Credit Counseling Requirements for Consumer Bankruptcy

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Summary

Section 106 of P.L. 109-8, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), creates credit counseling requirements for consumers seeking to file for bankruptcy under Chapter 7 (governing the liquidation of a debtor's assets) and Chapter 13 (governing the financial reorganization of a debtor's assets). BAPCPA amends the U.S. Bankruptcy Code, 11 U.S.C. §109, to require an individual to receive credit counseling before filing a petition for bankruptcy. In certain circumstances, these requirements may be waived. BAPCPA also requires debtors, after they file for bankruptcy relief, to take a personal financial management course. Both credit counseling agencies and personal financial management instructional course providers must obtain approval from a U.S. trustee before offering a course to satisfy these requirements. Section 106 of BAPCPA creates a new provision that specifies the approval requirements for both credit counseling agencies and personal financial management instructional courses. Finally, section 1220 of the Pension Protection Act of 2006 amends the Internal Revenue Code and establishes new standards that a credit counseling organization must meet to be exempt from federal income tax.

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In April 2005, President Bush signed P.L. 109-8, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The purpose of BAPCPA is not only to "improve bankruptcy law and practice by restoring personal responsibility and integrity to the bankruptcy system," but to ensure fairness of the system for both debtors and creditors.[1] BAPCPA consists of a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases. One of its many amendments requires debtors to participate in credit counseling programs before filing for bankruptcy relief.[2] BAPCPA's credit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy, such as the potentially devastating effect it can have on their credit rating.[3] BAPCPA also requires debtors, after they file for bankruptcy relief, to receive personal financial management training. This training is intended to provide debtors with guidance about how to manage their finances in order to avoid future financial difficulties.[4]

On August 17, 2006, President Bush signed the Pension Protection Act of 2006 (P.L. 109-280). Although the Act does not change BAPCPA's credit counseling provisions, section 1220 of the Pension Protection Act amends section 501 of the Internal Revenue Code, providing new standards that a credit counseling agency must meet to be eligible for a federal income tax exemption.

Credit Counseling Requirements Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Section 106 of BAPCPA adds credit counseling as a prerequisite to Chapter 7 or Chapter 13 bankruptcy filing or relief.[5] Section 106(a) of BAPCPA amends section 109 of the Bankruptcy Code to require an individual to receive credit counseling within the 180-day period preceding the date of filing a petition for bankruptcy. The credit counseling must be provided by an approved "nonprofit budget and credit counseling agency"[6] and must consist of either an individual or group briefing.[7] This briefing, which may be conducted by telephone or via the Internet, must outline the opportunities for credit counseling and must assist the debtor in performing a budget analysis.[8]

Under the new section 109(h) of the Bankruptcy Code, a debtor may be exempt from the mandatory credit counseling requirement in certain circumstances. For example, the requirement

[1] H.Rept. 109-31, p. 2.

[2] The credit counseling provisions have been the subject of controversy. Prior to and following the enactment of BAPCPA, there have been claims of abusive practices by several members of the credit counseling industry. *See* S.Rept. 109-55; Leslie Linfield, *Lightning Strikes Thrice: Emerging Issues in Bankruptcy Credit Counseling*, 25-1 AM. BANKR. INST.J. 16 (2006). This report does not address this controversy.

[3] H.Rept. 109-31, p. 18.

[4] Id.

[5] 11 U.S.C. § 101 et seq.

[6] Hereinafter referred to as "credit counseling agency."

[7] H.Rept. 109-31, p. 54.

[8] Id.

does not apply to a debtor who resides in a district where the U.S. trustee has determined that approved credit counseling agencies in that district are not reasonably able to provide adequate services to such individuals.[9] A debtor may also be temporarily exempted from the mandatory credit counseling requirement if the debtor submits to the court a certification[10] that (1) describes exigent circumstances meriting a waiver of this requirement; (2) states that the debtor requested credit counseling services from an approved credit counseling agency, but was unable to obtain such services within the five-day period beginning on the date the debtor made the request; and (3) is satisfactory to the court.[11] This exemption terminates when the debtor meets the requirements for credit counseling participation, but not longer than 30 days after the case is filed, unless the court, for cause, extends this period up to an additional 15 days.[12] The requirements for an exemption from credit counseling under section 109(h) are considered "stringent," and a failure to strictly follow the requirements has led to both denial of exemptions and an inability to file for bankruptcy.[13]

