on the list of approved providers. The comment suggested that, because EOUST possesses the information that comprises the approved list, placing the burden of notification on the provider is inappropriate.

Response: A provider is in the best position to recognize whether the information about the provider posted on the list of approved providers is accurate. Accordingly, the duty to notify

EOUST of any inaccuracies necessarily rests with the provider. Although EOUST corrects inaccuracies of which it becomes aware internally or from other outside sources, to the extent the provider is aware of inaccurate information, the provider must notify EOUST. No change to the rule is necessary.

12. Duty to Obtain Prior Consent [§ 58.31(a)]

Comment: One comment objected to the requirement that a provider seek approval of any listed changes other than the engagement of an independent contractor. The comment recommended simple notice for other listed changes.

Response: Because the list of approved providers constitutes EOUST's principal means of conveying information to the public, and because debtors and debtors' counsel rely on the list of approved providers to locate providers in their judicial districts who provide instruction by the various methods, providers must notify EOUST of any proposed changes to judicial districts or methods of delivery. Furthermore, because United States Trustees require notice and the opportunity to comment on a provider's fitness to provide instruction in a judicial district, simple notice is inadequate. Finally, as discussed below concerning sections 58.34(a) and 58.34(b), because fees in excess of \$50 per debtor are not presumed to be reasonable, and because 11 U.S.C. § 111(d)(1)(E) requires providers who charge a fee to provide services without regard to the debtor's ability to pay the fee, EOUST must approve changes to a provider's fee and fee waiver policy in advance. Accordingly, no change to this rule is necessary.

13. Criteria to Become Approved Providers [§§ 58.32 and 58.33(f)]

Comment: EOUST received one comment recommending that instructional curricula should include bankruptcy-specific content to address the specific hurdles debtors face upon emerging from bankruptcy.

Response: The detailed substantive curriculum requirements in section 58.33(f) mandate debtor education spanning a broad range of financial matters, including budgeting, financial management, credit, consumer information, and coping with financial crisis. The elements of the curriculum address the areas of greatest concern to consumers without posing undue risk that providers and their instructors will provide legal advice concerning bankruptcy or financial regulation to debtors. As noted elsewhere, EOUST interprets 11 U.S.C. § 110(e)(2) to permit instructors to explain basic bankruptcy principles and procedures and their general application; such matters may form part of the required debtor education curriculum.

14. Restrictions on Advertising [§ 58.33(c)(4)]

Comment: One comment advocated including two additional ethical rules concerning direct mail and telephone advertising. The first would bar providers from contacting debtors via outbound telephone calls, unless the provider already has provided instructional services to the debtor in question, and the call is in response to a request for contact by the debtor or debtor's counsel, either directly or through a contact form or locator service. The second would bar providers from using direct mail or electronic mail solicitations to contact debtors, unless the solicitations include a prominent disclaimer stating, "This is an advertisement for services," refrain from using seals or logos that may be confused easily with those used by any federal

government agency, do not include certain words (such as “trustee” or “bankruptcy court”), and the solicitation is in response to a request for contact by the debtor or debtor’s counsel, either directly or through a contact form or locator service.

Response: EOUST acknowledges that some restrictions on advertising and solicitation are necessary to protect consumers. However, the first proposed restriction, which prohibits providers from contacting debtors unless the debtor initiates the contact after the instructional course, forecloses a substantial body of contact between debtors and providers. Such a limitation may be more restrictive of commercial speech than is necessary to advance the government’s interest in consumer protection.

EOUST concurs with the second proposed restriction. Some types of mail solicitations from providers to recently-filed debtors may be confused with bankruptcy court correspondence, as they bear barcodes, case numbers, and other misleading markings, and, on at least one occasion, bear the words “Bankruptcy Court” on the envelope. Accordingly, the requirements that mail solicitations bear a prominent disclaimer and include only logos, seals, or similar marks that are substantially dissimilar to those used by federal agencies and courts constitute reasonable restrictions on advertising. These restrictions minimize consumer deception arising from the false impression that the solicitation constitutes an official court or United States Trustee Program communication. These restrictions are narrowly tailored to advance the government’s interest in consumer protection and are consistent with First Amendment principles governing commercial speech. *See, e.g., Central Hudson Gas & Elec. Corp. v Public Serv. Comm’n*, 447 U.S. 557 (1980) (holding that restrictions on commercial speech must directly advance an

important interest and shall be no more restrictive of speech than necessary and recognizing the constitutionality of regulations restricting deceptive advertising).

Furthermore, the restrictions on advertising are not an additional burden on providers as the proposed rule requires providers to “comply with the United States Trustee’s directions on approved advertising, including without limitation those set forth in appendix A to the application” (§ 58.33(n)(7) of the proposed rule). In that appendix, it states that approved providers shall not use the Department of Justice’s seal, the United States Trustee’s seal, the Bankruptcy Court’s seal, or any seal of the United States or a likeness thereof. Providers have been aware of this prohibition since the inception of the debtor education application in 2005. The final rule clarifies the contours of this restriction on advertising.

15. Instructor Qualifications [§ 58.33(d)(1)]

Comment: One comment objected to the requirement that instructors, rather than the provider, hold specific qualifications. The comment suggested that the listed requirements should apply to the provider as an entity, rather than to individual instructors. Another comment recommended imposing an additional requirement that instructors receive credit counseling-specific training before initial certification and be required to receive annual continuing education.

Response: The instructor qualification requirements are meant to ensure that each instructor possesses sufficient expertise in financial matters to provide substantive instruction to consumers. Accordingly, inexperienced instructors 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

serve as instructors. Based upon experience administering the Interim Final Rule and its interactions with providers, EOUST concluded the requirements set forth in this rule are sufficient to ensure that instructors will be qualified to provide the statutorily mandated instruction to debtors. Accordingly, no change to the rule is necessary.

16. Verification of Identity [§ 58.33(d)(3) and (e)(2)]

Comment: EOUST received comments concerning identity verification. One expressed the opinion that verification of debtor identity in the context of Internet and telephone instruction is impossible, and another sought further guidance concerning the appropriate means of identity verification.

Response: Establishing an individual's identity in the context of telephone and Internet instruction may pose difficulties. This does not, however, obviate identity verification requirements. Indeed, many providers already have implemented effective identity verification procedures. For in-person instruction, an individual may present his or her driver's license, or similar photo identification, to establish his or her identity. Because the instructor is physically present and can confirm that the photo in the driver's license matches the debtor, this identification procedure is sufficient for in-person instruction. In the case of Internet and telephone instruction the individual is not in the instructor's physical presence and additional measures are necessary to confirm the individual's identity. In such cases, providers successfully have requested that debtors supply their mothers' maiden names, or other information known specifically to the individual debtors, to confirm identity.

17. Learning Materials and Methodologies [§ 58.33(f) and (g)]

Comment: One comment recommended that the rule incorporate the National Standards for Adult Financial Literacy Education, established by the commenter, as the substantive standard for personal financial instruction. The commenter also recommended a clarification that “learning materials” should be “written learning materials.”

