



Henry J. Sommer, President  
*National Association of Consumer Bankruptcy Attorneys*  
2300 M. St., N.W., Suite 800  
Washington, D.C. 20037  
(202) 331-8005  
[www.nacba.org](http://www.nacba.org)

March 8, 2006

Peter G. McCabe  
Secretary of the Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, D.C. 20544

RE: Proposed Interim Rules and Official Forms

Dear Mr. McCabe:

The National Association of Consumer Bankruptcy Attorneys (NACBA) submits these comments in response to the proposed Interim Rules and Official Forms.

### **Interest Of NACBA**

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,400 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. The NACBA membership has a vital interest in the proposed Interim Rules and Official Forms as NACBA members represent a large number of the individual debtors who file consumer cases nationally.

### **Current Monthly Income for Purposes of Section 707(b)(7) Safe Harbor**

In the case of a married debtor not filing jointly, Official Form B22A requires the debtor to list income of the non-debtor spouse from various sources on Lines 3-10 in Part II. These income amounts are used in calculating the debtor's current monthly income for purposes of determining whether the debtor falls within the median income safe harbor under section 707(b)(7). The form apparently requires the listing of the non-debtor spouse's income because of the language in section 707(b)(7) referring to the

“current monthly income of the debtor, ... and the debtor’s spouse combined....” However, the key operative phrase in section 707(b)(7), which serves as the guidepost for determinations in various provisions of the 2005 Act, is “current monthly income.” This phrase is defined in section 101(10A) as including both spouses’ income only in joint cases. The definition captures a non-debtor spouse’s contribution to the household, rather than income, by requiring the inclusion in current monthly income of amounts paid by the non-debtor spouse “on a regular basis toward the household expenses of the debtor....”<sup>1</sup>

Because a non-debtor spouse has no current monthly income, the current monthly income of the debtor and the “debtor’s spouse combined” should be considered in applying section 707(b)(7), as in all other related provisions, only in joint cases. To strictly adhere to the statutory language, and to maintain consistency within the Official Forms, NACBA suggests that Official Form B22A be changed to require the listing of a spouse’s income in Column B on Lines 3-10 in joint cases, and that Part IV of the form be eliminated. The instructions for Line 8 of Official Form B22A should also be changed to state that contributions to the debtor’s household expenses from the non-debtor spouse are to be listed. In this way, the form avoids taking a position on an issue of substantive law.

### **Credit Counseling and Debtor Education**

To implement the credit counseling requirements in sections 109 and 521(b), Interim Rule 1007(b)(3) provides that the debtor must file a counseling certificate from an approved agency and a debt repayment plan, if any. The Petition (Official Form 1) was also amended to include a certification concerning debt counseling. The debtor must either certify that approved budget and credit counseling was received by the debtor within the 180-day period preceding the filing of the petition or that the debtor is requesting a waiver based on exigent circumstances. Interim Rule 1007(c) provides that the certificate from an approved agency and a debt repayment plan, if any, must be filed with the petition in a voluntary case.

NACBA requests that several changes be made to the Rules and Forms. In some cases, debtors have obtained approved budget and credit counseling pre-petition, thereby satisfying the requirement in section 109, but have not been able to obtain the necessary certificate from the agency until after the petition is filed. Many of the approved agencies have developed improved delivery methods for providing certificates, at least when the debtor is represented by counsel. But problems will inevitably continue to occur, especially for those pro se debtors who do not have a method of receiving the certificate electronically. Interim Rule 1007(c) should be amended to provide that the counseling certificate may be filed within 15 days of the petition.

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<sup>1</sup> Regular contributions to the debtor’s household expenses are currently reflected on Line 8 of Official Form B22A.

Since the debtor is required to state on the Petition whether counseling has been received pre-petition, the court will be advised as to whether the requirement has been satisfied. If the debtor later files a certificate during the 15-day period that indicates the counseling was obtained postpetition, and no waiver request was made, the EOUST and/or the court may take appropriate action. It is NACBA's understanding that the EOUST maintains a database relating to all certificates issued by approved agencies so the date of counseling may be easily verified. The change suggested by NACBA would obviate the need to file a motion to temporarily excuse the filing of the certificate, an additional and burdensome step that some NACBA members have felt compelled to take under the current Interim Rules.

In addition, the Petition should be amended to conform to section 109(h)(4), which permits the debtor to request a waiver of the counseling requirement based on disability, incapacity, and active military duty in a combat zone.<sup>2</sup> The Petition currently provides that the debtor may certify that he or she is requesting a waiver based only on exigent circumstances, in accordance with section 109(h)(3)(A), but does not mention or provide a check-off box for the other waiver requests. Adding these additional waiver categories would assist pro se debtors who might otherwise conclude from the present form that waivers may be sought only based on exigent circumstances.