In addition, a debtor may be exempt from the mandatory credit counseling requirement if the court determines, after notice and a hearing, that the debtor is unable to complete this requirement because of incapacity, disability, or active military duty in a military combat zone.[14] Incapacity, under this provision, means the debtor is "impaired by reason of mental illness or mental deficiency so that the debtor is incapable of realizing and making rational decisions with respect to financial responsibilities."[15] Disability under the 11 U.S.C. § 109(h) provision means that "the debtor is so physically impaired as to be unable, after reasonable effort, to receive credit counseling whether by participating in person, or via telephone or Internet briefing."[16]

BAPCPA also amends the Bankruptcy Code to deny a discharge to Chapter 7 and Chapter 13 debtors who fail to complete a personal financial management instructional course.[17] This requirement does not apply if the debtor resides in a district where the U.S. trustee has determined that the approved instructional courses in that district are not adequate.[18] Such determination must be reviewed annually by the U.S. trustee.[19] In addition, these provisions do not apply to a debtor who the court determines, after notice and a hearing, is unable to complete this requirement because of incapacity, disability, or active military duty in a military combat zone.[20] Section

[9] Id.; 11 U.S.C. § 109(h)(2). The U.S. trustee is appointed by the U.S. Attorney General and is authorized to supervise the administration of Chapter 7 and Chapter 13 bankruptcy cases. See 28 U.S.C.A. §581; 28 U.S.C.A. §586(a)(3). Some states allow for a "bankruptcy administrator" to perform this role, and this is acceptable under BAPCPA.

[10] Use of the term "certification" in BAPCPA has led to some controversy. The term "certification," which was not used in the Bankruptcy Code prior to BAPCPA, appears several times in the 2005 Act. No definition for the term was included in BAPCPA. Courts are split as to how to apply the term in reference to section 109. *See*, John Rao, *Bankruptcy 2.0(05): Chapters, Changes, and Challenges: Article: Testing the Limits of the Statutory construction Doctrines: Deconstructing the 2005 Bankruptcy Act*, 55 Am. U.L. Rev. 1427, 1430-31 (2006).

[11] 11 U.S.C. § 109(h)(3)(A); H.Rept. 109-31, pp. 54-55.

[12] 11 U.S.C. § 109(h)(3)(B); H.Rept. 109-31, p. 55.

[13] *See* Article, *The Year in Review: Case Law Developments under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N. Dak. L. Rev. 297, 312 (2006).

[14] 11 U.S.C. § 109(h)(4).

[15] 11 U.S.C. § 109(h)(4).

[16] Id.

[17] 11 U.S.C. § 727(a)(11); 11 U.S.C. § 1328(g)(2).

[18] Id.

[19] H.Rept. 109-31, p. 55.

[20] Id.

106(e) adds section 111 to the Bankruptcy Code. Under section 111(a), the clerk[21] is required to maintain a publicly available list of approved credit counseling agencies and personal financial management instructional courses. Section 111(b) discusses the determinations that must be made by a U.S. trustee before a credit counseling agency or a personal financial management course can be approved.

Under section 111(b)(1), the U.S. trustee must undertake a thorough review of the qualifications of the credit counseling agency or personal financial management instructional course to ensure that the counseling services or course meets the standards set forth in section 111. The section also allows a U.S. trustee to require that the credit counseling agency or course provider provide information with respect to this review. If, prior to approval by the U.S. trustee, a credit counseling agency or instructional course did not appear on the list required under section 111(a), then approval shall be allowed for a probationary period not to exceed six months.[22] A U.S. trustee may grant subsequent approvals for successive one-year periods thereafter if the counseling agency or instructional course has met the requirements under section 111 for the preceding period and can satisfy these standards in the future.[23]

Approval Requirements for a Credit Counseling Agency

Section 111(c), which was created by BAPCPA, provides the minimum requirements for approval of a credit counseling agency. Under this section, a U.S. trustee shall only approve an agency that demonstrates that it will provide qualified counselors, maintain adequate provision for safekeeping and payment of client funds, provide adequate counseling with respect to client credit problems, and deal responsibly and effectively with other matters relating to the quality, effectiveness, and financial security of the services it provides.[24] Section 111(c)(2) elaborates on these requirements. For a credit counseling agency to be approved, the agency must:

- have a board of directors, the majority of which are not employed by the counseling agency and will not benefit directly or indirectly from the outcome of the counseling services;[25]
- charge only a "reasonable" fee for counseling services, if the agency is to charge a fee, and provide services regardless of the ability to pay the fee;[26]
- provide for the safekeeping and payment of client funds, including an annual audit of the trust accounts and employee bonding;[27]
- provide full disclosure to a client, including funding sources, counselor qualifications, possible impact on credit reports, and any costs of such program to be paid by the client and how such costs will be paid;[28]

[21] Presumably, "clerk" as referred to in section 106(e) is the clerk of the Bankruptcy Court.

