

SUMMARY OF CHAPTER 1

of the

Bankruptcy Code as Amended by
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

June 5, 2006

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SECTION 101
Definitions

Other than as noted below, section 101 defines terms used elsewhere in the Bankruptcy Code. Rather than discuss these new and amended defined terms in the abstract, they will be discussed in the context of the sections making use of them. At this point, the new and substantially amended defined terms merely are grouped by subject matter and include after each term a list of all sections of the Bankruptcy Code using each defined term.

However, a few of the new defined terms deserve brief discussion at this juncture.

Incidental Property and Debtor’s Principal Residence. The term “incidental property” appears only in section 101, once when it is defined in paragraph (27B), and a second time within the definition of “debtor’s principal residence” in paragraph (13A).

A debtor’s principal residence is defined as a residential structure, including incidental property without regard to whether it is attached to the real property. Incidental property may include any property commonly conveyed with a principal residence, easements, rights, fixtures, rents, royalties, mineral rights, water rights, oil and gas rights, escrow funds, and insurance proceeds, as well as all replacements and additions.

The amendments made by the BAPCPA include no new or amended sections using the term “debtor’s principal residence.” That term already appeared in sections 1123(b)(5) [prohibiting the modification of a claim secured by the debtor’s principal residence in a chapter 11 plan], 1322(b)(2) [prohibiting the modification of a claim secured by the debtor’s principal residence in a chapter 13 plan], and 1322(c)(1) & (c)(2) [making two exceptions to the anti-modification rule of section 1322(b)(2)].

It is somewhat surprising that the amendments to section 522, the section dealing with a debtor’s exemptions, particularly paragraphs (o), (p), and (q) imposing restrictions on homestead exemptions, make no reference to these defined terms.

Domestic Support Obligation. The term “domestic support obligation” refers to a debt “in the nature of alimony, maintenance, or support” of a spouse, former spouse, child of the debtor, or such child’s parent that is “established or subject to establishment before, on, or after the date of the order for relief” in a separation agreement, divorce decree, property settlement agreement, court order, or determination made by a governmental unit. The debt may accrue either before or after the order for relief and it may be owed to the recipient of the support or in the cause of a child, to the child’s parent, guardian, or responsible relative, or to a governmental unit. See 11 U.S.C. § 101(14A).

Family Fisherman. The term “family fisherman” is part of the title of chapter 12, but does not otherwise appear independently in sections other than section 101. The only place “family fisherman” appears outside of section 101 is within section 109(f) as a part of “family fisherman with regular annual income.” Inside section 101, it is used in connection with the terms “commercial fishing vessel” and “family farmer with regular annual income.” See 11 U.S.C. § 101(7B) & (19B).

Definitions by Subject Area. Below, grouped by general subject matter, are the significantly substantially amended and new defined terms in section 101 of the Bankruptcy Code:

Cross-Border Insolvency

foreign proceeding, 11 U.S.C. §
101(23)
section 303(b)

foreign proceeding (cont.)

section 1501(b)
section 1502(1) - definitions
section 1502(4) - definitions
section 1502(5) - definitions

foreign proceeding (cont.)

section 1504
section 1507(b)
section 1509(a)
section 1511(a)
section 1512
section 1515(a)
section 1515(b)
section 1515(c)
section 1516(a)
section 1517(a)
section 1517(b)
section 1517(c)
section 1518
section 1518(1)
section 1518(2)
section 1520(a)
section 1521(a)
section 1521(b)
section 1523(a)
section 1523(b)
section 1524
section 1528
section 1529
section 1529(1)
section 1529(2)
section 1530
section 1532

foreign representative, 11 U.S.C. § 101(24)

section 1501(b)
section 1507(a)
section 1509(a)
section 1509(b)
section 1509(c)
section 1509(d)
section 1509(e)
section 1509(f)
section 1510
section 1511(a)
section 1511(b)
section 1512
section 1515(a)
section 1515(b)
section 1515(c)
section 1516(a)
section 1517(a)
section 1518
section 1518(1)
section 1518(2)
section 1519(a)
section 1520(a)

foreign representative (cont.)

section 1520(c)
section 1521(a)
section 1521(b)
section 1522(c)
section 1523(a)
section 1524
section 1525(a)
section 1525(b)
section 1526(a)
section 1526(b)

Debt Relief Agencies

assisted person, 11 U.S.C. § 101(3)

section 526(a)
section 526(b)
section 526(c)
section 527(a)
section 527(b)
section 527(c)
section 527(d)
section 528(a)

bankruptcy assistance, 11 U.S.C. § 101(4A)

section 526(c)
section 527(a)
section 527(b)
section 527(c)
section 528(a)
section 528(b)

debt relief agency, 11 U.S.C. § 101(12A)

section 526(a)
section 526(c)
section 527(a)
section 527(b)
section 527(c)
section 527(d)
section 528(a)
section 528(b)

Debtor's Residence

debtor's principal residence, 11 U.S.C. § 101(13A)

section 1123(b)
section 1322(b)
section 1322(c)

incidental property, 11 U.S.C. § 101(27B)

only found in section 101

Family Farmer or Fisherman Bankruptcies

commercial fishing operation, 11 U.S.C. § 101(7A)

section 1203
section 1206

commercial fishing vessel, 11 U.S.C. § 101(7B)

section 1206

family farmer, 11 U.S.C. § 101(18)

section 109(f)
section 109(g)
section 303(a)
section 522(p)

family fisherman, 11 U.S.C. § 101(19A)

No references outside of section 101 (see discussion above)

family fisherman with regular annual income, 11 U.S.C. § 101(19B)

section 109(f)

Health Care Bankruptcies

health care business, 11 U.S.C. § 101(27A)

section 333(a)
section 351
section 503(b)(8)
section 704(a)

patient, 11 U.S.C. § 101(40A)

section 333(a)
section 333(b)
section 333(c)
section 351
section 351(1)
section 351(2)
section 351(3)
section 503(b)(8)
section 704(a)(12)

patient records, 11 U.S.C. § 101(40B)

section 333(c)
section 351
section 351(1)
section 351(2)

patient records (cont.)

section 351(3)
section 503(b)(8)

Means Testing

current monthly income, 11 U.S.C. § 101(10A).

section 527(a)
section 527(c)
section 704(b)
section 707(b)
section 1322(d)
section 1325(b)

median family income, 11 U.S.C. § 101(39A)

section 704(b)
section 707(b)
section 1322(d)
section 1325(b)

Privacy

personally identifiable information, 11 U.S.C. § 101(41A)

section 332(b)
section 332(c)
section 363(b)

Securities

financial participant, 11 U.S.C. § 101(22A)

section 362(b)
section 546(e)
section 546(f)
section 546(g)
section 548(d)
section 555
section 556
section 559
section 560
section 562(a)
section 562(c)
section 741(7) - definitions
section 753
section 761(4) - definitions
section 767

forward contract, 11 U.S.C. § 101(25)

section 362(b)
section 546(e)
section 548(d)
section 556
section 561(a)
section 561(d)

forward contract (cont.)

section 562(a)
section 562(c)
section 753
section 767

forward contract merchant, 11

U.S.C. § 101(26)
section 362(b)
section 546(e)
section 548(d)
section 556
section 562(a)
section 562(c)
section 753
section 767

master netting agreement, 11

U.S.C. § 101(38A)
section 362(b)
section 546(j)
section 548(d)
section 556
section 561(a)
section 561(b)
section 561(d)
section 562(a)
section 562(c)
section 753
section 767

repurchase agreement, 11 U.S.C. § 101(47)

section 362(b)
section 546(f)
section 548(d)
section 559
section 561(a)
section 561(d)
section 562(a)

securities clearing agency, 11

U.S.C. § 101(48)
section 362(b)
section 546(e)
section 555
section 556
section 559
section 560
section 561(c)
section 562(a)
section 562(c)
section 741(7) - definitions
section 753

repurchase agreement (cont.)