Response: No change to the rule is necessary. EOUST declines to adopt standards established by one source as the substantive standard for instruction by all providers.

18. Course Procedures - Length of Time [§58.33(g)(1)(i)]

Comment: EOUST received one comment that requiring “a minimum” of two hours for an instructional course emphasizes the time actually spent in class rather than the topics covered and the knowledge transferred to the debtor. The commenter suggested replacing the word “minimum” with “approximately.”

Response: No change is necessary. Based upon experience administering the Interim Final Rule and its interactions with providers, EOUST has determined that two hours, at a minimum, are necessary to cover all the substantive topics set forth in 11 U.S.C. § 111(d)(1) and 28 C.F.R. § 58.33(f).

19. Course Procedures - When Course is “Complete” [§ 58.33(g)]

Comment: One comment sought clarification about when Internet instruction is “complete” and suggested that completion should be defined specifically. The comment noted that, in the case of Internet instruction, providers and debtors are uncertain whether instruction is

considered complete when the debtor finishes the online course, or whether further interaction with an instructor is necessary.

Response: Unlike budget and credit counseling, which, by statute, require client-specific counseling with respect to credit and financial problems and development of a plan to address each individual client's financial problems, post-bankruptcy personal financial management instruction does not require individualized counseling and the development of a personalized plan. Accordingly, the instruction is "complete" (1) when the debtor has finished an instructional course that complies with the provisions of 11 U.S.C. § 111(d) and the other provisions of this rule, and that EOUST has approved; (2) after the debtor has established his or her identity as described in this rule; and (3) after the debtor has taken any test required by the provider, and if the debtor failed to obtain at least a 70 percent passing grade, received follow-up instruction from the provider; the scope of the follow-up instruction is left to the discretion of the provider.

20. Course Procedures - Telephonically Present [§ 58.33(g)(3)(i)]

Comment: One comment sought clarification regarding the meaning of the term "present" for telephone-based courses.

Response: The requirement that an instructor is telephonically present to instruct and interact with debtors does not require the instructor to provide live course instruction on the telephone, but requires that the instructor be present to respond to debtor inquiries.

21. Course Procedures - Internet Providers [§58.33(g)(4)(i)]

Comment: One comment objected to the application of § 58.33(g)(3)(v) to Internet course providers, noting that it does not obtain telephone numbers from its Internet clients.

Response: To the extent instruction takes place by Internet, the provider may satisfy this requirement by providing direct communication from an instructor by electronic mail, live chat, or telephone.

22. Special Needs [§ 58.33(j)]

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.

23. Mandatory Disclosures [§ 58.33(k)]

Comment: EOUST received several 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 debtors; the comment suggested deleting paragraphs 58.33(k)(4) and (5) as unnecessary, and allowing paragraphs (6) and (9) to be given during the instructional session rather than before, at the instructor’s discretion.

EOUST also received a comment recommending that, to the extent a provider also is approved as a nonprofit budget and credit counseling agency pursuant to 11 U.S.C. § 111(c), the provider be able to state that the United States Trustee has reviewed those services.

Response: While EOUST recognizes that the disclosures are numerous, they are necessary to protect consumers. Paragraphs (4) and (5) provide debtors with essential

information concerning the qualifications of the course instructor and inform debtors who otherwise may be unaware that providers may not charge or receive referral fees. These disclosures allow debtors to make informed decisions concerning the choice of provider by giving debtors complete information before they engage the provider. Paragraphs (6) and (9) inform consumers that the provider must provide a certificate promptly and the certificate will be provided only if the consumer completes the instruction. These disclosures are particularly important to eliminate misunderstandings between the provider and debtor and make clear to debtors that they must complete instruction before receiving a certificate.

Though the proposed rule did not prohibit providers from informing debtors that they were, if applicable, also approved credit counseling agencies, the rule did not expressly allow it either. To reduce a restriction on providers, paragraph (k)(8) has been revised to permit a provider to disclose that, to the extent that provider is also approved as a nonprofit budget and credit counseling agency pursuant to 11 U.S.C. § 111(c), the United States Trustee has reviewed those credit counseling services.

24. Recordkeeping Requirements [§ 58.33(m)]

Comment: EOUST received several comments concerning recordkeeping requirements. A number of comments objected that the recordkeeping requirement was burdensome. One objected to the requirement in section 58.33(m)(3) that Internet instructional course providers assess the language debtors use in daily life. Another comment objected to the requirement that providers maintain records concerning the provision of free or reduced-fee services on a voluntary basis.

Response: Certain recordkeeping requirements, such as the requirement to maintain records concerning the numbers of debtors who seek instruction in languages other than English, are necessary to advance the underlying purpose of the statute and to assist EOUST in ensuring that instructional services are available to the broadest range of consumers. Accordingly, the final rule retains most recordkeeping requirements regarding all debtors but has limited this requirement concerning prohibiting bundling or tying agreements as to debtors who seek but ultimately do not receive instructional services from a particular provider. In those instances, the broad reference to “debtors” does not advance a legitimate regulatory objective. Accordingly, the definition of “debtors” has been revised to conform to 11 U.S.C. § 101(13), to the extent that the individual has sought an instructional course from an approved provider.

The requirement that providers retain hard copies of signed certificates for two years has been deleted. The final rule no longer requires providers 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.

25. Additional Minimum Requirements [§ 58.33(n)(5)]

Comment: Two comments regarding provider obligations objected to the rule’s requirement that providers take no action to limit debtors from bringing claims against providers “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 11 U.S.C. § 111(g)(2).

Response: To reduce the burden on providers, the rule has been amended to strike the reference to “any applicable law.”

26. Advertising [§ 58.33(n)(7) and (n)(9)]

Comment: EOUST received one comment suggesting that the phrase “approval does not endorse or assure the quality of a Provider’s services” should be deleted. The comment claimed advertising is protected speech and that the quoted phrase raises doubts in the mind of the consumer concerning the meaning of approval. The comment also objected to the restrictions on commercial advertising during the instructional course on First Amendment grounds.

Response: This disclaimer is necessary to inform consumers that, although the provider is approved to issue instructional course certificates, such approval does not constitute a government guarantee or endorsement of the quality of the provider’s services. This disclaimer protects consumers who otherwise might infer that approval means all provider actions automatically carry the approval or endorsement of the federal government. In addition, after obtaining approval, a provider may change its business practices or employ unqualified instructors, 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 provider approval, and as the disclaimer is narrowly tailored to advance EOUST’s interest without otherwise controlling or otherwise limiting the content of a provider’s advertisements, the disclaimer is reasonable.

For the same reasons, the limitation on commercial advertising during the instructional course constitutes a reasonable time, place, and manner restriction on speech.

27. Fees [§ 58.34(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 the proposed \$50 reasonable fee is unreasonable and should be adjusted for regional variations. 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 instruction.

