06 - BK-015

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

JAN 30 2007

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

Re: Proposed Amendments to the Bankruptcy Rules and Official Forms Published for Comment August 2006

Dear Mr. McCabe:

As a creditor filing thousands of proofs of claim every month in bankruptcy cases seeking payment of millions of dollars, the Internal Revenue Service has a vital interest in the proposed amendments to the Bankruptcy Rules and Official Forms published for comment in August 2006. The Office of Chief Counsel, Internal Revenue Service, submits the following comments to the proposed amendments. Our submission also includes comments on two rules not published for public comment at this time, specifically, Bankruptcy Rules 3007 and 3015.

I. Comments on Proposed Amendments to Bankruptcy Rules and Officials Forms

Rule 2002. Notices to Creditors, etc., United States, and United States Trustee

The proposed amendment to Rule 2002(g)(2), concerning exceptions for designated addresses, should be expanded to include an exception for Bankruptcy Rule 5003(e), which allows a governmental unit to file a statement with the bankruptcy court designating its mailing address.

The proposed amendment to Rule 2002(g)(2) reconciles the designation of address provisions in Rule 2002(g)(2) with the designation of address provisions in 11 U.S.C. § 342(f), by adding an exception for designations filed under that section. Section 342(f)(1) allows an entity to file a notice designating the mailing address to be used by all courts or by particular courts to provide notice to the entity in all Chapter 7 and 13 cases. Rule 5003(e) allows a governmental unit to file a statement with the bankruptcy court designating its mailing address for all cases.

While the proposed amendment to Rule 2002(g)(2) reflects that section 342(f) overrides the notice of address provisions in Rule 2002(g), the amendment does not take into account the provisions in Rule 5003(e) allowing a governmental unit to designate a mailing address. Read in context with Rule 2002(g)(1), which has not been amended, the proposed amendment to Rule 2002(g)(2) now provides:

> (g) ADDRESSING NOTICES.
>
> (1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or authorized agent has directed in its last request filed in the particular case. For purposes of this subdivision –
>
> (A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address....
>
> (2) Except as provided in § 342(f) of the Code, if a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notice shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later...

The Committee Note to subdivision (g)(2) provides that (g)(2) continues to operate in Chapter 11 and 12 cases, and in cases under Chapters 7 and 13 when the creditor fails to file a notice of address with the court under section 342(f). But in failing to include an exception for Rule 5003(e), the proposed amendment renders Rule 5003(e) virtually ineffective. This is particularly true in Chapter 11 or 12 cases involving a governmental unit that has filed a designation of address with the clerk under Rule 5003(e), but has not filed a notice of address or proof of claim in the particular case. Under the proposed amendment, notices required to be mailed under Rule 2002 would be required to be mailed to the governmental unit at the address shown on the list of creditors or schedule of liabilities, whichever is filed later, even though the governmental unit has designated a different mailing address under Rule 5003(e). The governmental unit cannot avoid this outcome by filing a notice of address with the courts under section 342(f) since an entity can only designate an address under that section in Chapter 7 and 13 cases. Rule 2002(g)(1) would not apply since, in the above scenario, neither a request designating an address nor a proof of claim designating one has been filed in the particular case. The best way to eliminate the gap in the designation of address provisions in Rule 2002(g)(2) is to expand the proposed amendment to include an exception for designations of address under Rule 5003(e). Mailing notices to creditors using the address

shown on the list of creditors or schedule of liabilities, as (g)(2) provides, should be the address of last resort to be used only after the creditor has failed to designate under section 342(f), Rule 2002(g)(1), or Rule 5003(e).

For these reasons, Rule 2002(g)(2) should be amended as follows:

> (2) If a creditor or indenture trustee has not filed a request designating a mailing address under § 342(f), Rule 2002(g)(1), or Rule 5003(e), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under § 342(f), Rule 2002(g)(1), or Rule 5003(e), the notices shall be mailed to the address shown on the list of equity security holders.

Consistent with the above changes, the fifth paragraph of the Committee Note should be amended as follows:

> Subdivision (g)(2) of the rule is amended because the 2005 amendments to section 342(f) of the Code permit creditors in Chapter 7 and 13 individual debtor cases to file a notice with any bankruptcy court of the address to which the creditor wishes all notices to be sent, while Rule 5003(e) permits a Federal, State or local governmental unit to designate a mailing address. Rule 2002(g)(2) continues to operate in chapter 11 and 12 cases, and in chapter 7 cases when the debtor is not an individual, if the governmental creditor has not filed a statement designating an address under Rule 5003(e). It also continues to apply in cases under chapters 7 and 13 if the creditor has not filed a notice under section 342(f) or the governmental creditor has not filed a statement designating an address under Rule 5003(e). The amendment to Rule 2002(g)(2) therefore only limits that subdivision when a creditor files a notice under section 342(f) or a governmental creditor files a statement under Rule 5003(e).