section 767

securities self regulatory organization, 11 U.S.C. § 101(48A)

section 362(b)

swap agreement, 11 U.S.C. § 101(53B)

section 362(b)
section 546(g)
section 548(d)
section 560
section 561(a)
section 561(d)
section 562(a)

Small Business Bankruptcies

single asset real estate, 11 U.S.C. § 101(51B)
section 362(d)

small business case, 11 U.S.C. § 101(51C)
section 362(n)
section 1116
section 1121(e)
section 1125(f)
section 1129(e)

small business debtor, 11 U.S.C. § 101(51D)
section 308(b)
section 362(n)
section 1102(a)

Support Claims

domestic support obligation, 11 U.S.C. § 101(14A)
section 362(b)
section 503(b)
section 507(a)
section 523(a)
section 547(c)
section 704(a)
section 707(c)
section 1106(a)
section 1112(b)
section 1129(a)
section 1202(b)
section 1208(c)
section 1225(a)
section 1225(b)
section 1228(a)
section 1302(b)
section 1307(c)

domestic support obligation (cont.)

section 1325(a)
section 1325(b)
section 1328(a)

Transfers

transfer, 11 U.S.C. § 101(54)

section 109(c)
section 303(b)
section 346(f)
section 349(b)
section 362(b)
section 362(d)
section 363(b)
section 363(d)
section 502(d)
section 502(j)
section 503(c)
section 522(b)
section 522(e)
section 522(g)
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section 550(c)

transfer (cont.)

section 550(e)
section 550(f)
section 551
section 561(a)
section 704(a)
section 707(a)
section 741(2)
section 749(a)
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section 761(17)
section 764(a)
section 764(b)
section 765(a)
section 766(a)
section 766(c)
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section 766(h)
section 783(b)
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section 926(b)
section 1101(2)
section 1123(a)
section 1142(b)
section 1146(a)
section 1172(a)
section 1172(b)
section 1222(a)
section 1231(a)
section 1520(a)
section 1521(a)

SECTION 103
Applicability of Chapters

Summary of Amendment

Section 103 specifies which chapters and sections are applicable to the different forms of bankruptcy relief. A related section, section 1161, specifies which sections otherwise made applicable by section 101, are not applicable to railroad reorganizations.

The amendments to section 103 are necessitated by the addition of chapter 15, dealing with cross-border bankruptcies and insolvencies, to the Bankruptcy Code. Chapter 15 replaces former section 304. Under chapter 15, a representative of a foreign debtor may file a petition in United States bankruptcy court seeking recognition of the foreign proceeding. Pending recognition, the United States bankruptcy court is authorized to grant provisional relief, such as a stay of execution against assets in the United States. Upon recognition, certain parts of the Bankruptcy Code automatically become applicable, such as the automatic stay.

Section 103(a) provides that in a case under chapter 15, section 307 [right of United States Trustee to appear], 362(n) [inapplicability of automatic stay to certain small business cases], and 555-557 and 559-562 [all relating to securities contracts] are applicable. Section 103(a) should be read with section 1520. Section 1520 provides that upon recognition of a foreign proceeding, sections 361, 362, 363, 549, and 552 may also apply to a case commenced under chapter 15.

Section 103(k) is new. With three exceptions, section 103(k)(1) limits the applicability of the sections in chapter 15 of the Bankruptcy Code to cases filed under chapter 15. Sections 1505 [authorizing a bankruptcy trustee to act in a foreign country on behalf of the estate], 1513 [foreign creditors have the same rights as domestic creditors to participate in a U.S. bankruptcy case], and 1514 [notification of foreign creditors of a U.S. bankruptcy case] apply in all cases filed under all chapters. See Fed. R. Civ. P. 4(f) made applicable by Fed. R. Bankr. P. 7004.

Section 103(k)(2) provides that section 1509 is applicable even when no case is pending under title 11. Among other things, section 1509 gives a foreign representative the right to commence a case under section 1504.

Cross References

New Defined Terms

foreign proceeding, 11 U.S.C. § 101(23)
foreign representative, 11 U.S.C. § 101(24)

Bankruptcy Code

11 U.S.C. § 307	[right of United States Trustee to appear]
11 U.S.C. § 362(n)	[inapplicability of automatic stay to certain small business cases]
11 U.S.C. § 555	[relating to securities contracts]
11 U.S.C. § 556	[relating to securities contracts]
11 U.S.C. § 557	[relating to securities contracts]
11 U.S.C. § 559	[relating to securities contracts]
11 U.S.C. § 560	[relating to securities contracts]
11 U.S.C. § 561	[relating to securities contracts]
11 U.S.C. § 562	[relating to securities contracts]

11 U.S.C. § 1505	[authorizing a bankruptcy trustee to act in a foreign country on behalf of the estate]
11 U.S.C. § 1509	[foreign representative may commence a case under section 1504]
11 U.S.C. § 1513	[foreign creditors have the same rights as domestic creditors to participate in a U.S. bankruptcy case]
11 U.S.C. § 1514	[notification of foreign creditors of a U.S. bankruptcy case]

SECTION 104
Adjustment of Dollar Amounts

Effective Date

Paragraphs (o), (p), and (q) of section 522, dealing with homestead exemptions, apply to cases filed on or after the date of enactment, April 20, 2005. Consequently, the references to section 522(p) & (q) in section 104(b), are likewise effective in all cases filed on or after April 20, 2005. The remainder of the amendments to section 104 apply to cases filed on or after October 17, 2005.

Summary of Amendment

Section 104(b) provides that the dollar amounts specified in enumerated sections of the Bankruptcy Code are subject to adjustment at 3-year intervals to reflect the change in the Consumer Price Index for All Urban Consumers rounded to the nearest \$25. When adjusted, the Judicial Conference of the United States publishes the revised amounts in the Federal Register. The next adjustment will be published on March 1, 2007 and become effective on April 1, 2007.

Section 104(b)(1) has been amended to require this tri-annual adjustment to the dollar amounts in the following additional sections:

- | | |
|-----------------------|---|
| 11 U.S.C. § 101(3) | “Assisted person” must have less than \$150,000 in nonexempt property. |
| 11 U.S.C. § 101(18) | “Family farmer” must have debts that do not exceed \$3,237,000. |
| 11 U.S.C. § 101(19A) | “Family fisherman” must have debts that do not exceed \$1,500,000. |
| 11 U.S.C. § 101(51D) | A “small business debtor” must have unsecured debts of not more than \$2,000,000. |
| 11 U.S.C. § 522(f)(3) | A nonpossessory, nonpurchase money security interest in implements, professional books, tools of the trade, animals, and crops may not be avoided to the extent these items have a value exceeding \$5,000. |
| 11 U.S.C. § 522(f)(4) | “Household goods” includes jewelry with an aggregate value of up to \$500. |
| 11 U.S.C. § 522(n) | An IRA is exempt up to \$1,000,000. |
| 11 U.S.C. § 522(p) | Homestead exemption capped at \$125,000 if the property acquired within 1215 days of the petition. |
| 11 U.S.C. § 522(q) | \$125,000 cap also applies if the debtor has been convicted of a felony for abusing title 11, or owes a debt for violation of state or federal securities laws or a debt arising from a criminal act or an intentional tort causing serious physical injury or death to another in the preceding 5 years. |
| 11 U.S.C. § 541(b) | Amounts deposited into an education individual retirement account or a state tuition credit or certificate may not exceed \$5,000 if placed in the account within 365 to 720 days before the filing of the petition. |