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 the experiences of approved providers 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) providers may request permission to charge a larger fee, which EOUST will consider on a case-by-case basis; and (d) whether a provider charges fees for

an instructional session per individual or per couple is within the business discretion of the provider.

EOUST acknowledges that local variations in income, cost of living, overhead, inflation, and other factors may influence and lead to inter-provider differences in determining the reasonableness of instructional course fees. However, based on EOUST's experience with approved providers, the \$50 presumptively reasonable fee adequately incorporates the costs associated with complying with the statute and rule, taking into account the increasing prevalence of telephone and Internet instruction, both of which have lower costs than in-person instruction, and the prevalence of group instruction in the post-bankruptcy course setting. The rule permits providers to exceed the presumptively reasonable fee after receiving approval from EOUST by demonstrating, at a minimum, that its costs for delivering the instructional services justify the requested fee. The provider bears the burden of establishing that its proposed fee is reasonable. Such requests may occur at the time of the provider's annual re-application for approval to provide instructional services, or at any other time the provider deems necessary. Providers 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 provider continues to charge that fee in the same amount. Of course, any new requests must be submitted to EOUST for approval.

28. Fee Waivers [§ 58.34(b)]

Comment: EOUST received numerous comments concerning the requirement that providers offer instructional services at a reduced cost, or waive the fee entirely, for debtors who are financially unable to pay. The proposed rule requires providers to waive or reduce fees for debtors 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 debtor’s ability to pay necessitated further study and assessment of financial impact on the providers, one comment objected to the use of 150 percent of the poverty level as a mandatory fee waiver requirement and suggested that 100 percent of the poverty level was appropriate. Another comment suggested permitting or implementing a schedule of discounts for debtors whose incomes fall below the poverty level, but who can afford to pay some amount, while yet another comment suggested not only that a debtor should bear the burden of demonstrating inability to pay, but that a debtor should affirmatively request the fee waiver.

Response: Based on these comments and EOUST’s existing fee waiver data, EOUST has revised the rule to reduce the burden on providers while still maintaining adequate protection for debtors. EOUST acknowledges that standardization may not take into account local differences,

and may have a disparate impact on providers located in geographic areas of concentrated low income. Although a provider may apply to EOUST to increase its instructional fee, such fee increases ultimately shift the fee burden to those debtors more able to pay.

Furthermore, a mandatory fee waiver for debtors with income at 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 providers 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 providers to adopt a mandatory fee waiver policy with respect to all such debtors, some providers 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 debtor education providers, without the proposed mandatory fee waiver,

12.2 percent of certificates were issued at no cost, with another 13.9 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 debtors 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, a provider may charge a debtor a reduced fee if the provider determines that the debtor does, in fact, have the ability to pay some of the fee; the amount may be determined using a sliding scale, of the provider's design, that takes into account the debtor's financial circumstances. If the provider determines that the debtor has the ability to pay some of the fee, there is no minimum amount by which the provider should reduce the fee; the amount of fee reduction is entirely dependent upon the debtor's ability to pay as determined by the debtor's financial circumstances. This rebuttable presumption satisfies the statutory mandate that instructional services be provided without regard to a debtor's ability to pay the fee while taking into account the provider's need to generate sufficient income from fees to cover operational costs. Accordingly, this policy establishes a uniform, objective standard by which providers, debtors, and EOUST can evaluate debtor entitlement to a fee waiver or a fee reduction depending on each particular debtor's ability to pay. The provider makes the determination of whether to grant the fee waiver or fee reduction when the provider provides instruction to the debtor; the provider need not consult with EOUST before making its determination. EOUST will review a provider's fee waiver policies and

statistics during the provider's annual review or during a quality of service review. Finally, because the poverty level is updated periodically and takes into account the debtor'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 debtors whose household income falls below 150 percent of the poverty level recognizes providers' need to generate sufficient income from fees to cover operational costs in light of the statutory mandate. To the extent a provider believes the fee waiver policy set forth in the rule adversely impacts its financial viability, the provider may apply to EOUST to increase its fee. The provider shall demonstrate that its costs of delivering instructional 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 debtor income levels, and the mechanisms by which providers implement the rebuttable presumption, are subject to EOUST scrutiny during the annual application review for each approved provider 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 debtors and providers, and determine whether providers are applying the mandatory fee waiver policy uniformly and fairly, the rule has been amended to add a new section, § 58.34(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 providers and debtors by evaluating data from providers concerning the instructional 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 instructional services be provided without regard to the debtor's ability to pay, while enabling EOUST to revisit the objective standard in light of provider operational costs and impact on debtors. The reasonableness of provider 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.

29. Certificates - Bundling [§ 58.34(d)]

Comment: One comment recommended revising this provision to permit providers who also offer credit counseling to offer a discount to credit counseling clients who return to the provider for post-bankruptcy instruction. The comment recommended new language to read, "A provider shall not combine a debtor's purchase of an instructional course with the purchase of any other service offered by the provider."

Response: EOUST does not prohibit the practice of discounting post-bankruptcy instructional course fees for credit counseling clients who return to take the instructional course as long as the provider does not require the client to purchase both courses. The rule's prohibition against linking services does not prohibit credit counseling agencies from offering a

discount to debtors who wish to return for post-bankruptcy instruction. No change to the rule is necessary.

30. Delivery of Certificates – To Whom [§ 58.35(a)]

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

Response: EOUST agrees that written consent to deliver a certificate to a debtor's attorney is unnecessary and unduly impedes the efficiency of telephone and Internet instruction. Accordingly, the rule has been revised to permit verbal authorization to send a certificate to a debtor's attorney. In the case of Internet instruction, electronic mail authorization or an electronic affirmation (such as a radio button or a box on a web page) is sufficient.

31. Delivery of Certificates – Time [§ 58.35(b)]

Comment: Several comments objected to the requirement that a provider deliver the certificate to a debtor within three business days of completion of the instructional course. One comment suggested that the rule specify that "delivery" means transmission, not receipt.

Response: The requirement that a provider send the certificate to a debtor within three business day accords the provider 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 provider 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 instructor, or other circumstances beyond the provider’s control, EOUST can evaluate such incidents on a case-by-case basis.

32. Certificates - Fees [§§ 58.33(k)(1) and 58.35]

Comment: Several comments objected to permitting providers to charge separate fees for certificates; other comments sought clarification concerning the type of consent providers must obtain before charging additional fees for certificates. One comment sought clarification in the case of telephone and Internet instruction, 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 providers 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 providers that charge separate fees for certificates. 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 providers as the proposed rule, and

Interim Final Rule, already require providers to disclose their fee policy before rendering services.

33. Certificates - Issuance [§ 58.35(h)]

Comment: One comment objected to the proposed rule on the grounds that certificate issuance is a purely administrative function, and entities operating under the authority of an approved provider, in addition to providers, should be permitted to issue certificates.

Response: The certificate avers that the instructor has provided the represented instruction to the debtor. Accordingly, the requirement that only approved providers generate certificates, and not subsidiary or related but unapproved entities, serves quality control and consumer protection functions. Accordingly, no change to the rule is necessary.

