

February 15, 2008

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: November 1, 2007 Federal Register Notice of Proposed Amendments

Dear Mr. McCabe:

This comment letter is submitted on behalf of the undersigned trade associations to provide comment on the proposed amendments to the Bankruptcy Rules and Official Forms noticed in the *Federal Register* on November 1, 2007. We appreciate the opportunity to provide our comments on those amendments to the Judicial Conference Committee on Rules of Practice and Procedure ("Committee").

Proposed Rule 1017.1. Exemption from Prepetition Credit Counseling Requirement

Section 109(h)(1) of the Bankruptcy Code ("Code") requires an individual, in order to be a debtor under the Code, to receive certain credit counseling described in the Code ("Counseling Requirement"). The exceptions to the Counseling Requirement are extremely narrow. One such exception, and the basis for Proposed Rule 1017.1, states that the Counseling Requirement may be waived if the individual submits a certification that: (i) describes exigent circumstances that merit a waiver; (ii) states that the individual was unable to obtain counseling during the 5-day period beginning on the date on which the individual requested such counseling; and (iii) is satisfactory to the court. *See* 11 U.S.C. 109(h)(3).

We oppose Proposed Rule 1017.1. Proposed Rule 1017.1 states that any certification filed by a debtor under Section 109(h)(3) is deemed satisfactory to the court unless the court, either *sua sponte* or on the motion of a party of interest filed no later than 14 days after the filing of the certification, enters a finding that the certification is not satisfactory. Although the Code clearly states that the individual must make certifications that a court affirmatively finds satisfactory, thereby placing the burden of proof on the individual for purposes of the waiver in Section 109(h)(3), Proposed Rule 1017.1 would essentially disregard the statute and place all burdens on the court or a party in interest to find the certification faulty. In short, despite the clear text of the statute, a court need not do anything in order for a waiver under Section 109(h)(3) to succeed. The Proposed Rule reads Section 109(h)(3)(A)(iii) out of the Code.

Proposed Rule 1017.1 would appear to waive the credit counseling requirement based on any certification filed by a debtor, regardless of the merits of the certification, unless a judge or a party in interest is willing to expend time and resources objecting to the individual's certification. Giving the court or party in interest the option to ignore the certificate is a strange result, since such a result would allow their inertia to void the benefit intended for the potential debtor. The clear congressional intent of Section 109 of the Code was to ensure that potential debtors obtain some

modicum of credit counseling prior to filing for bankruptcy. We understand that this requirement was—and remains—relatively controversial. Regardless, it is the law and the provision is intended to benefit potential debtors. In particular, Congress felt it important that individuals understand their options before making the decision to file for bankruptcy. *See, e.g.*, H. R. Rep. No. 105-540, at 59 (1998). Although there was much discussion about the breadth of the Counseling Requirement, especially in connection with “exigent circumstances,” Congress retained only very narrow exceptions to the requirement to ensure that individuals obtained the benefit of the Counseling Requirement prior to filing for bankruptcy. It is highly unlikely that lawmakers intended to allow for a new exception relating to the indifference of a judge or interested party. Such an exception may also invite abuse of certifications under Section 109(h)(3), as unscrupulous individuals (or their attorneys) may file less-than-compelling certifications with the hope that a court or parties in interest do not have the inclination or resources to challenge the certification. For these reasons, we strongly urge the Committee to reject Proposed Rule 1017.1.

Aside from our objections relating to statutory construction and congressional intent, we believe the Committee should consider other important issues. First, we do not believe there is a need for Proposed Rule 1017.1. It is not clear to us that significant numbers of cases are currently affected by waivers submitted under Section 109(h)(3). To the extent that such waivers are filed, it is also our understanding that courts have not had significant issues in addressing those waivers. Proposed Rule 1017.1 appears to be a “solution” in search of a problem. We believe the problems associated with Proposed Rule 1017.1 significantly outweigh any benefit it may provide. Furthermore, it is not apparent to us how the debtor’s certification would be served on a party in interest. For example, the Committee does not appear to propose an amendment to Form 9 or provide any other mechanism to notify parties in interest of the debtor’s certification. Finally, it is not clear—nor does it appear that the Committee considered—whether a 14-day time period is sufficient for a party in interest to raise an objection, even assuming the certification is provided to such party in a timely and appropriate manner.

Proposed Form 27. Reaffirmation Agreement Cover Sheet

The Committee proposes to adopt Official Form 27, a reaffirmation cover sheet that must be attached to any reaffirmation agreement to assist the court with determinations under Section 524(m) of the Code, among other things. We do not necessarily object to the adoption of Form 27, *per se*. We note, however, that the Committee is proposing a form to assist judges in making it easier for them to consider reaffirmation agreements without necessarily needing to review the underlying agreement. Yet the Committee has refused to adopt rules or forms to ensure that reaffirmation agreements meet the basic statutory requirements established in the Code. In particular, we have suggested in the past that the Committee should adopt rules or forms to ensure that reaffirmation agreements include the text required by the Code as opposed to allowing various courts to adopt reaffirmation forms or language that call into question the statutory validity of reaffirmation agreements approved by such courts.

Although we have made this specific request to the Committee in the past, the Committee has declined to adopt such rules and forms, with little explanation or justification for allowing courts to deviate from the plain language of the Code. We note that the memorandum circulated among the members of Advisory Committee on the Rules of Bankruptcy Procedure indicated that rules or forms ensuring adherence to the Code were not necessary. The memorandum stated that “[a]dopting a

particular reaffirmation agreement as an Official Form might result in tacitly adopting some courts [*sic*] methodology and rejecting the view of other courts on substantive matters.”¹ It is not clear to us how rules or forms preserving adherence to the Code on this matter could raise substantive disagreement among bankruptcy judges. Indeed, it is ironic that various creditors have expressed to us that the vagaries and inconsistencies among reaffirmation agreements across bankruptcy courts has increased since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act, despite the fact that the Code now requires more uniformity than before enactment of the Act. For these reasons, we take this opportunity to ask the Committee again to adopt the necessary rules and/or forms to ensure that reaffirmations are handled in a manner consistent with the requirements of the statute.

Conclusion

We appreciate the opportunity to provide our comments to the Committee. If you would like more information, or have questions regarding our comments, please do not hesitate to contact Mike McEneny (202.736.8368), Karl Kaufmann (202.736.8133), or Philip Corwin (202.347.6875) who assisted in the preparation of this letter.

Sincerely,

American Bankers Association
Consumer Bankers Association
The Financial Services Roundtable

American Financial Services Association
Independent Community Bankers Association

¹ We note that the justification provided in the memorandum would be justification enough for a rejection of Proposed Rule 1017 1, discussed above, as certainly a majority of judges must believe that the statute places the burden is on the debtor to demonstrate the validity of a counseling certification.