[22] 11 U.S.C. § 111(b)(3).

[23] 11 U.S.C. § 111(b)(4), 11 U.S.C. § 111 (b)(5).

[24] 11 U.S.C. § 111(c)(1).

[25] 11 U.S.C. § 111(c)(2)(A).

[26] 11 U.S.C. § 111(c)(2)(B). BAPCPA does not define the "reasonable" standard, however, it has been suggested that the U.S. trustee would be in a position to define what constitutes a reasonable fee. See Leslie E. Linfield, *Strange Bedfellows: Bankruptcy Reform and Mandatory Credit Counseling*, 24-4 Am. Bankr. L.J. 12.

[27] 11 U.S.C. § §111(C)(2)(C).

- provide adequate counseling with respect to a client's credit problems that includes an analysis of such client's current financial condition, factors that caused such financial condition, and how such client can develop a plan to respond to the problems without incurring negative amortization of debt;[29]
- provide trained counselors who receive no commissions or bonuses based on the outcome of the counseling services provided by such agency, who have adequate experience, and who have been adequately trained to provide counseling services to individuals in financial difficulty;[30]
- demonstrate adequate experience and background in providing credit counseling;[31]
- have adequate financial resources to provide continuing support services for budgeting plans over the life of any repayment plan.[32]

Under section 111(e), a district court may, at any time, investigate the qualifications of a credit counseling agency and request documents to ensure the integrity and effectiveness of the agency. If the credit counseling agency does not meet the requirements as set forth in section 111, the district court may remove the agency from the section 111(a) approved list. A credit counseling agency is also prohibited from providing information to a credit reporting agency concerning whether a debtor has received or sought instruction on personal financial management.[33]

Approval Requirements for a Personal Financial Instructional Management Course

Section 111(d) lists the requirements for approval by the U.S. trustee for a personal financial management instructional course.[34] During the initial six-month probationary period discussed under section 111(b)(3), an instructional course must provide, at a minimum:

- trained personnel with adequate experience and training in providing effective instruction and services;[35]

(...continued)

[28] 25 11 U.S.C. § 111(c)(2)(D).

[29] 11 U.S.C. § 111(c)(2)(E).

[30] 11 U.S.C. § 111(c)(2)(F).

[31] 11 U.S.C. § 111(c)(2)(G).

[32] 11 U.S.C. § 111(c)(2)(H).

[33] 11 U.S.C. § 111(g)(1).

[34] Requirements for the personal management instructional course are to be developed in a test program, discussed in 11 U.S.C. § 105 (2005). Section 105 provides, among other things, that the Director of the Executive Office for United States Trustees must (1) consult with a wide range of debtor education experts who operate financial management education programs and (2) develop a financial management training curriculum and materials that can be used to teach individual debtors how to manage their finances better. The Director must select six judicial districts to test the effectiveness of the financial management training curriculum and materials for an 18-month period beginning not later than 270 days after the Act's enactment date. See 11 U.S.C. § 105.

[35] 11 U.S.C. § 111(d)(1)(A).

- learning materials and teaching methodologies that are designed to help debtors understand personal financial management and are consistent with stated objectives directly related to the goals of such instructional course;[36]
- adequate facilities situated in reasonably convenient locations at which such instructional course is offered, except that such facilities may include the provision of such instructional course by telephone or through the Internet, if such instructional course is effective;[37]
- the preparation and retention of reasonable records (which shall include the debtor's bankruptcy case number) to permit evaluation of the effectiveness of such instructional course, including any evaluation of satisfaction of instructional course requirements for each debtor attending such instructional course, which shall be available for inspection and evaluation by the Executive Office for United States Trustees, the United States trustee, or the chief bankruptcy judge for the district in which such instructional course is offered;[38]
- if a fee is charged for the instructional course, charge a reasonable fee, and provide services without regard to ability to pay the fee.[39]

There are additional requirements necessary for approval of a personal financial management course during any one-year period following the initial probationary period. An instructional course provider must demonstrate that the course has satisfied the requirements of section 111(d)(1).[40] Also, under section 111(d)(2), an instructional course provider must demonstrate that the course has been effective in assisting a substantial number of debtors to understand personal financial management and that the course is otherwise likely to increase substantially the debtor's understanding of personal financial management.