34. Certificates – Original Signature [§ 58.35(j)(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 instructor. 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 providers by deleting the requirement that, when a certificate is generated for electronic filing with the court, the provider must provide the debtor a paper certificate bearing the instructor's original signature as well.

35. Certificates - Information [§ 58.35(l)]

Comment: Two comments sought revisions concerning information on the certificate.

One comment recommended a revision to the rule specifically authorizing providers to verify the judicial district in which the debtor's bankruptcy case is pending via PACER or other court records, to minimize debtor error. Another comment objected to the requirement that the certificate bear the instructor's name.

Response: No change to the rule is necessary. Nothing in the rule or 11 U.S.C. § 111(d) prohibits instructors or providers from accessing public records, to the extent authorized, to verify the judicial district in which the debtor's bankruptcy case is pending, or from requesting that debtors bring a copy of a court document to the instructional course. Furthermore, the requirement that the certificate bear the instructor's name is necessary to permit EOUST to confirm the quality of instruction by a particular instructor.

36. Certificates - Legal Name [§ 58.35(m)]

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 instruction on behalf of the debtor. The comments 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 the course on behalf of the debtor under certain circumstances, the rule expressly should prohibit third parties from taking instruction on behalf of debtors.

EOUST also received one comment recommending an amendment to the rule permitting the provider to “affix debtor’s name as it appears on debtor’s bankruptcy filing.”

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 providers 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 debtor’s participation in instruction. Furthermore, EOUST declines to prohibit third parties from completing instruction on behalf of a debtor 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 instruction by duly authorized attorneys-in-fact on behalf of debtors.

No change to the rule is necessary to permit providers to affix a debtor’s name as it appears on the debtor’s bankruptcy filing. The debtor bears the burden of providing the provider with the proper name.

37. Appeals [§ 58.36]

Comment: One comment sought clarification concerning several aspects of the appeal process. First, the comment requested inclusion of a specific statement that interim directives removing a provider from the approved list are rare and should be used only in extraordinary circumstances. Second, the comment also requested clarification that the appeal period begins to run upon the provider’s receipt of the United States Trustee’s removal decision, rather than from

the date the United States Trustee made the decision. Finally, the comment sought to limit the authority of the Director to extend its review period due to exigent circumstances.

Response: No change to the rule is necessary. First, by their nature, the specifically enumerated circumstances permitting interim directives ensure that only in limited circumstances will the United States Trustee remove a provider from the approved list pursuant to the interim directive procedure. Second, the rule provides that, to be timely, appeal documents shall be received not later than 21 calendar days from the date of the notice to the provider. The rule is unambiguous. The Director shall receive the documents within 21 calendar days of the date of the notice, even if the provider does not have 21 calendar days to respond. The rule also requires the United States Trustee to deliver removal documents to the provider by overnight courier to avoid loss of time and prejudice to the provider. Finally, the Director will generally not extend the deadline to issue a final decision unless the provider agrees to the extension of time. However, there may be circumstances where the Director needs to extend the deadline but the provider unreasonably declines to extend the deadline. In such instances, the Director must have the authority to extend the deadline to ensure that a thorough and fair consideration of the provider's request for review has occurred before issuing a final decision.

38. Appeals - Return of Client Fees [§ 58.36(q)(3)]

Comment: One comment recommended extending the time for providers removed from the list of approved providers to explain why they require additional time to complete refunds to debtors. The comment also recommended changing the criteria for debtors eligible to receive a

return of fees to those who had “substantially” received instruction, rather than those who had “completely” received instruction.

Response: No change to the rule is necessary. EOUST will consider prompt and reasonable requests for extension of time and the rule already provides for the return of fees for anyone who has paid for services but not received them.

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” and, 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 instructional course industry, and informal communications with providers, EOUST

anticipates that this cost for submitting an application should equal approximately \$500 per application for providers. This cost is not new. It is the same cost that providers incurred when applying under the Interim Final Rule.

Although providers may charge a fee for providing the financial management instructional course, providers must provide the instructional course without regard to a debtor's ability to pay the fee in accordance with 11 U.S.C. § 111(d)(1)(E). Based upon the available information, current practice of many providers, experience with the instructional course industry, and informal communications with providers, \$50 is presumed to be a reasonable fee for an instructional course. This rule does not prevent providers from charging more than \$50. It requires providers to notify EOUST of any additional charge prior to implementing the additional fee and justify the additional cost to obtain EOUST approval for the increased fee.

The amount presumed to be reasonable for instructional course 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 providers must waive or reduce the fee if the debtor demonstrates a lack of ability to pay the fee, which shall be presumed if the debtor'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 provider may rebut this presumption if the provider determines, based on financial information provided by the debtor in connection with instructional services, that the debtor is able to pay the fee in a

reduced amount. Please refer to the Regulatory Flexibility Act section for a discussion on fees, fee waivers and fee reductions.

Additionally, providers will incur *de minimis* recordkeeping costs. For instance, a provider will be required to maintain various records, such as records on which it relied in submitting its application; copies of the semi-annual reports; records on instruction provided in languages other than English; fees, fee waiver and fee reduction statistics; complaints; and records enabling the provider 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 providers because the Interim Final Rule required providers to maintain records, but did not specify which records needed to be kept, nor for how long. With implementation of this rule, providers 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 applicants that will ultimately apply is unknown, though EOUST currently has approved approximately 270 providers. The annual hour burden on providers is estimated to be ten hours. This estimate is based on consultations with individuals in the instructional course industry, and experience with providers 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, and the requirement that providers give adequate disclosures concerning providers' policies. These disclosures include notifying debtors that they may qualify for reduced or free services to further the BAPCPA's requirement that services be provided without regard to ability to pay the fee. This rule also provides for greater supervision by the United States Trustee to ensure providers deliver effective instruction to debtors concerning personal financial management. Additionally, this rule assists in reducing fraud by requiring providers to identify debtors before providing an instructional course and corresponding certificate of completion. Another benefit of this rule is clarifying that providers who cannot provide instruction in the debtor's language shall expeditiously direct the debtor to a provider who can provide services in the debtor's language. These benefits justify the rule's costs in complying with Congress' mandate that a list of approved providers 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 1105-0085 for form EOUST-DE1, the “*Application for Approval as a Provider of a Personal Financial Management Instructional Course.*” The Department notes that full notice and comment opportunities were provided to the general public through the Paperwork Reduction Act process, and that the application 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.

This rule sets forth guidance concerning the reasonable fee a provider 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 debtor’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(d)(1)(E).