- 11 U.S.C. § 547(c)(9) In a business case, the trustee may not recover preferential transfers aggregating less than \$5,000.
- 11 U.S.C. § 707(b) Imposes a “means test” on chapter 7 debtors with income above a defined threshold. That threshold is reached if a debtor’s current monthly income multiplied by 12 exceeds the median family income, as determined by the Census Bureau, for a household of the same size. For households exceeding 4 individuals, \$525 per month per additional individual is added to the median family income. Debtors with income above the threshold are presumed to be abusing chapter 7 if they will have \$10,000 or more in projected disposable income over five years. If they will have less than \$6,000, no abuse is presumed. If they will have projected disposable income between \$6,000 and \$10,000, abuse is presumed if that income will pay 25% or more of their nonpriority, unsecured debt.
- 11 U.S.C. § 1322(d) If the debtor’s and the debtor’s spouse’s current monthly income is equal to or more than the median family income for a household of the same size, a chapter 13 plan may provide for payments over a period not to exceed 5 years. If the debtor’s and the debtor’s spouse’s current monthly income is less than the median family income for a household of the same size, a chapter 13 plan may not last longer than 3 years unless, for cause, the court permits payment of claims over a period not to exceed 5 years. As under the means test of section 707(b), for households with more than 4 persons, \$525 per month per additional individual is added to the median family income.
- 11 U.S.C. § 1325(b) For a chapter 13 debtor with income greater than the median family income, subsection (3) incorporates the means test of section 707(b) to determine projected disposable income. Once again, for households with more than 4 persons, \$525 per month per additional individual is added to the median family income.
- Subsection (4) establishes the “commitment period” of the plan. Unless the debtor is able to pay claims in fewer than 3 years, the debtor must pay all projected disposable income into the plan for 3 years. However, if the debtor’s spouse’s current monthly income is equal to or more than the median family income for a household of the same size, these payments must continue for 5 years. Once again, for households with more than 4 persons, \$525 per month per additional individual is added to the median family income.
- 11 U.S.C. § 1326(b)(3) If, as a result of a motion pursuant to section 707(b), a chapter 7 case is converted, or is dismissed then refiled under chapter 13, compensation due the former chapter 7 trustee (see section 707(b)(4)) must be paid monthly in installments not exceeding the greater of \$25, or the amount due nonpriority unsecured claims, multiplied by 5%, then divided by the number of months remaining in the plan.
- 28 U.S.C. § 1409(b) The venue statute for proceedings arising under title 11, or arising in or related to a case under title 11. A proceeding must be filed in the defendant’s district of residence if it seeks to recover less than \$1,000 from an insider, less than \$15,000 for a consumer debt, or

less than \$10,000 on a business debt from a noninsider.

A corresponding amendment has been made to section 104(b)(2) requiring the tri-annual adjustment to the dollar amounts in these sections to be published in the Federal Register.

Cross References

New Defined Terms

assisted person, 11 U.S.C. § 101(3)
current monthly income, 11 U.S.C. § 101(10A)
family farmer, 11 U.S.C. § 101(18)
family fisherman, 11 U.S.C. § 101(19A)
median family income, 11 U.S.C. § 101(39A)
small business debtor, 11 U.S.C. § 101(51D)

Bankruptcy Code

See sections cited above.

Applicable Nonbankruptcy Statutes

28 U.S.C. § 1409 [venue statute for proceedings]

Information Necessary to Apply Amended Section

The Census Bureau reports on its Internet site the state median family income for households ranging in size from 1 to 7 or more persons. This information for 2004 can be found at www.census.gov/hhes/www/income/medincsizeandstate.html (families of 2 or more, and www.census.gov/hhes/www/income/medinccarnersandstate.html (1 person). For 2005, this information is summarized on the United States Trustee's Internet site www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm.

In the future, if Census Bureau data for a given year is not available, the applicable family median income will be based on the latest available year adjusted to reflect the percentage change in the Consumer Price Index for All Urban Consumers for the year prior to the filing of the petition. See 11 U.S.C. § 101(39A)(B). This information is available from the Bureau of Labor Statistics and can be obtained at www.bls.gov/cpi/.

SECTION 105
Power of Court

Summary of Amendment

Prior to the amendment to section 105(d), the court was given the discretion to hold status conferences in any case or proceeding under the Bankruptcy Code. Section 105 now requires the court to hold status conferences, whether at the court's instance or on the motion of a party in interest, if "necessary to further expeditious and economical resolution of the case.

SECTION 107
Public Access to Papers

Summary of Amendment

Section 107(a) adds two more exceptions to the general rule that documents filed in a bankruptcy case are public records open to examination by anyone at reasonable times and without charge.

Existing law, section 107(b), gives the bankruptcy court discretion to issue protective orders where necessary to protect trade secrets, confidential research, development, or commercial information, and to protect a person from scandalous or defamatory matter contained in a paper filed in a case.

Section 107(c) is new. It permits the court to protect an individual from the disclosure of “any means of identification,” as well as other information included in a paper that is a means of identification, if disclosure would create an undue risk of identity theft or other unlawful injury to the individual or the individual’s property. The term, “means of identification,” is defined at 18 U.S.C. § 1028(d)(7):

“the term ‘means of identification’ means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any –

(A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;

(B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;

(C) unique electronic identification number, address, or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e));”

Note that “telecommunication identifying information” is broad enough to include a debtor’s telephone number.

However, when a protective order is issued under section 107(c), the court must entertain an ex parte application by any entity acting pursuant to “the police or regulatory power of a domestic governmental unit” requesting access to the sealed information.

Also, without the necessity of an application requesting access, the United States Trustee, the case trustee, and any auditor serving under 28 U.S.C. § 586(f), must be given access to all information contained in any paper filed or submitted in a bankruptcy case. They are prohibited, however, from disclosing information the court has protected.

The public’s access to papers filed in bankruptcy cases and proceedings is also limited by new section 112. Section 112 provides that a debtor may not be required to disclose in the public record the name of a minor child. If the name of a minor child is disclosed, it must be kept in a nonpublic record.

Litigation Points

1. What is an “undue risk” of identity theft? Are bankruptcy debtors likely targets of identity theft?

2. Section 107(c)(1) requires that the court “protect an individual” from an “undue risk” of “unlawful injury.” How must the court discharge this duty? Is sealing a record sufficient?

Cross References

Bankruptcy Code

11 U.S.C. § 112 [protection of the name of a minor child]

Applicable Nonbankruptcy Statutes

18 U.S.C. § 1028(d)(7) [definition of “means of identification”]
28 U.S.C. § 586(f) [authorizing the United States Trustee to contract with auditors to perform audits pursuant to section 603(a) of the BAPCPA. See discussion below in connection with sections 112 and 727.]

Administrative Burdens Imposed on Court

A slight to moderate burden may be imposed on the court to the extent it is required to entertain ex parte applications to gain access to protected information and to maintain sealed information separate and apart from its paper and electronic case files.

If there is cause to seal a debtor’s telephone number, others aside from the court will be inconvenienced. For instance, without a telephone number, a trustee might be precluded from utilizing the most convenient method of contacting a debtor.

SECTION 109
Who May Be a Debtor

Summary of Amendment

I. **Foreign Insurance Companies and Banks.** Section 109(b), defining who may be a debtor under chapter 7, is amended at subparagraph (3)(A) to clarify that a foreign insurance company “engaged in such business in the United States” may not be a chapter 7 debtor. Similarly, section 109(b)(3)(B) clarifies that a foreign bank, savings bank, cooperative bank, savings or building and loan association, or credit union that has a branch or agency in the United States may not be a chapter 7 debtor.