Selected Cases Concerning Credit Counseling Requirements

Bankruptcy courts have examined a number of issues concerning BAPCPA's credit counseling requirements. Most commonly, courts have looked at the provisions of section 109(h) and have ruled on (1) what circumstances constitute sufficient grounds to "waive"[41] the credit counseling requirements and (2) when an individual must receive credit counseling in order to be eligible to file for bankruptcy. The following cases present some of the circumstances under which the requirements of section 109(h) have been analyzed.[42]

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[36] 11 U.S.C. § 111(d)(1)(B).

[37] 11 U.S.C. § 111(d)(1)(C).

[38] 11 U.S.C. § 111(d)(1)(D).

[39] 11 U.S.C. § 111(d)(1)(E).

[40] 11 U.S.C. § 111(d)(2).

[41] It should be noted that while section 109(h)(3), as well as some courts, refer to a waiver of the credit counseling requirements, the word "waiver" as used in ths section may be misleading. A debtor who receives a "waiver" of the credit counseling requirements under section 109(h)(3) must obtain this counseling within 30 days after the bankruptcy case is filed, unless this period is extended for an additional 15 days by a court. See H.Rept. 109-31, p. 55. The court in *In re Dixon*, 338 B.R. 383 (B.A.P. 8th Cir. 2006) pointed out this discrepancy and stated that what a court is authorized to grant would be better described as a "deferral."

[42] While not discussed in this report, one controversial issue that courts have considered is whether a bankruptcy petition should be dismissed or stricken due to a debtor's failure to receive credit counseling. Under BAPCPA, whether a case is dismissed or stricken has different implications for debtors. For a discussion of this issue, see *In re Salazar*, (continued...)

The Meaning of "Exigent Circumstances"

As discussed above, under section 109(h)(3), a debtor may be temporarily exempted from mandatory credit counseling if debtor submits to the court a certification that (1) describes exigent circumstances meriting a waiver of this requirement; (2) states that the debtor requested credit counseling services from an approved credit counseling agency, but was unable to obtain such services within the seven-day period beginning on the date the debtor made the request;[43] and (3) is satisfactory to the court. In *Dixon*, a Chapter 13 debtor filed a certification requesting a waiver of credit counseling. In his certification, the debtor claimed exigent circumstances based on the fact that a foreclosure sale was scheduled for the debtor's home on the same day as the bankruptcy filing.[44] Further, the debtor claimed that after he learned of the credit counseling requirement, he was informed that it would be two weeks before credit counseling could be obtained over the telephone and 24 hours before the counseling could be accessed by the Internet. Based on these circumstances, the debtor argued that it was impossible for him to receive credit counseling prior to the foreclosure sale.

The bankruptcy court refused to waive the credit counseling requirement and denied the bankruptcy petition. On appeal, the U.S. Bankruptcy Appellate Panel for the Eighth Circuit considered whether the bankruptcy court erred in its decision to deny the waiver. The Panel discussed the meaning of "exigent circumstances" and pointed out that there are two requirements: first, that there be exigent circumstances and second, that the exigent circumstances must merit a waiver of the credit counseling requirement. In discussing whether a waiver of credit counseling requirements is appropriate, the Panel explained that a debtor's exigency must be such that it precludes a debtor from obtaining the credit counseling within the five-day "window" preceding the bankruptcy.[45]

The Panel went on to describe "exigent" as meaning "that the debtor finds himself in a situation in which adverse events are imminent and will occur before the debtor is able to avail himself of the statutory [counseling]."[46] The Panel acknowledged that in virtually all cases (including the instant case) debtors have exigent circumstances. The real question, the Panel explained, was whether exigent circumstances present were deserving of a waiver. The Panel noted that in the earlier decision, the court had observed that state law required 20 days notice of foreclosure. With that much notice, the Panel found, the circumstances were not exigent. The Panel concluded that the bankruptcy court had not abused its discretion in denying the waiver and affirmed the decision.[47]

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339 B.R. 622, 633-34 (Bankr. S.D. Tex. 2006).