After carefully evaluating the financial management instructional course industry, EOUST based its fee guidance on current industry practice. Over 90 percent of approved

providers charge \$50 or less. According to a U.S. Government Accountability Office (“GAO”) report in 2007, the mean fee for providers among all providers was \$43. *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 providers among all providers is \$42. Among the ten largest providers (by certificate volume), nearly all charge \$50 or less in fees. Only two of the ten largest providers charge more than \$50 (one of the providers in question charges \$50, but increases the fee to \$75 for telephone instruction; the other provider charges \$55, but increases the fee to \$59 for telephone instruction). Four of the ten largest providers charge substantially less than \$50: one charges \$25; one charges \$24; one charges \$19; and the other charges \$14.95. According to EOUST records, fee policies have not changed among the ten largest providers since 2006.

In 2011, EOUST took a random sampling of ten providers that were not among the ten largest providers to determine these providers’ fees. Of these ten providers, one charges \$50; one charges \$40; one charges \$37.50; one charges \$35; four charge \$25; one charges \$9; and one is free of charge. Accordingly, a \$50 presumptively reasonable fee not only strikes an appropriate balance between the financial condition of debtors and the financial viability of approved providers, but is generally equivalent to the general practice in the debtor education industry. Thus, establishing a presumptively reasonable fee of \$50 does not impose a significant economic impact on providers. Rather, it embodies a fee structure that encompasses that 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(d)(1)(E). 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 providers 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 providers to reduce uncertainty among providers 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 providers, six use household income at or below 150 percent of the poverty level as the threshold for determining eligibility for a fee waiver. Two providers consider the debtor’s income and whether the debtor was granted a court fee waiver; one provider uses 100 percent of poverty level; and one provider assesses the debtor’s housing status and existence of severe hardship. In 2011, EOUST took a random sampling of ten providers that were not among the ten largest providers to determine these providers’ fee waiver policies. Half of the providers use the 150 percent of poverty level standard; one provider uses the *in forma pauperis* or *pro bono* standard without specifying 150 percent; two providers use 100 percent of

the poverty level; one provider uses 200 percent of the poverty level; and one provider does not charge a fee for its instructional course.

In the proposed rule, EOUST proposed a bright-line standard establishing entitlement to a fee waiver for debtors 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 debtors 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 providers may result when providers 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 a provider may apply to EOUST to increase its 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 debtors more able to pay. As of July 2009, according to self-reporting by approved debtor education providers, without the proposed mandatory fee waiver, 12.2 percent of certificates were issued at no cost, with another 13.9 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 providers were subject to a mandatory fee waiver policy with respect to all such debtors based on the *in forma pauperis* standard, some providers might suffer financial losses that would render them unable to provide services, reducing capacity to serve the overall 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(d)(1)(E) with providers' need to collect adequate fees for services provided. Under the rebuttable presumption, a debtor with household income equal to or less than 150 percent of the poverty level is presumptively entitled to a fee waiver, but the provider may determine, based on information it receives from the debtor, that the debtor actually is able to pay the fee in part. In that case, the provider may charge the debtor a reduced fee, taking into account the debtor's actual ability to pay. This rebuttable presumption balances the need for an objective fee waiver standard, consumer protection, and the need to ensure provider compliance with the Bankruptcy Code with the providers' need to collect adequate fees.

Additionally, although EOUST considered indexing fee waivers to debtor income, EOUST determined that such an indexing system fails to take into account the variation in ability to pay for debtors at the same income level. For example, two debtors may have income at 150 percent of the poverty level, but one debtor 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(d)(1)(E). EOUST concluded that each provider should determine each debtor's eligibility based on the debtor'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 providers of a personal financial management instructional course. 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 F.R. 59,818, 59,827 (Oct. 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, as well as 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 58.25 through 58.27 are revised to read as follows:

§ 58.25 Definitions.

(a) The following definitions apply to §§ 58.25 through and including 58.36 of this Part, as well as the applications and other materials providers submit in an effort to establish they meet the requirements necessary to become an approved provider of a personal financial management instructional course.

(b) These terms shall have these meanings:

(1) The term “accreditation” means the recognition or endorsement that an accrediting organization bestows upon a provider because the accrediting organization has determined the provider meets or exceeds all the accrediting organization’s standards;

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

(i) Not be a provider or affiliate of any provider; and

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

(3) The term “affiliate” means:

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

(ii) Each of a provider’s officers and each of a provider’s directors; and

(iii) Every relative of a provider’s officers and every relative of a provider’s directors;

(4) The term “application” means the application and related forms, including appendices, approved by the Office of Management and Budget as form EOUST-DE1,

Application for Approval as a Provider of a Personal Financial Management Instructional Course, as it shall be amended from time to time;

(5) The term “approved list” means the list of providers 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;

(6) The term “approved provider” means a provider currently approved by a United States Trustee under 11 U.S.C. 111 as an approved provider of a personal financial management instructional course eligible to be included on one or more lists maintained under 11 U.S.C. 111(a)(1);

(7) The term “certificate” means the document an approved provider shall provide to a debtor after the debtor completes an instructional course, if the approved provider does not notify

the appropriate bankruptcy court in accordance with the Federal Rules of Bankruptcy Procedure that a debtor has completed the instructional course;

(8) The term “debtor” shall have the meaning given that term in 11 U.S.C. 101(13), to the extent that individual has sought an instructional course from an approved provider;

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

(10) The term “effective instruction” means the actual receipt of an instructional course by a debtor from an approved provider, and all other applicable services, rights, and protections specified in:

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

(ii) this part;

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

(12) The terms “fee” and “fee policy” each mean the aggregate of all fees an approved provider charges debtors for providing an instructional course, including the fees for any materials; “fee policy” shall also mean the objective criteria the provider uses in determining whether to waive or reduce any fee, contribution, or payment;

(13) 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 a provider’s application or to remove an approved provider from the approved list;

(14) 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;

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

(16) The term “independent contractor” means a person or entity who provides any goods or services to an approved provider other than as an employee and as to whom the approved provider 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;

(17) The term “instructional course” means a course in personal financial management that is approved by the United States Trustee under 11 U.S.C. 111 and this part, including the learning materials and methodologies in § 58.33(f), which is to be taken and completed by the debtor after the filing of a bankruptcy petition and before receiving a discharge under 11 U.S.C. 727(a)(11), 1141(d)(3) or 1328(g)(1);

(18) The term “instructor” means an individual who teaches, presents or explains substantive instructional course materials to debtors, whether provided in person, by telephone, or through the Internet;

(19) The term “languages offered” means every language other than English in which an approved provider offers an instructional course;

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

(21) 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;

(22) The term “material change” means, alternatively, any change:

(i) In the name, structure, principal contact, management, instructors, physical location, instructional course, fee policy, language services, or method of delivery of an approved provider; or

(ii) That renders inapplicable, inaccurate, incomplete, or misleading any statement a provider previously made:

- (A) In its application or related materials; or
- (B) To the United States Trustee;

(23) The term “method of delivery” means one or more of the three methods by which an approved provider can provide some component of an instructional course to debtors, including:

- (i) “In person” delivery, which applies when a debtor primarily receives an instructional course at a physical location with an instructor physically present in that location, and with the instructor providing oral and/or written communication to the debtor at the facility;
 - (ii) “Telephone” delivery, which applies when a debtor primarily receives an instructional course by telephone; and
 - (iii) “Internet” delivery, which applies when a debtor primarily receives an instructional course through an Internet website;
- (24) The term “notice” in § 58.36 means the written communication from the United States Trustee to a provider that its application to become an approved provider has been denied or to an approved provider that it is being removed from the approved list;
- (25) The term “provider” shall mean any entity 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 provider;
- (26) The term “referral fees” means money or any other valuable consideration paid or transferred between an approved provider and another entity in return for that entity, directly or indirectly, identifying, referring, securing, or in any other way encouraging any debtor to receive an instructional course from the approved provider;
- (27) The term “relative” shall have the meaning given that term in 11 U.S.C. 101(45);

(28) The term “request for review” means the written communication from a provider to the Director seeking review of the United States Trustee’s decision either to deny the provider’s application or to remove the provider from the approved list;

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

(30) 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.