II. **Fishermen.** Section 109(f), defining those eligible to file under chapter 12, is expanded to include family fishermen as well as family farmers with regular income. However, there is one distinction (other than the obvious one) between family farmers and family fishermen.

A family farmer must have debts that do not exceed \$3,237,000 and not less than 50% of these debts must arise out of the farming operation. See 11 U.S.C. § 101(18). A family fisherman, however, is limited to no more than \$1,500,000 in aggregate debt with not less than 80% of it arising out of a commercial fishing operation. See 11 U.S.C. § 101(7A) & (19A). More than fifty percent of both a family farmer’s and family fisherman’s gross income must be derived from a farming operation or commercial fishing operation, respectively. See 11 U.S.C. § 101(18)(A) & (19A)(A)(ii).

III. **In Forma Pauperis and Filing Fee Installments.** The BAPCPA also amends 28 U.S.C. § 1930(f) and authorizes in forma pauperis petitions. While not an eligibility issue under section 109, the ability of a debtor to qualify for waiver of the filing fee may impose a practical barrier to bankruptcy relief. For that reason it is discussed in connection with section 109.

New Official Form 3B must be used to make a request for a fee waiver. The bankruptcy court may waive the filing fee in a chapter 7 case for an individual with income less than 150 percent of the “income official poverty line” that is applicable to a family of comparable size and who is unable to pay the filing fee. “Filing fee” includes the filing fee for the petition as well as “any other fee prescribed by the Judicial Conference.” The interim procedures for evaluating a request for a fee waiver are at www.uscourts.gov/bankruptcycourts/jcusguidelines.html.

These guidelines specify:

- The court to promptly determine whether the application should be granted, denied, or set for early hearing on notice to the United States trustee or bankruptcy administrator, the case trustee, the debtor, and, if applicable, the attorney for the debtor.
- In any determination regarding a filing fee waiver application, the debtor has the burden of showing that the application should be granted.
- The district court or the bankruptcy court should consider the totality of the circumstances in determining whether the debtor is unable to pay the fee in installments as provided for in amended section 1930(f)(1) of title 28, United States Code. Official Form 3B elicits information relevant to this determination. A debtor is not disqualified for a waiver of the filing fee solely because the debtor has paid (or promised to pay) a bankruptcy attorney, bankruptcy petition preparer, or debt relief agency in connection with the filing.
- The income for comparison to the poverty guidelines is the "Total Combined Monthly Income" as reported (or as will be reported) on Line 16 of Schedule I. Non-cash governmental assistance (such as food stamps or housing subsidies) is not

included. The income of a spouse is included whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. The income of any other family member listed on Schedule I as a dependent also is included.

– Any order denying a filing fee waiver application should give the debtor a reasonable time (generally, 10 days) in which either to pay the fee in full or begin making installment payments. An order denying the fee waiver application should set forth an installment payment schedule to eliminate supplemental work for the clerk's office. It also should advise the debtor that failure to pay the fee or make timely installment payments may lead to dismissal of the case. A standard order is included with the Official Form.

– The court may vacate an order waiving the filing fee if developments in the case or administration of the estate demonstrate that the waiver was unwarranted. See Fed. R. Bankr. P. 9023 and 9024; section 105(a) of the Bankruptcy Code.

For those debtors using the services of an attorney or bankruptcy petition preparer and wishing to pay the filing fee in installments, former Fed. R. Bankr. P. 1006(b) required that nothing be paid to the attorney or preparer until all installments had been paid in full. Interim Rule 1006(b)(1) & (3) now permit the debtor to pay the filing fee in installments even though the debtor has paid for pre-petition services. Interim Rule 1006(b)(3) prohibits further post-petition payments to the attorney or preparer by the debtor or a chapter 13 trustee until the remainder of the filing fee has been paid in full.

IV. **Credit Briefing.** Section 109(h) imposes a new pre-petition credit counseling requirement on individual debtors filing a petition under any chapter.

A. **Eligibility Requirement.** An individual is prohibited by section 109(h)(1) from being a debtor under any chapter unless that individual has, during the 180 days preceding the filing of the petition, received a “briefing” from an “approved nonprofit budget and credit counseling agency.” See In re Fuller, 2005 WL 3454699 (Bankr. W.D. Pa. 2005); In re Rodgers, 2005 WL 3454702 (Bankr. W.D. Pa. 2005); In re Stidham, 2005 WL 3454709 (Bankr. W.D. Pa. 2005); In re Childs, 335 B.R. 623 (Bankr. D. Md. 2005); In re Davenport, 335 B.R. 218 (Bankr. M.D. Fla. 2005).

1. **Constitutionality.** The credit counseling requirement does not violate an individual’s equal protection rights under the 14th Amendment because corporate debtors are not required to receive such counseling. See Hedquist v. Fokkena (In re Hedquist), 2006 WL 1042429 (B.A.P. 8th Cir. 2006).

B. **Timing.** The credit counseling briefing must be received during the 180 days prior to the filing of the petition. See 11 U.S.C. § 109(h)(1).

1. **Must be Pre-Petition.** Absent an exemption (see discussion below), receiving the briefing after a petition is filed does not satisfy section 109(h)(1). See In re Hubbard, 333 B.R. 377 (Bankr. S.D. Tex. 2005)

2. **Same Day as Petition?** Note that section 109(h)(1) specifies that the counseling must be received “during the 180-day period preceding the filing of the petition.” One court, in two different opinions, has interpreted this language to mean that the counseling must be received at least one calendar day before the petition is filed. See In re Mills, 2006 WL 1071679 (Bankr. D.D.C. 2006); In re Murphy, 2006 WL 1071153 (Bankr. D.D.C. 2006). The opposite result was reached in In re Warren, 339 B.R. 475 (Bankr. E.D. Ark. 2006).

3. *Automatic Stay.* If an individual debtor files a petition without receiving credit counseling, does the petition trigger the automatic stay? One court, In re Salazar, 339 B.R. 622 (Bankr. S.D. Tex. 2006), held that, because an individual who files a petition without credit counseling is not eligible for bankruptcy relief, a petition filed by such an individual does not trigger the automatic stay. See 11 U.S.C. § 301(a) & 362(a). Cf. In re Ross, 338 B.R. 134 (Bankr. N.D. Ga. 2006) (concluding that a petition filed by a debtor not complying with section 109(h) nonetheless triggers the automatic stay).
- C. Format of Counseling. This briefing may be given in an individual or group setting and it may be by telephone or over the Internet. See 11 U.S.C. § 109(h)(1).
- D. Content of Counseling. The briefing must outline the opportunities afforded to the debtor for credit counseling, and it must assist the prospective debtor “in performing a related budget analysis.” See 11 U.S.C. § 109(h)(1).
- E. Certificate. Interim Rule 1007(b)(3) & (c) requires that the debtor file with the petition a certificate indicating the debtor received the briefing as well as the debt repayment plan. Unlike the schedules and statement of financial affairs, the debtor is not given the option of filing the certificate and debt repayment plan within 15 days of filing the petition.
 1. *Debt Repayment Plan.* The certificate must be filed together with a copy of any debt repayment plan, must be filed with the petition.
 2. *No Official Form.* Neither the Interim Rules nor the revised Official Forms prescribe the form of this certificate. This has opened the door to a split of authority.
 - a. **Sworn certificate.** Two courts, In re Hubbard and In re Laporta, 332 B.R. 879 (Bankr. D. Minn. 2005), have required that the certificate be a declaration signed under penalty of perjury pursuant to 28 U.S.C. § 1746.
 - b. **Unsworn certificate.** Two other courts, In re Childs, 335 B.R. 623 (Bankr. D. Md. 2005), and In re Graham, 336 B.R. 292 (Bankr. W.D. Ky. 2005), permit an unsworn certificate.
- F. Is Counseling Jurisdictional? While section 109 specifies the debtors who are eligible for relief under each chapter of the Bankruptcy Code, prior to BAPCPA courts generally did not treat the eligibility requirements of section 109 as jurisdictional. That is, if a party in interest did not raise a debtor’s eligibility, at some point during the case they could be precluded from raising the issue. See e.g., In re Wenberg, 902 F.2d 768 (9th Cir. 1990), *affirming*, 94 B.R. 631 (B.A.P. 9th Cir. 1988); Promenade National Bank v. Phillips (In re Phillips), 844 F.2d 230 (5th Cir. 1988).
 1. Most courts interpreting section 109(h) have also concluded that credit counseling is not a jurisdictional requirement. See In re Seaman, 340 B.R. 698 (Bankr. E.D.N.Y. 2006); In re Ross, 338 B.R. 134 (Bankr. N.D. Ga. 2006).
 2. Others have come to the opposite conclusion. See e.g., In re Hawkins, 340 B.R. 642 (Bankr. D.D.C. 2006).