Consistent with this recommended change, NACBA also suggests that the Petition be redesigned to include an enlarged area dealing with credit counseling that would contain information about the requirement and the potential consequences of noncompliance. This could also be accomplished, perhaps even more effectively, by a separate form dealing exclusively with credit counseling. Such information would greatly assist pro se debtors and help prevent unnecessary dismissals.

Similarly, it may be advisable for the section 341 notice (Official Form B9A, BRC, and BRI) to list the deadline for the debtor to submit proof of completion of an instructional course concerning financial management (Official Form 23), as required by sections 727(a)(11) and 1328(g), and Interim Bankruptcy Rule 1007 (c). The section of the Notice that contains "Explanations" could also be amended to include a description of the financial management course requirement and the situations in which it does not apply.

### **Calculation of Disposable Income for Debtors Below Median**

Interim Rule 1007(b)(6) requires the debtor in a chapter 13 case to file a statement of current monthly income, prepared on Official Form B22C in Part I. This statement of current monthly income, based on the definition in section 101(10A), is required for all debtors, whether above or below the state median. However, if the debtor has current monthly income above the state median, a calculation of disposable income in accordance with section 1325(b)(3) is prepared on Official Form B22C in Part V.

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<sup>2</sup> Language similar to that provided in Official Form 23 could be used.

Debtors below the state median are instructed not to fill out Part V and no other section of Official Form B22C, or any other Official Form, provides for the calculation of disposable income based on current monthly income for a debtor below the median.

Section 1325(b)(2) clearly provides that the determination of disposable income is based on current monthly income for debtors above and below the median. Since Schedules I and J, as amended, do not provide for the calculation of disposable income based on current monthly income, NACBA believes that Interim Rule 1007(b)(6) and Official Form B22C should be amended to provide for the determination of disposable income for debtors below the median. This could easily be accomplished by changing line 56 of Official Form B22C to provide for two parts: a line as in the present form would be for debtors above median that would state “Total of deductions allowed under section 707(b)(2). Enter the amount from Line 52,” and a second line for debtors below median that would state “Total of monthly expenses. Enter the amount from Line 18 of Schedule J.”

### **Deduction for Other Necessary Expenses**

Section 707(b)(2)(A) provides a list of the debtor’s monthly expenses that are permitted as allowable deductions for purposes of the means test. Among the permitted expenses, section 707(b)(2)(A)(ii)(I) provides that the debtor may deduct “actual monthly expenses amounts for the categories specified as Other Necessary Expenses” under the IRS collection guidelines.

In general, Official Form B22A does a good job of providing line items for expense deductions in a manner that is consistent with the statute. However, Part V of the form (Lines 25 to 32) lists some but not all of the categories of Other Necessary Expenses provided for in the IRS collection guidelines.<sup>3</sup> For example, no provision is made for accounting and legal expenses (or other expenses related to the production of income that do not involve the operation of a business), for expenses related to home security, or for education expenses for a physically or mentally challenged child that are not provided for in Line 38.

The amounts listed in Lines 25 to 32 are included in the “total of all deductions allowed under section 707(b)(2),” as reflected on Line 47. However, at the end of Official Form B22A, following the means test calculation and determination of any presumption of abuse under section 707(b)(2) in Part VI, Part VII contains a space for the debtor to list “Additional Expenses Claims” not provided for in Part V. NACBA requests that Line 56 in Part VII be moved to Part V so that these amounts may be deducted from current monthly income as part of the total deductions reflected on Line 47. Similar changes should be made Official Form B22C.

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<sup>3</sup> A description of the Other Necessary Expenses is contained in § 5.15.1.10 of the IRS Financial Analysis Handbook.

The legislative history of the 2005 Act makes clear that the list of Other Necessary Expenses prepared by the IRS is non-exclusive.<sup>4</sup> Debtors should be permitted to list expenses that fall within these categories and get an appropriate deduction on the form so as to avoid the improper and unnecessary triggering of a presumption of abuse and related litigation expenses. If the EOUST or any other party with standing believes that the expenses are not permitted, they may file a motion requesting the court to determine whether the presumption of abuse arises. In that case, the court will then apply the statute and decide whether the other necessary expense is an appropriate deduction. The Official Form should not take a position on this matter; it is not the job of the Rules Committee to decide issues of substantive law.

Thank you for this opportunity to submit comments on behalf of NACBA.

Very truly yours,

*/s/ Henry Sommer*  
Henry Sommer  
President

*/s/ Bradford W. Botes*  
Bradford W. Botes  
Executive Director

*/s/ John Rao*  
John Rao  
Secretary

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<sup>4</sup> See H. Rep. 109-31, 14, n. 66 (2005).