§ 58.26 Procedures all providers shall follow when applying to become approved providers.

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

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

(c) The provider 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 a representative of the provider who is authorized under applicable law to sign on behalf of the applying provider.

(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 provider, 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 the preceding subsection.

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

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

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

(h) By the act of submitting an application, a provider 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.

§ 58.27 Automatic expiration of providers' status as approved providers.

(a) Except as provided in § 58.28(c), if an approved provider was not an approved provider immediately prior to the date it last obtained approval to be an approved provider, such an approved provider shall cease to be an approved provider 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 § 58.28(c), if an approved provider was an approved provider immediately prior to the date it last obtained approval to be an approved provider, such a provider shall cease to be an approved provider one year from the date on which it was last approved to be an approved provider unless the United States Trustee approves an additional one year period.

3. Sections 58.28 through 58.36 are added and read as follows:

§ 58.28 Procedures all approved providers shall follow when applying for approval to act as an approved provider for an additional one year period

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

(b) Such a provider 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 provider that has complied with all prerequisites for applying to act as an approved provider for an additional one year period may continue to operate as an approved provider 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 a provider receives a written extension from the United States Trustee.

§ 58.29 Renewal for an additional one year period.

If an approved provider'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.

§ 58.30 Mandatory duty of approved providers to notify United States Trustees of material changes.

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

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

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

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

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

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

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

(5) [reserved].

(d) A provider 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 provider is pending before the United States Trustee.

(e) An approved provider 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.

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

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

(1) The engagement of an independent contractor to provide an instructional course;
(2) Any increase in the fees received from debtors for an instructional course or a change in the provider's fee policy;

(3) Expansion into additional federal judicial districts;
(4) Any changes to the method of delivery the approved provider employs to provide an instructional course; or

(5) Any changes in the approved provider's instructional course.

(b) A provider applying to become an approved provider 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 provider's amended application shall be accompanied by a contemporaneously executed writing, signed by the signatory of the application, that makes the certifications specified in § 58.26(e).

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

§ 58.32 Continuing requirements for becoming and remaining approved providers.

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

- (1) Satisfies every requirement of this part; and
- (2) Provides effective instruction to its debtors.

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

- (1) Has satisfied every requirement of this part;
- (2) Has provided effective instruction to its debtors; and
- (3) Will continue to satisfy both paragraphs (b)(1) and (2) of this section in the future.

§ 58.33 Minimum qualifications providers shall meet to become and remain approved providers.

To meet the minimum qualifications set forth in § 58.32, and in addition to the other requirements set forth in this part, providers and approved providers shall comply with paragraphs (a) through (n) of this section on a continuing basis:

(a) Compliance with all laws. A provider shall comply with all applicable laws and regulations of the United States and each state in which the provider provides an instructional course including, without limitation, all laws governing licensing and registration.

(b) Prohibition on legal advice. A provider shall not provide legal advice.

(c) Ethical standards. A provider shall:

(1) 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) for any federal judicial district where the provider is providing or is applying to provide an instructional course, a federal judge in any federal judicial district where the provider is providing or is applying to provide an instructional course, or a federal court employee in any federal judicial district where the provider is providing or is applying to provide an instructional course;

(2) Not enter into any referral agreement or receive any financial benefit that involves the provider paying to or receiving from any entity or person referral fees for the referral of debtors to or by the provider; and

(3) Not enter into agreements involving an instructional course that create a conflict of interest; and

(4) Not contact any debtor utilizing the United States Postal Service, or other mail carrier, or electronic mail for the purpose of soliciting debtors to utilize the provider's instructional course, unless:

(i) Any such solicitations include the phrase "This is an advertisement for services" or "This is a solicitation;"

(ii) Prominently displayed at the beginning of each page of the solicitation;

(iii) In a font size larger than or equal to the largest font size otherwise used in the solicitation;

(iv) Any such solicitations include only logos, seals, or similar marks that are substantially dissimilar to the logo, seal, or similar mark of any agency or court of the United States government, including but not limited to the United States Trustee Program.

(d) Instructor training, certification and experience. A provider shall:

(1) Use only instructors who possess adequate experience providing an instructional course, which shall mean that each instructor either:

(i) Holds one of the certifications listed below and who has complied with all continuing education requirements necessary to maintain that certification:

(A) Certified as a Certified Financial Planner;

(B) Certified as a credit counselor by an accrediting organization;

(C) Registered as a Registered Financial Consultant; or

(D) Certified as a Certified Public Accountant; or

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

- (2) Demonstrate adequate experience, background, and quality in providing an instructional course, which shall mean that, at a minimum, the provider shall either:
- (i) Have experience in providing an instructional course for the two years immediately preceding the relevant application date; or
 - (ii) For each office providing an instructional course, employ at least one supervisor who has met the qualifications in paragraph (d)(2)(i) of this section for no fewer than two of the five years preceding the relevant application date; and
 - (iii) If offering any component of an instructional course by a telephone or Internet method of delivery, use only instructors who, in addition to all other requirements, demonstrate sufficient experience and proficiency in providing such an instructional course by those methods of delivery, including proficiency in employing verification procedures to ensure the person receiving the instructional course is the debtor, and to determine whether the debtor has completely received an instructional course.

(e) Use of the telephone and the Internet to deliver a component of an instructional course. A provider shall:

- (1) Not provide any debtor a diminished instructional course because the debtor receives any portion of the instructional course by telephone or Internet;
- (2) Confirm the identity of the debtor before commencing an instructional course by telephone or Internet by:

- (i) Obtaining one or more unique personal identifiers from the debtor and assigning an individual access code, user ID, or password at the time of enrollment;
- (ii) Requiring the debtor 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 instructional course; and
- (iii) Employing adequate means to measure the time spent by the debtor to complete the instructional course.