- G. Waiver. Other than granting the exemptions permitted by sections 109(h)(2), (h)(3), & (h)(4), the court may neither waive the creditor counseling requirement nor use Rule 60(b) to excuse the failure to obtain counseling. See In re Sukmungsa, 333 B.R. 875 (Bankr. D. Utah 2005) (rejecting the debtors' attempt to excuse their failure to certify compliance with section 109(h) as excusable neglect under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b)(1)); In re Miotto, 2006 Bankr. LEXIS (Bankr. N.D. Ill. 2006).
- H. Dismissal. If a debtor fails to receive a pre-petition briefing, most courts will dismiss the petition unless the debtor qualifies for an exemption (see discussion below). See e.g., In re Calderon, 2006 WL 871477 (Bankr. S.D. Fla. 2006); In re Seaman, 340 B.R. 698 (Bankr. E.D.N.Y. 2006); In re Raymond, 2006 WL 1153898 (Bankr. D.N.H. 2006); In re Ross, 338 B.R. 134 (Bankr. N.D. Ga. 2006); In re Tomco, 339 B.R. 145 (Bankr. W.D. 2006).
1. *Striking vs. Dismissal*. Some courts, however, are “striking” rather than dismissing a petition when the debtor fails to receive the briefing prior to filing the petition. See In re Hubbard, 333 B.R. 377 (Bankr. S.D. Tex. 2005); In re Valdez, 335 B.R. 801 (Bankr. S.D. Fla. 2005); In re Rios, 336 B.R.177 (Bankr. S.D.N.Y. 2005). These courts proceed on the premise that a petition filed by an unbriefed debtor is void *ab initio*.
 2. *Advantages of Each Position*. On the one hand, this result may permit the court to conclude that a stricken petition does not count as a prior petition for purposes of 11 U.S.C. § 362(c)(3) & (c)(4). On the other hand, it may mean that a “void” petition filed by an unbriefed debtor does not trigger the automatic stay. See In re Salazar, 339 B.R. 622 (Bankr. S.D. Tex. 2006).
- I. Briefing Exemptions. Three types of exemptions from the requirement of a pre-filing credit counseling briefing are permitted by section 109(h).
1. *Lack of Available Credit Counseling Services*. If the United States Trustee determines that the approved nonprofit budget and credit counseling agencies for the district are not reasonably able to provide adequate services, section 109(h)(2)(A) exempts the debtor from the briefing requirement. Such a determination by the United States Trustee is not a case-by-case determination. Rather, it is a determination that is made generally and that must be reviewed not less than annually. See 11 U.S.C. § 109(h)(2)(B).
 2. *Exigent Circumstances*. A debtor may also “submit” a “certification” of exigent circumstances meriting, to the satisfaction of the court, a waiver of the briefing if it also indicates that the debtor requested a pre-filing briefing but was unable to obtain the counseling services within 5 days of the request. See 11 U.S.C. § 109(h)(3)(A). This certification must describe the attempts that were made to obtain a briefing prior to filing the petition. See In re Cleaver, 333 B.R. 430 (Bankr. S.D. Ohio 2005); In re Rodriquez, 336 B.R. 462 (Bankr. D. Idaho 2005).
 - a. **Timing of Certification for Exemption**. If a certification of exigent circumstances is filed, it must be filed with the petition. See Interim Rules 1007(b)(3) & (c).
 - b. **Prima Facie Showing**. The requirements of section 109(h)(3) are in the conjunctive: the debtor must show exigent circumstances, inability to obtain credit counseling within 5 days of a request, and

satisfy the court that an exemption is appropriate. See In re Gee, 332 B.R. 602 (Bankr. W.D. Mo. 2005); In re Watson, 332 B.R. 740 (Bankr. E.D. Va. 2005); In re Wallert, 332 B.R. 884 (Bankr. D. Minn. 2005); In re Rodriguez, 336 B.R. 462 (Bankr. D. Idaho 2005); In re Fields, 337 B.R. 173 (Bankr. E.D. Tenn. 2005); and In re Sosa, 336 B.R. 113 (Bankr. W.D. Tex. 2005).

(1) What constitutes exigent circumstances was discussed in In re Childs 335 B.R. 623 (Bankr. D. Md. 2005). That court required that the debtor show only that “some looming event that renders prepetition credit counseling . . . infeasible.” The debtor was not required to explain the reasons for the exigency or the debtor’s responsibility for the exigency. The court in Childs described this as a “minimal” burden that the debtor must satisfy.

(2) On the other hand, in In re Talib, 335 B.R. 417 (Bankr. W.D. Mo. 2005), the court required the debtor to explain why she had waited until the last minute to obtain the credit counseling. And, in In re Dixon, 338 B.R. 383 (B.A.P. 8th Cir. 2006), the panel concluded that when the debtor is aware of a pending foreclosure but nonetheless waits until the day before the scheduled sale date to seek credit counseling, the debtor has failed to prove exigent circumstances. See, also In re Mingueta, 338 B.R. 833 (Bankr. C.D. Cal. 2006); In re DiPinto, 336 B.R. 693 (Bankr. E.D. Pa. 2006).

c. **Procedure to Obtain Exemption.** While Interim Rules 1007(b)(3) & (c) require that a certification of exigent circumstances be filed with the petition, there is no Official Form for the certificate and the Interim Rules are silent as to the procedure that must be followed to determine whether the court finds the request for an exemption “satisfactory.” Must the debtor set a hearing? Does the court grant or deny the exemption based on the debtor’s certification?

d. **Exemption is an Extension of Time to Receive Briefing.** The exemption available under section 109(h)(3) is actually an extension of time to receive the briefing. The debtor entitled to the exemption must receive the briefing within 30 days after the filing of the petition unless the court, for cause, extends the exemption by up to a further 15 days. See 11 U.S.C. § 109(h)(3)(B).

3. *Exemption Based on Disability, Incapacity, Military Service.* If the court determines, after notice and a hearing, that the debtor cannot satisfy the requirements of section 109(h)(1) because of incapacity, disability, or active military duty in a combat zone, it may grant an exemption from the briefing requirement. See 11 U.S.C. § 109(h)(4). “Incapacity” is defined as impairment by reason of mental illness or mental deficiency such that the debtor is incapable of realizing and making rational decisions with respect to his or her financial responsibilities. A “disability” requires that the debtor be so physically disabled as to be unable, after reasonable effort, to participate in an in-person, telephone, or Internet briefing.