[43] In 2009, the federal judiciary changed the way time periods are calculated. Consequently, this provision was amended to provide for a seven-day window rather than the original five-day window. However, this change did not result in a larger time period in practice. Because of the new calculation methods, the window in which a debtor must seek counseling before claiming exigent circumstances remains five business days.

[44] *In re Dixon*, 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006), *aff'g In re Dixon*, (Bankr. E.D. Mo. Nov. 10, 2005).

[45] The Panel also discussed the meaning of the term "satisfactory to the court" as used in section 109. The Panel explained that while the meaning of the phrase is unclear, it is fair to interpret it as an indication that Congress wanted courts to have some discretion under the statute. *In re Dixon*, 338 B.R. at 387.

[46] *In re Dixon*, 338 B.R. at 388.

[47] *See also In re Kimmel*, No. 06-00539, 2006 Bankr. LEXIS 1874 (2006) (A debtor was not entitled to a waiver of the credit counseling requirement because the scheduling of a foreclosure sale on the filing date was not exigent circumstances when he knew about the sale for three months and had filed a prior bankruptcy petition).*But see In re* (continued...)

"Adequate Services" by Approved Credit Counseling Agencies

As mentioned above, under section 109(h)(2), a debtor may be exempt from the credit counseling requirement if the debtor resides in a district where the U.S. trustee has determined that approved credit counseling agencies are not reasonably able to provide adequate services to such individuals. In *Petit Louis*, the debtor, who could only speak and understand Creole, filed a Chapter 7 bankruptcy petition.[48] Because the debtor could not obtain the credit counseling in Creole, and because he could not afford to hire an interpreter, the debtor requested that the U.S. trustee either waive the credit counseling requirement, provide a Creole interpreter, or decertify the approved counseling agencies for failure to provide Creole speaking counselors. The U.S. trustee declined the requests of the debtor, and the debtor then applied to the bankruptcy court for a waiver of the counseling requirements. The U.S. trustee claimed, among other things, that the trustee had no responsibility to provide language interpreters and that lack of English capability was not a sufficient reason for a waiver. The court found that the credit counseling agencies in the district were not reasonably able to provide adequate services to the debtor, and the court waived the credit counseling requirement.

On a motion for reconsideration, the U.S. trustee argued that the court did not have the authority to waive the credit counseling requirement. The court disagreed and ruled that not only could a court waive the credit counseling requirement under section 109(h)(3), it also had the authority to waive the requirement under section 109(h)(2). The U.S. trustee also argued that the court did not have the right to review a U.S. trustee finding that credit counseling agencies in the district were "adequate." The court again disagreed and found that the forum was proper.

The court affirmed its determination that credit counseling services in the Southern District of Florida were inadequate for this debtor. The court explained that Mr. Petit-Louis had properly invoked the court's jurisdiction by notifying the U.S. trustee that he intended to challenge the adequacy of the credit counseling available, and giving the U.S. trustee an opportunity to respond. The U.S. trustee's motion for reconsideration was denied.

Credit Counseling After Bankruptcy Petition Filed

BAPCPA amends section 109 of the Bankruptcy Code to require an individual to receive credit counseling prior to filing a petition for bankruptcy. In general, most courts have strictly followed this provision and have been reluctant, for any reason, to accept a bankruptcy petition when credit counseling was sought or obtained after the petition was filed. For example, in *Davenport*, a debtor claimed she was unable to receive pre-petition counseling due to the repossession of her car.[49] She later obtained counseling after filing a bankruptcy petition and sought to be excused from the pre-petition requirement. The debtor claimed that equity principles (i.e., "no harm, no foul") should apply to her because she completed the counseling after filing for bankruptcy.

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Childs, 355 B.R. 623 (Bankr. D. Md. 2005) (Debtor Melvin Carter sought a waiver of the credit counseling requirement because of a scheduled foreclosure on his home the following day and an inability to get an appointment for credit counseling within five days. The court granted the waiver, and opined that "the standard for exigent circumstances set forth in [section 109(h)] is minimal. It requires only that the debtor state the existence of some looming event that renders prepetition credit counseling to be infeasible." *Id.* at 630.)

[48] *In re Petit Louis*, 344 B.R. 696 (Bankr. S.D. Fla. 2006).

[49] *In re Davenport*, 335 B.R. 218 (Bankr. M.D. Fla. 2005).