(f) Learning materials and methodologies. A provider shall provide learning materials to assist debtors in understanding personal financial management and that are consistent with 11 U.S.C. 111, and this part, which include written information and instruction on all of the following topics:

- (1) Budget development, which consists of the following:
 - (i) Setting short-term and long-term financial goals, as well as developing skills to assist in achieving these goals;
 - (ii) Calculating gross monthly income and net monthly income; and
 - (iii) Identifying and classifying monthly expenses as fixed, variable, or periodic;
- (2) Money management, which consists of the following:
 - (i) Keeping adequate financial records;
 - (ii) Developing decision-making skills required to distinguish between wants and needs, and to comparison shop for goods and services;

(iii) Maintaining appropriate levels of insurance coverage, taking into account the types and costs of insurance; and

(iv) Saving for emergencies, for periodic payments, and for financial goals;

(3) Wise use of credit, which consists of the following:

(i) Identifying the types, sources, and costs of credit and loans;

(ii) Identifying debt warning signs;

(iii) Discussing appropriate use of credit and alternatives to credit use; and

(iv) Checking a credit rating;

(4) Consumer information, which consists of the following:

(i) Identifying public and nonprofit resources for consumer assistance; and

(ii) Identifying applicable consumer protection laws and regulations, such as those governing correction of a credit record and protection against consumer fraud; and

(5) Coping with unexpected financial crisis, which consists of the following:

(i) Identifying alternatives to additional borrowing in times of unanticipated events; and

(ii) Seeking advice from public and private service agencies for assistance.

(g) Course procedures.

(1) Generally, a provider shall:

(i) Ensure the instructional course contains sufficient learning materials and teaching methodologies so that the debtor receives a minimum of two hours of instruction, regardless of the method of delivery of the course;

(ii) Use its best efforts to collect from each debtor a completed course evaluation at the end of the instructional course. At a minimum, the course evaluation shall include the information contained in Appendix E of the application to evaluate the effectiveness of the instructional course;

(2) For an instructional course delivered in person, the provider shall:

(i) Ensure that an instructor is present to instruct and interact with debtors; and
(ii) Limit class size to ensure an effective presentation of the instructional course materials;

(3) For instructional courses delivered by the telephone, the provider shall:

(i) Ensure an instructor is telephonically present to instruct and interact with debtors;
(ii) Provide learning materials to debtors before the telephone instructional course session;

(iii) Incorporate tests into the curriculum that support the learning materials, ensure completion of the course, and measure comprehension;

(iv) Ensure review of tests prior to the completion of the instructional course; and
(v) Ensure direct oral communication from an instructor by telephone or in person with all debtors who fail to complete the test in a satisfactory manner or who receive less than a 70 percent score;

(4) For instructional courses delivered through the Internet, the provider shall:

(i) Comply with § 58.33(g)(3)(iii), (iv), and (v); provided, however, that to the extent instruction takes place by Internet, the provider may comply with §58.33(g)(3)(v) by ensuring direct communication from an instructor by electronic mail, live chat, or telephone; and

(ii) Respond to a debtor's questions or comments within one business day.

(h) Services to hearing and hearing-impaired debtors. A provider shall furnish toll-free telephone numbers for both hearing and hearing-impaired debtors whenever telephone communication is required. The provider shall provide telephone amplification, sign language services, or other communication methods for hearing-impaired debtors.

(i) [reserved].

(j) Services to debtors with special needs. A provider that provides any portion of its instructional course in person shall comply with all federal, state and local laws governing facility accessibility. A provider shall also provide or arrange for communication assistance for debtors with special needs who have difficulty making their service needs known.

(k) Mandatory disclosures to debtors. Prior to providing any information to or obtaining any information from a debtor, and prior to delivering an instructional course, a provider shall disclose:

- (1) The provider's fee policy, including any fees associated with generation of the certificate;
- (2) The provider's policies enabling debtors to obtain an instructional course for free or at reduced rates based upon the debtor's lack of ability to pay. To the extent an approved provider

publishes information concerning its fees on the Internet, such fee information must include the provider's policies enabling debtors to obtain an instructional course for free or at reduced rates based upon the debtor's lack of ability to pay;

(3) The provider's policy to provide free bilingual instruction or professional interpreter assistance to any limited English proficient debtor;

(4) The instructors' qualifications;

(5) The provider's policy prohibiting it from paying or receiving referral fees for the referral of debtors;

(6) The provider's obligation to provide a certificate to the debtor promptly upon the completion of an instructional course;

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

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

(9) The fact that a debtor will only receive a certificate if the debtor completes an instructional course.

(l) Complaint Procedures. A provider shall employ complaint procedures that adequately respond to debtors' concerns.

(m) Provider records. A provider shall prepare and retain records that enable the United States Trustee to evaluate whether the provider is providing effective instruction 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 provider shall prepare and retain for a minimum of two years, and permit review of 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 provider 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) Records concerning the delivery of services to debtors with limited English proficiency and special needs, and to hearing-impaired debtors, including records:

- (i) Of the number of such debtors, and the methods of delivery used with respect to such debtors;
 - (ii) Of which languages are offered or requested, and the type of language support used or requested by such debtors (*e.g.*, bilingual instructor, in-person or telephone interpreter, translated web instruction);
 - (iii) Detailing the provider's provision of services to such debtors; and
 - (iv) Supporting any justification if the provider did not provide services to such debtors, including the number of debtors not served, the languages involved, and the number of referrals provided;
- (4) Records concerning the delivery of an instructional course to debtors for free or at reduced rates based upon the debtor's lack of ability to pay, including records of the number of debtors for whom the provider waived all of its fees under § 58.34(b)(1)(i), the number of debtors for whom the provider waived all or part of its fees under § 58.34(b)(1)(ii), and the number of debtors for whom the provider voluntarily waived all or part of its fees under § 58.34(c);
- (5) Records of complaints and the provider's responses thereto;
- (6) Records that enable the provider to verify the authenticity of certificates their debtors file in bankruptcy cases; and
- (7) Records that enable the provider to issue replacement certificates.

(n) Additional minimum requirements. A provider 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 provider's qualifications to be an approved provider;
- (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 instructional course or bankruptcy process;
- (5) Take no action that would limit, inhibit, or prevent a debtor from bringing an action or claim for damages against a provider, as provided in 11 U.S.C. 111(g)(2);
- (6) Refer debtors seeking an instructional course only to providers that have been approved by a United States Trustee to provide such services;
- (7) Comply with the United States Trustee's directions on approved advertising, including without limitation those set forth in Appendix A to the application;
- (8) Not disclose or provide to a credit reporting agency any information concerning whether a debtor has received or sought instruction concerning personal financial management from a provider;
- (9) Not expose the debtor to commercial advertising as part of or during the debtor's receipt of an instructional course, and never market or sell financial products or services during

the instructional course provided, however, this provision does not prohibit a provider from generally discussing all available financial products and services;

(10) Not sell information about any debtor to any third party without the debtor's prior written permission;

(11) Comply with the requirements elsewhere in this part concerning fees for the instructional course and fee waiver policies; and

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

§ 58.34 Minimum requirements to become and remain approved providers relating to fees.