- a. In In re Petit-Louis, 338 B.R. 132 (Bankr. S.D. Fla. 2006), the court granted a waiver of the credit counseling requirement because the debtor spoke only Creole and credit counseling was not available in that language. Curiously, the court stated that this waiver was granted pursuant to section 109(h)(3) even though that section provides only an extension of time to receive the counseling.

Litigation Points

1. Section 109(h)(1) does not seem to be limited to individuals filing voluntary petitions. Can an individual defeat an involuntary petition by refusing to submit to a briefing? Note that section 109(h)(1) refers to the “filing of the petition by such individual.” This suggests that the credit counseling requirement does not apply to petitions filed by persons other than the individual debtor. That is, it does not apply to involuntary petitions filed by creditors.

2. Subparagraphs (h)(3)(A) and (h)(4) permit the filing of a request to delay or waive the briefing requirement. Must such requests be approved before a petition is filed? Before relief is ordered? Or, is relief ordered and the case subject to later dismissal if the court does not grant the delay or waiver?

3. If the debtor obtains a 30-day or 45-day extension under section 109(h)(3)(A), what happens if the debtor fails to attend a briefing during the extension? Is the petition automatically dismissed? Must it be dismissed after notice and a hearing? If no one complains, may the debtor receive a discharge?

4. May the 5-day period described in section 109(h)(3)(A)(ii) occur anytime during the 180-day period preceding the filing of the petition?

5. If a prospective debtor is suffering from an incapacity within the meaning of section 109(h)(4), will that person have the capacity to ask for the waiver or even file a petition?

6. If a petition is dismissed because the debtor is not eligible under section 109(h) for bankruptcy relief, does the dismissed petition count for purposes of section 362(c)(3) & (c)(4)?

7. 28 U.S.C. § 1930(f)(1), the new bankruptcy in forma pauperis statute, permits the waiver of the filing fee for an individual chapter 7 debtor having “less than 150 percent of the income official poverty line.” Over what period is this to be measured? May the court order that payment of the filing fee be deferred rather than waived? If the filing fee for a chapter 7 petition is waived, will the chapter 7 trustee be paid in a “no-asset” case? Section 330(b)(1), specifies that a chapter 7 trustee is to receive \$45 “from the filing fee.” What happens if there is no filing fee? Apparently, the chapter 7 trustee will be a volunteer in such cases unless, of course, assets are located.

8. Who must approve a petition for in forma pauperis status? If it is the court rather than the clerk, is the bankruptcy petition accepted for filing and relief ordered even though the court has not acted upon the petition for in forma pauperis status? See Interim Rule 1006(c) [a voluntary petition must be accepted for filing if accompanied by an IFP application] and Official Form 3B. Note that Interim Rule 4004(c)(1)(G) provides that a discharge will not be granted until the debtor pays the filing fee “unless the court has waived the fees under 28 U.S.C. § 1930(f).”

Cross References

New Defined Terms

commercial fishing operation, 11 U.S.C. § 101(17A)

family farmer, 11 U.S.C. § 101(18)

family farmer with regular income, 11 U.S.C. § 101(19)

family fisherman, 11 U.S.C. § 101(19A)

family fisherman with regular income, 11 U.S.C. § 101(19B)

Bankruptcy Code

11 U.S.C. § 111	[nonprofit budget and credit counseling agencies and providers of the financial management instructional course]
11 U.S.C. § 521(b)	[requiring the debtor to file a certificate from an approved nonprofit budget and credit counseling agency]
11 U.S.C. § 727(a)(11)	[imposing a post-filing requirement that the debtor also attend an educational course on personal financial management]
11 U.S.C. § 1328(g)(1)	[imposing a post-filing requirement that the debtor also attend an educational course on personal financial management]

Applicable Nonbankruptcy Statutes

12 U.S.C. § 3101	[definition of agency and branch in section 1(b) of the International Banking Act of 1978]
28 U.S.C. § 1930(f)	[bankruptcy in forma pauperis statute]
42 U.S.C. § 9902(2)	[statutory authorization for the Office of Management and Budget to calculate the official poverty line]

Bankruptcy Rules

Fed. R. Bankr. P. 1006	[payment of filing fee]
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Interim Rules

Interim Rule 1006(b)	[permitting payment of filing fee in installments even though professional fees paid pre-petition]
Interim Rule 1006(c)	[petition must be filed without filing fee if accompanied by in forma pauperis petition]
Interim Rule 1007(b)(3)	[requiring the debtor to file a certificate that the pre-petition credit counseling briefing has been obtained]
Interim Rule 1007(c)	[the statement required by Interim Rule 1007(b)(3) must be filed with the petition]

Official Forms

Official Form 3B	[application for waiver of fees]
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Information Necessary to Apply Amended Section

28 U.S.C. § 1930(f)(1), the new bankruptcy in forma pauperis statute, permits the waiver of the filing fee for an individual chapter 7 debtor having “less than 150 percent of the income official poverty line.” In 1969, the Bureau of the Budget (the predecessor of the Office of Management and Budget) issued a document designating the Census Bureau poverty thresholds as the federal government's official statistical definition of poverty. The role of the Office of Management and Budget vis-a-vis the poverty line was limited to this one-time designation of the poverty thresholds as the official federal statistical definition of poverty. The Office of Management and Budget has never issued the poverty thresholds. The poverty thresholds published annually by the Census Bureau in the Federal Register can be obtained on the Internet at <http://www.census.gov/hhes/poverty/threshld/thresh04.html>.

The poverty thresholds for 2005, by size of family and number of children under 18 years, are reproduced at the end of chapter 1.

Drafting Issues and Problems

See Litigation Points #1 and #2.

Administrative Burdens Imposed on Court

Section 521(b) requires an individual debtor to file at the beginning of a case a “certificate” from an approved nonprofit budget and credit counseling agency describing the services provided to the debtor and attaching a copy of any repayment plan developed by the agency. Presumably, this certificate will permit the court and any party in interest to determine if the debtor has received the required briefing. However, section 521 does not contain any provision requiring dismissal of the case if the debtor fails to file this certificate. See 11 U.S.C. § 521(e) & (i). Nor does section 109(h) authorize the court to refuse a petition or to dismiss one if the debtor fails to file the certificate or to attend the briefing. If the failure of the debtor either to attend a briefing or to file the certificate is cause for dismissal, as seems likely, will the court be expected to do this without a motion by a party in interest? If so, this may impose a burden on the court, particularly in those cases where the court has given the debtor additional time to complete the briefing and to file the certificate.

SECTION 110
Penalty for Persons Who Negligently or
Fraudulently Prepare Bankruptcy Petitions

Summary of Amendment

Existing law provides that a bankruptcy petition preparer must sign all prepared documents and they must bear the preparer's name, address, and social security number. A copy of the document must be given to the debtor when it is presented to the debtor for signature. The preparer may not sign documents on behalf of the debtor, is prohibited from using the word "legal" in advertising, and may not collect filing fees from the debtor. These prohibitions are continued in amended section 110 as is the fine of up to \$500 for each violation of section 110. See 11 U.S.C. § 110(b), (c), (d), (e), (f), (g), & (l)(1).

Before preparing a document or accepting any fees, a bankruptcy petition preparer must provide to the debtor a written notice on an Official Form disclosing that the bankruptcy petition preparer is not an attorney, and may not practice law or give legal advice. Both the debtor and the preparer must sign the document, with the preparer signing under penalty of perjury, and the document must be filed with the document prepared for filing. See 11 U.S.C. § 110(b)(2).

Subparagraphs (b)(1) and (c)(2)(B) of section 110 provide that when a bankruptcy petition preparer is not an individual, then an officer, principal, responsible person, or partner of the bankruptcy petition preparer must sign the prepared document and print on it his or her name, address, and social security number.