The bankruptcy court explained that the only way to excuse compliance with the pre-petition requirement was to meet the three requirements necessary for a waiver; equity principles would not suffice. Although the court noted that exigent circumstances were present, it found that to be a debtor, an individual must establish that a request for credit counseling was made before the petition was filed. The court dismissed the bankruptcy petition.[50]

Meaning of "Date of Filing"

Section 109 of the Bankruptcy Code states that credit counseling must be obtained "within the 180-day period preceding the date" of filing for bankruptcy. However, the courts have split on the question of whether this requirement is satisfied by debtors who complete credit counseling on the same day, but just before, filing a bankruptcy petition.

Some courts fall into the "plain language" category and hold that debtors must have completed credit counseling on the day before filing a bankruptcy petition.[51] The "plain language" cases posit that the "date of filing" refers to the entire calendar day on which a petition is filed, not the specific moment at which it is filed. As the 180-day period must precede the day of filing, the "plain meaning rule" concludes that the last day on which credit counseling can precede the filing date is the day prior to the date of filing. The "plain language" cases also draw support from Rule 9006 of the Federal Rules of Bankruptcy Procedure, which governs the calculation of time. It provides that, when counting days, "the day of the act, event or default from which the designated period of time begins to run shall not be included."[52] In other words, when calculating the earliest day on which counseling can occur one should not count the day of filing. Consequently, when counting the latest day on which counseling can occur, "plain language" cases argue that the day of filing should not be included.

Other courts are categorized as "bright line" cases and conclude that a debtor has satisfied the credit counseling requirement so long as counseling occurs prior to filing.[53] Courts that have adopted this reasoning have relied on other provisions of the Bankruptcy Code that prescribe retrospective time constraints. For example, § 547(b)(4)(A) provides that the trustee may avoid certain transfers of an interest in property made 90 days before the date of the filing of the petition. As the Bankruptcy Appellate Panel of the Tenth Circuit noted,

> [T]he date of filing in § 547(b)(4)(A) is interpreted as the moment of filing, since there would otherwise be an uncovered gap between midnight and whenever the petition was filed, during which transfers could be made whether or not they were otherwise preferential, an absurd result, 'contrary to the congressional purpose of the provisions.'[54]

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[50] While most courts have reached the same decision as Davenport (*see, e.g.*, *In re* Gee, 332 B.R. 602, 603-04 (Bankr. W.D. Mo. 2005)), at least one court has found that the completion of credit counseling after filing a petition for bankruptcy is sufficient under certain circumstances. *See In re* Bricksin, 346 B.R. 497 (Bankr. N.D. Cal. 2006).

[51] *See In re Hammonds*, 2008 Bankr. LEXIS 2929 (Bankr. N.D. Ala. 2008); *In re Gossett*, 369 B.R. 361 (Bankr. N.D. Ill. 2007); *In re Cole*, 347 B.R. 70 (Bankr. E.D. Tenn. 2006).

[52] FED. R. BANKR. 9006(a).

[53] *See In re Barbaran*, 365 B.R. 333 (Bankr. D.D.C. 2006); *In re Swanson*, 2006 Bankr. LEXIS 3639 (Bankr. D. Idaho Dec. 21, 2006); *In re Moore*, 359 B.R. 665 (Bankr. E.D. Tenn. 2006); *In re Hudson*, 352 B.R. 391 (Bankr. D. Md. 2006); *In re Toccaline*, 2006 Bankr. LEXIS 1644 (Bankr. D. Conn. 2006); *In re Spears*, 355 B.R. 116 (Bankr. E.D. Wisc. 2006); *In re Warren*, 339 B.R. 475 (Bankr. E.D. Ark. 2006).

[54] *In re Francisco*, 390 B.R. at 703-704.

Applying this construction of the "date of filing" to the language used in § 109(h) permits debtors to satisfy the credit counseling requirement on the same day as they file for bankruptcy, so long as the counseling occurs before the petition is filed.