(a) If a fee for, or relating to, an instructional course is charged by a provider, such fee shall be reasonable:

(1) A fee of \$50 or less for an instructional course is presumed to be reasonable and a provider need not obtain prior approval of the United States Trustee to charge such a fee;

(2) A fee exceeding \$50 for an instructional course is not presumed to be reasonable and a provider must obtain prior approval from the United States Trustee to charge such a fee. The provider bears the burden of establishing that its proposed fee is reasonable. At a minimum, the provider must demonstrate that its cost for delivering the instructional course justifies the fee. A provider that previously received permission to charge a higher fee need not reapply for permission to charge that fee during the provider'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) A provider shall waive the fee in whole or in part whenever a debtor demonstrates a lack of ability to pay the fee.

(i) A debtor presumptively lacks the ability to pay the fee if the debtor'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 provider may charge the debtor a reduced fee, if the provider determines, based on income information the debtor submits to the provider, that the debtor is able to pay the fee in a reduced amount. Nothing in this subsection requires an provider to charge a fee to debtors 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 subsection.

(iii) A provider shall disclose its fee policy, including the criteria on which it relies in determining a debtor's eligibility for reduced fees, and the provider's policy for collecting fees pursuant to paragraph (b)(1)(ii) of this section, in accordance with § 58.33(k)(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 debtors and providers. 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, a provider also may waive fees based upon other considerations, including, but not limited to:

- (1) The debtor's net worth;
- (2) The percentage of the debtor's income from government assistance programs;
- (3) Whether the debtor is receiving pro bono legal services in connection with a bankruptcy case; or
- (4) If the combined current monthly income, as defined in 11 U.S.C. 101(10A), of the debtor 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) A provider shall not require a debtor to purchase an instructional course in connection with the purchase of any other service offered by the provider.

(e) A provider who is also a chapter 13 standing trustee may only provide the instructional course to debtors in cases in which the trustee is appointed to serve and may not charge any fee to those debtors for the instructional course. A standing chapter 13 trustee may not require debtors in cases administered by the trustee to obtain the instructional course from the trustee. Employees and affiliates of the standing trustee are also bound by the restrictions in this section.

§ 58.35 Minimum requirements to become and remain approved providers relating to certificates.

(a) An approved provider shall send a certificate only to the debtor who took and completed the instructional course, except that an approved provider shall instead send a certificate to the attorney of a debtor who took and completed an instructional course if the debtor specifically directs the provider to do so. In lieu of sending a certificate to the debtor or the debtor's attorney, an approved provider may notify the appropriate bankruptcy court in accordance with the Federal Rules of Bankruptcy Procedure that a debtor has completed the instructional course.

(b) An approved provider shall send a certificate to a debtor, or notify the appropriate bankruptcy court in accordance with the Federal Rules of Bankruptcy Procedure, that a debtor has completed the instructional course no later than three business days after the debtor

completed an instructional course and after completion of a debtor course evaluation form that evaluates the effectiveness of the instructional course. The approved provider shall not withhold the issuance of a certificate or notice of course completion to the appropriate bankruptcy court because of a debtor's failure to submit an evaluation form, though the provider should make reasonable effort to ensure that debtors complete and submit course evaluation forms.

(c) If a debtor has completed instruction, a provider may not withhold certificate issuance or notice of course completion to the appropriate bankruptcy court for any reason, including, without limitation, a debtor's failure to obtain a passing grade on a quiz, examination, or test. A provider may not consider instructional services incomplete based solely on the debtor's failure to pay the fee. Although a test may be incorporated into the curriculum to evaluate the effectiveness of the course and to ensure that the course has been completed, the approved provider cannot deny a certificate to a debtor or notice of course completion to the appropriate bankruptcy court if the debtor has completed the course as designed.

(d) An approved provider 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.

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

(f) An approved provider shall issue a certificate, or provide notice of course completion to the appropriate bankruptcy court in accordance with the Federal Rules of Bankruptcy Procedure, with respect to each debtor who completes an instructional course. Spouses receiving an instructional course jointly shall each receive a certificate or notice of course completion to the appropriate bankruptcy court shall be made for both individuals.

(g) An approved provider shall issue a replacement certificate to a debtor who requests one.

(h) Only an authorized officer, supervisor or employee of an approved provider shall issue a certificate, or provide notice of course completion to the appropriate bankruptcy court, and an approved provider shall not transfer or delegate authority to issue a certificate or provide notice of course completion to any other entity.

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

(j) An approved provider 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 (h) 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 instructor).

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

(l) An approved provider shall identify on the certificate:

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

(2) Whether an instructional course was provided in person, by telephone or via the

Internet;

(3) The date and time (including the time zone) when instructional services were completed by the debtor; and

(4) The name of the instructor that provided the instructional course.

(m) An approved provider shall affix the debtor's full, accurate name to the certificate. If the instructional course is obtained by a debtor through a duly authorized representative, the certificate shall also set forth the name of the legal representative and legal capacity of that representative.

§ 58.36 Procedures for obtaining final provider action on United States Trustees' decisions to deny providers' applications and to remove approved providers from the approved list.

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

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

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

(1) If any entity has suspended or revoked the provider's license to do business in any jurisdiction; or

(2) Any United States district court has removed the provider under 11 U.S.C. 111(e).

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

(1) Deny the provider's application; or

(2) Remove the provider from the approved list.

(e) 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 provider copies of any such documents that were not supplied to the United States Trustee by the provider. The notice shall be sent to the provider by overnight courier, for delivery the next business day.

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

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

- (1) The expiration of the provider's time to seek review from the Director, if the provider fails to timely seek review of a denial or removal decision; or
- (2) The issuance by the Director of a final decision, if the provider timely seeks such review.

(h) The United States Trustee may provide that a decision to remove a provider from the approved list is effective immediately and deny the provider the right to provide an instructional course whenever the United States Trustee finds any of the factors set forth in paragraphs (c)(1) or (2) of this section.

(i) A provider's request for review shall be in writing and shall fully describe why the provider disagrees with the denial or removal decision, and shall be accompanied by all documents and materials the provider wants the Director to consider in reviewing the denial or removal decision. The provider 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 provider.

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

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

(l) In reviewing the decision to deny a provider's application or to remove a provider 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.

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

(n) Whenever the United States Trustee provides under paragraph (h) of this section that a decision to remove a provider 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 provider's request for review, unless the provider 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 provider 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 (m) of this section.

(o) In reaching a decision under paragraphs (m) or (n) 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.

(p) A provider that files a request for review shall bear its own costs and expenses, including counsel fees.

(q) When a decision to remove a provider from the approved list takes effect, the provider shall:

(1) Immediately cease providing an instructional course to debtors;
(2) No later than three business days after the date of removal, send all certificates to all debtors who completed an instructional course prior to the provider's removal from the approved list; and

(3) No later than three business days after the date of removal, return all fees to debtors who had paid for an instructional course, but had not completely received the instructional course.

(r) A provider must exhaust all administrative remedies before seeking redress in any court of competent jurisdiction.

Dated: February 14, 2013

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

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