Section 110(e) prohibits a bankruptcy petition preparer from giving legal advice. This includes counseling a potential debtor or debtor regarding the advisability of filing a petition, the chapter under which to file, the dischargeability of debts, including tax debts, the necessity of paying or reaffirming claims, the character of the debtor's assets and debts, the tax consequences of filing a petition, and the debtor's ability to retain particular assets, including the debtor's home and car. See 11 U.S.C. § 110(e)(2).

Section 110(h)(1) has been added to permit the Supreme Court to adopt a Federal Rule of Bankruptcy Procedure prescribing guidelines for setting the maximum allowable fee chargeable by a bankruptcy petition preparer. If such is set, the preparer must advise the debtor of the maximum fee before preparing any document or accepting a fee. To the extent the preparer charges a fee in excess of the maximum fee, it must be turned over to the trustee. This includes fees paid up to 12 months prior to the filing of the petition. See 11 U.S.C. § 110(h)(3)(A). Even a reasonable fee within the prescribed maximum is subject to disgorgement if the preparer violates any provision in section 110.

The maximum \$500 fine permitted by former section 110 must be trebled if the preparer advised the debtor to conceal assets or income or to use a false social security number, failed to inform the debtor that the debtor was filing a bankruptcy petition, or prepared a document for filing that failed to disclose the identity of the preparer. See 11 U.S.C. § (l)(2). All fines imposed shall be paid to the United States Trustee and used thereafter to fund enforcement of section 110 on a national basis. See 11 U.S.C. § 110(l)(4)(A).

In addition to assessing fines, the bankruptcy court may, as part of its contempt power, enjoin a bankruptcy petition preparer who has previously failed to comply with an order under section 110. The injunction may be issued on the "motion" of the court, the trustee, or the United States Trustee. See 11 U.S.C. § 110(j)(3).

Cross References

New Defined Terms

debt relief agency, 11 U.S.C. § 101(13A)

Bankruptcy Code

11 U.S.C. § 526 [petition preparer also regulated as a debt relief agency]

SECTION 111
Nonprofit Budget and Credit Counseling Agencies;
Financial Management Instructional Courses

Summary of Amendment

Section 111 covers two topics. First, it provides for the United States Trustee's approval of the nonprofit budget and credit counseling agencies who are charged with advising individual debtors of the available opportunities for credit counseling, performing budget analyses, and negotiating alternative repayment schedules. See 11 U.S.C. §§ 109(h), 502(k), 521(b) & 547(h). Second, the United States Trustee also is required to accredit instructional courses concerning personal financial management.

Pre-Filing Credit Counseling

Section 111(b) requires the United States Trustee to approve the nonprofit budget and credit counseling agencies charged with giving individual debtors the briefing required by section 109(h). To be approved, an agency must demonstrate that it will provide qualified counselors, it has made adequate provision for the safekeeping and payment of client funds, it is able to provide adequate credit counseling, and it can deal responsibly and effectively with matters relating to the quality, effectiveness, and financial security of its services. See 11 U.S.C. § 111(c)(1). The agency must have a board of directors, the majority of whom are not employed by the agency and will not benefit financially from its counseling services. See 11 U.S.C. § 111(c)(2)(A). If the agency charges a reasonable fee, its services must be offered without regard to the debtor's ability to pay it. See 11 U.S.C. § 111(c)(2)(B). An agency must also make provision for an annual audit of trust funds and for employee bonding. See 11 U.S.C. § 111(c)(2)(C).

When dealing with clients, the agency must make full disclosure of its funding sources, the possible impact on the client's credit report of engaging the services of the agency, and the cost of the program and how it will be paid. See 11 U.S.C. § 111(c)(2)(D). A credit counselor must be trained and have adequate experience and background in the field, his or her qualifications must be fully disclosed to the client, and the counselor may not receive a commission or bonus based on the outcome of the counseling services. See 11 U.S.C. § 111(c)(2)(D), (E), (F) & (G). The credit counseling offered to clients must include an analysis of the client's current financial condition, the factors causing the client's financial distress, and a plan to respond to that distress that does not involve the negative amortization of debt. See 11 U.S.C. § 111(c)(2)(E). The agency's financial resources must be sufficient to provide support to the client over the life of any repayment plan. See 11 U.S.C. § 111(c)(2)(H)

To aid its determination that an agency can meet these standards, the United States Trustee may require the agency to provide it with relevant information. See 11 U.S.C. § 111(b)(1). The initial approval of an agency by the United States Trustee will be for a probationary 6-month period. See 11 U.S.C. § 111(b)(3). At the conclusion of the probationary period, if the United States Trustee finds that the agency has met the above standards and is likely to satisfy them in the future, the agency may be accredited for a further 1-year period. See 11 U.S.C. § 111(b)(4). The decision to accredit, or to not accredit, an agency is subject to review by the district court on the application of "an interested person." See 11 U.S.C. § 111(b)(5).

The district court is permitted by section 111(e) to investigate the qualifications of a nonprofit budget and credit counseling agency at any time. To this end, the district court may request the production of documents to satisfy itself of the effectiveness and integrity of the agency. If it is not satisfied, the district court may order the removal of the agency from the approved list (see below).

The clerk of the bankruptcy court must maintain a publicly available list of currently approved agencies. See 11 U.S.C. § 111(a)(1). If the United States Trustee advises the court clerk that an agency is no longer approved, the agency must be removed from the list. See 11 U.S.C. § 110(f).

A nonprofit budget and credit counseling agency is prohibited by section 111(g)(1) from reporting the fact that a “debtor” has received or sought instruction concerning personal financial management from the agency. The willful or negligent failure to comply with section 111(g)(1) will make the agency liable for the debtor’s actual damages, court costs, and reasonable attorneys’ fees. See 11 U.S.C. § 111(g)(2).

Post-Filing Debtor Education

Section 105 of the BAPCPA requires the United States Trustee, after consulting experts in the field and chapter 13 trustees now providing debtor education, to “develop a financial management training curriculum and materials that can be used to educate debtors who are individuals on how to better manage their finances.” This is to be developed by conducting a test program in 6 judicial districts for 18 months, beginning no later than 270 days after April 20, 2005 [January 15, 2006]. During this test period, the United States Trustee is charged with evaluating the test program and sampling existing consumer education programs offered by the credit industry as well as by trustees. Not later than 3 months after the conclusion of the 18-month test period, a report is to be made to Congress regarding the effectiveness of such training and education.

Even though the test program and evaluation will not be completed until sometime in late 2007, sections 727(a)(11) and 1328(g) become effective in cases filed on and after October 17, 2005, albeit with provision for exemptions. These exemptions, which approximate the exemptions given by section 109(h)(2) & (h)(4), are discussed in connection with sections 727 and 1328. Sections 727 and 1328 condition a debtor’s discharge on the completion of a course on personal financial management. Comparable conditions do not appear in sections 1141(d) or 1228.

Section 111(b) requires the United States Trustee to approve an instructional course concerning personal financial management. Approval may be given only if the provider is able to staff the educational program with “trained personnel with adequate experience and training in providing effective instruction and services,” provide “materials and teaching methodologies designed to assist debtors in understanding personal financial management,” provide adequate facilities in convenient locations (a requirement that does not preclude offering courses by telephone or through the Internet), prepare and retain reasonable records in order to evaluate the effectiveness of the course, and, if a reasonable fee is charged, offer the course even if the debtor cannot pay the fee. See 11 U.S.C. § 111(d).