Credit Counseling Organizations and the Pension Protection Act of 2006

Under prior law, credit counseling organizations were eligible for a federal income tax exemption under Internal Revenue Code section 501(c)(3) or 501(c)(4). Section 1220 of the Pension Protection Act of 2006 (P.L. 109-280) amends the Internal Revenue Code and establishes the following additional requirements that credit counseling organizations[55] must meet to claim this income tax exemption:

- The organization must provide credit counseling services tailored to the specific needs and circumstances of consumers.[56]
- The organization does not make loans to debtors (other than loans with no fees or interest) and does not negotiate the making of loans on behalf of debtors.[57]
- The organization must provide services for the purpose of improving a consumer's credit record, credit history, or credit rating only to the extent that such services are incidental to providing credit counseling services. Separate fees may not be charged for these services.[58]
- The organization does not refuse to provide credit counseling services to a consumer due to the inability of the consumer to pay, the ineligibility of the consumer for debt management plan enrollment, or the unwillingness of the consumer to enroll in a debt management plan.[59]
- The organization establishes and implements a fee policy that is reasonable[60] and can be waived if the consumer cannot pay. The fee charged cannot be based on

[55] The Pension Protection Act contains new requirements for "credit counseling organizations" that provide "credit counseling services." The term "credit counseling services" is defined by the Act as "the providing of educational information to the general public on budgeting, personal finance, financial literacy, saving and spending practices, and the sound use of consumer credit," as well as "the assisting of individuals and families with financial problems by providing them with counseling," or a combination of these services. IRC § 501(q)(4)(A). Credit counseling agencies, as specified in sections 109 and 111 of the Bankruptcy Code, can be considered "credit counseling organizations."

[56] 26 U.S.C. § 501(q)(1)(A)(i).

[57] 26 U.S.C. § 501(q)(1)(A)(i).

[58] 26 U.S.C. § 501(q)(1)(A)(iii); 26 U.S.C. § 501(q)(1)(A)(iv).

[59] 26 U.S.C. § 501(q)(1)(B). Many credit counseling agencies offer voluntary "debt-management plan services" to their consumer clients. These services, as defined by the Pension Protection Act, are "related to the repayment, consolidation, or restructuring of a consumer's debt, and include[ ] the negotiation with creditors of lower interest rates, the waiver or reduction of fees, and the marketing and processing of debt management plans." Under debt management plans, a consumer typically makes a monthly payment to the agency, and the agency distributes a payment to the consumer's creditors. The agency may retain a portion of the consumer's payments to cover certain costs associated with the debt management plan. In many cases, when creditors are paid, the creditors make a payment to the credit counseling agency.

[60] The Joint Committee on Taxation, in its explanation of the Pension Protection Act, states that whether a credit counseling organization's fees are consistent with a specific state law is only evidence that a fee is reasonable; it is not (continued...)

the consumer's debt or the savings a consumer gets from using the services, except as provided by state law.[61]

- The organization must have a diverse board of directors (or other governing body) that is controlled by persons who represent the broad interests of the public, such as public officials acting in their capacities as such, persons having special knowledge or expertise in credit or financial education, and community leaders. Not more than 20% of the voting power of the board may be vested in persons who are employed by the organization or who will benefit financially, directly or indirectly, from the organization's activities (other than through the receipt of reasonable directors' fees or the repayment of consumer debt to creditors other than the credit counseling organization or its affiliates). Additionally, not more than 49% of the voting power of the board may be vested in persons who are employed by the organization or who will benefit financially, directly or indirectly, from the organization's activities (excluding only reasonable directors' fees).[62]
- The organization does not own more than 35% of the total combined voting power of a corporation (or profits or beneficial interest in the case of a partnership, trust, or estate) that is in the trade or business of lending money, repairing credit, or providing debt management plan services, payment processing, and similar services.[63]
- The organization receives no amount for providing referrals to others for debt management plan services, and pays no amount to others for obtaining referrals.[64]

In addition, organizations that are exempt under IRC § 501(c)(3) cannot solicit contributions from current consumers and face limits on their income from debt management plan services. Organizations exempt under IRC § 501(c)(4) must notify the IRS they are applying for recognition as a credit counseling organization.

The new requirements in section 1220 of the Pension Protection Act are generally effective for taxable years beginning after August 17, 2006. These requirements are only necessary in order to have a tax-exempt status and should not affect approval of a credit counseling agency by a U.S. trustee.

(...continued)

determinative. *Technical Explanation of H.R. 4, The 'Pension Protection Act of 2006'*, prepared by the staff of the Joint Committee on Taxation, JCX-38-06, 79 (Aug. 3, 2006).

[61] 26 U.S.C. § 501(q)(1)(C).

[62] 26 U.S.C. § 501(q)(1)(D).

[63] 26 U.S.C. § 501(q)(1)(E).

[64] 26 U.S.C. § 501(q)(1)(F).

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