To aid its determination that a provider can meet these standards, the United States Trustee may require the provider to provide it with relevant information. See 11 U.S.C. § 111(b)(1). The initial approval of a provider by the United States Trustee will be for a probationary 6-month period. See 11 U.S.C. § 111(b)(3). At the conclusion of the probationary period, if the United States Trustee finds that the provider has met the above standards and is likely to satisfy them in the future, the provider may be accredited for a further 1-year period. See 11 U.S.C. § 111(b)(4). The decision to accredit, or to not accredit, is subject to review by the district court on the application of “an interested person.” See 11 U.S.C. § 111(b)(5). At the conclusion of each 1-year period, if the provider demonstrates that the course it offered met the above standards and it has been “effective in assisting a substantial number of debtors to understand personal financial management” and is “otherwise likely to increase the debtor’s understanding of personal financial management,” the provider may be accredited for an additional year. See 11 U.S.C. § 111(b)(4) & (d)(2).

The clerk of the bankruptcy court must maintain a publicly available list of currently approved instructional courses. See 11 U.S.C. § 111(a)(2). If the United States Trustee advises the court clerk that a course is no longer approved, the course must be removed from the list. See 11 U.S.C. § 111(f).

Litigation Points

1. See the discussion below at “Drafting Issues and Problems” regarding section 111(g).
2. Section 111(b)(5) gives the district court jurisdiction to review the U.S. Trustee’s final approval or disapproval of nonprofit budget and credit counseling agencies and providers of the instructional course on personal financial management. May these matters be referred to the bankruptcy court by the district court under 28 U.S.C. § 157(a)? Will these matters be resolved as adversary proceedings or as contested matters? See Fed. R. Bankr. P. 2020 [providing that a “proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014.”]
3. Must an investigation by the district court pursuant to section 111(e) be triggered by a complaint or may it act *sua sponte*?

Cross References

Bankruptcy Code

11 U.S.C. § 109(h)	[individual must obtain credit counseling as condition to bankruptcy eligibility]
11 U.S.C. § 502(k)	[failure to negotiate alternative repayment schedule]
11 U.S.C. § 521(b)	[filing certificate from nonprofit budget and credit counseling agency]
11 U.S.C. § 547(h)	[nonavoidability of transfers pursuant to alternative repayment schedule]
11 U.S.C. § 727(a)(11)	[imposing a post-filing requirement that the debtor also attend an educational course on personal financial management]
11 U.S.C. § 1141(d)	[the chapter 11 discharge]
11 U.S.C. § 1228	[the chapter 12 discharge]
11 U.S.C. § 1328(g)	[imposing a post-filing requirement that the debtor also attend an educational course on personal financial management]

Applicable Nonbankruptcy Statutes

28 U.S.C. § 157(a)	[Referral of bankruptcy cases and proceeding by district court to bankruptcy court]
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Drafting Issues and Problems

Section 111(g) is inconsistent with the remainder of section 111. In all other paragraphs of section 111, when discussing nonprofit budget and credit counseling agencies, reference is made to the “client” rather than the “debtor,” and when discussing the course on personal financial management, reference is made to the “debtor” rather than to a “client.” Compare paragraph (c), discussing the accreditation requirements of agencies, with paragraph (d), discussing the requirement of a course concerning personal financial management. The former refers to “client” and the later refers to “debtor” or “debtors.”

This makes sense. Section 109(h) requires a nonprofit budget and credit counseling agency to provide its services prior to the filing of a petition. In this context, there is no debtor. However, the education course required by sections 727(a)(11) and 1328(g) comes after the filing of the petition. There is a debtor.

While nothing in section 111 prohibits an agency from also being accredited to give the post-filing education course, section 111 makes clear that an agency is distinct from a “provider.” A nonprofit budget and credit counseling agency will be giving the pre-filing credit counseling and budget analysis, and a provider will give the post-filing instructional course. See also 11 U.S.C. § 111(a), (b) & (f).

Hence, the remedy afforded by section 111(g) for damages caused by a nonprofit budget and credit counseling agency’s disclosure to a credit reporting agency that a debtor has sought or received instruction on personal financial management will not come into play unless the agency also is a provider of the course. Absent such dual accreditation, section 111 does not contemplate that a nonprofit budget and credit counseling agency will provide debtors with the course on personal financial management.

Oddly, section 111(g) gives no remedy against a provider (at least a provider that is not also an agency) who informs a credit reporting agency that the debtor has attended the course on personal financial management.

By negative inference, if the only thing that cannot be reported to a credit reporting agency is whether or not a debtor has sought instruction concerning personal financial management, a nonprofit budget and credit counseling agency may report a client’s use of its credit counseling and budgeting services to a credit reporting agency. Given that section 111(c)(2)(D) requires the agency to disclose the impact on a client’s credit report caused by utilizing the services of the agency, the Bankruptcy Code appears to give a green light to such reports.

Also, if all individual debtors in chapter 7 and chapter 13 must take the post-filing course on personal financial management, what is the harm of making a report that the course was taken? The fact that a petition was filed will be reported. And, if taking the course is mandatory, won’t the mere report that the petition was filed carry with it the necessary implication that the course was, or will be, taken?

Administrative Burdens Imposed on Court

A minor burden is imposed on the clerk to maintain lists of approved nonprofit budget and credit counseling agencies and of approved instructional courses on personal financial management.

SECTION 112
Prohibition on Disclosure of Name of Minor Children

Effective Date

While the effective date of section 112 is October 17, 2005, it makes reference to 28 U.S.C. § 586(f).

Section 603 of the BAPCPA imposes an uncodified duty on the Attorney General to conduct random audits in 0.4% of all chapter 13 and individual chapter 7 petitions. These audits will seek “to determine the accuracy, veracity, and completeness of petitions, schedules, and other information that the debtor is required to provide under section sections 521 and 1322 . . . and section 111. This provision takes effect 18 months after the date of enactment, April 20, 2005.

Section 586(f) authorizes the Attorney General to hire auditors in order to perform audits of debtors’ schedules and statements. The Attorney General also is directed by section 586(f) to report material misstatements of income, expenditures, assets to the clerk of the court and to the U.S. Attorney. The clerk is to give notice of the misstatement to creditors. Presumably, the U.S. Attorney will consider criminal prosecution. Section 586(f), like the uncodified provisions of section 603 of the BAPCPA, goes into effect 18 months after the date of enactment, April 20, 2005.

Summary of Amendment

A debtor may not be required to disclose in the public record the name of a minor child. If the name of a minor child is disclosed, section 112 requires that it be kept in a nonpublic record and made available for examination by the United States Trustee, the case trustee, and any auditor serving under 28 U.S.C. § 586(f). These persons, however, are precluded from disclosing the name.

Litigation Points

1. May a creditor disclose the name of the debtor’s minor child in a document filed by the creditor? Section 112 does not appear to apply to creditors.

Cross References

Bankruptcy Code

11 U.S.C. § 107 [public access to papers filed in bankruptcy cases and proceedings]

Applicable Nonbankruptcy Statutes

28 U.S.C. § 586(f) [Attorney General charged with hiring auditors to perform audits of schedules and statements]

Drafting Issues and Problems

For those districts using a bankruptcy administrator rather than the United States Trustee, section 112 does not permit a bankruptcy administrator to gain access to the names of the debtor’s minor children.

28 U.S.C. § 586(f) is referred to in section 112. It requires the Attorney General to perform audits of debtors’ schedules and statements and to report material misstatements of income, expenditures, or assets to the clerk of the court and to the U.S. Attorney. There is no requirement that misstatements or omissions of debts and creditors be reported. And, while the clerk is required to give notice of material

misstatements to creditors, there is no provision for notice to the trustee.

Administrative Burdens Imposed on Court

A slight burden may be imposed on the court to the extent it is required to maintain sealed information separate and apart from its paper and electronic case files and, pursuant to the related provisions of 28 U.S.C. § 586(f), to give notice to creditors of material misstatements in a debtor's statements and schedules.