Rule 3002. Filing Proof of Claim or Interest

The proposed amendments to Rule 3002(c)(1) should be revised to allow for court-approved extensions of the exclusive time period for a governmental unit to file a timely proof of claim resulting from a tax return filed under 11 U.S.C. § 1308. In addition, the proposed amendment to Rule 3002(c) should be revised to reflect that Chapter 12 now governs both family farmers' and family fishermen's debt adjustment cases.

The proposed amendments to Rule 3002(c)(1) regarding the time in which a proof of claim may be filed timely conform the rule to the statute, as amended by section 716(d) of the 2005 Act. See 11 U.S.C. § 502(b)(9). Before the proposed amendment, Rule

3002(c)(1) generally provided that a proof of claim would be timely if it were filed not later than 180 days after the order for relief. Additionally, the rule modified the general 180-day period by providing that the court could extend such period for cause on motion of a creditor made within such period. The proposed amendment adds a new and exclusive 60-day time period in which a governmental unit may file a timely claim resulting from a tax return filed under new section 1308. However, the proposed amendment does not provide that this new period is subject to extension by the court after timely motion by a governmental unit and for cause, because the rule introduces the new period after the provision that provides for the extension. This is problematic because if the government requires more time to file a claim resulting from a tax return filed under section 1308 but misses the 180-day period, then arguably the court may not extend the time period on motion for cause, even if the 60-day period has not elapsed. This problem would be resolved by switching the order of the second and third sentences, so that what is now the second sentence (the provision allowing for court approved extensions) would modify both the general 180-day rule and the new 180/60-day rule that exclusively governs section 1308 claims.

Additionally, because Chapter 12 now governs both family farmers' and family fishermen's debt adjustment cases, the first sentence of Rule 3002(c) should be amended to reflect this change and not limit application of the rule in Chapter 12 to family farmers.

These changes could be implemented as follows:

> (c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 ~~family farmer's~~ debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:
>
> (II) A proof of claim filed by a governmental unit, other than for a claim resulting from a tax return filed under § 1308, is timely filed if it is filed not later than 180 days after the date of the order for relief. ~~On motion of a governmental unit filed before the expiration of such period and for cause shown, the court may extend the time to file a claim by the governmental unit.~~ A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under § 1308 is timely filed if it is filed not later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return, whichever is later. <u>On motion of a governmental unit filed before the expiration of the period in which a proof of claim timely may be filed and for cause shown, the court may extend the time in which the governmental unit may file a claim.</u>

Rule 4002. Duties of Debtor

The Committee Note to the proposed amendments to Rule 4002 should be revised to remove the impression that debtors are not required to obtain copies of required tax returns or transcripts if they do not have them in their possession.

The proposed amendments to Rule 4002 implement the provisions of the 2005 Act that expand the obligation of debtors to provide additional evidence of the debtor's financial affairs, including the requirement under 11 U.S.C. § 521(e)(2)(A) to provide to the trustee a copy of the Federal income tax return, or transcript of such return, for the most recent tax year ending immediately before the petition date and for which a return was filed. The Committee Note to the proposed amendment states that "[t]he rule does not require that the debtor create documents or obtain documents from third parties; rather, the debtor's obligation is to bring to the § 341 meeting of creditors the documents which the debtor possesses." This statement could be construed as indicating that debtors are not required to provide copies of tax returns or transcripts of such returns if they do not have them in their possession. The requirement in section 521(e)(2) is not limited, however, to situations where debtors keep copies of their returns. Debtors who do not have copies of the tax returns that are required to be provided to the trustee under this provision should obtain copies of such returns or transcripts thereof from the Internal Revenue Service. Thus, a debtor is obligated to comply with the return documentation requirement of section 521(e)(2) even if providing a copy of such return or transcript requires the debtor to request the same from a third party, i.e., the Internal Revenue Service. The Committee Note should be amended to remove the impression that debtors are not required to obtain copies of the required tax returns or transcripts if they do not have them.

Rule 5003. Record Kept By the Clerk

The proposed amendment to Rule 5003(e) should be revised to require the clerk to maintain a separate list of addresses designated by governmental units for the service of prompt determination requests, as required by 11 U.S.C. § 505(b)(1).

The proposed amendment to Rule 5003(e) implements the addition of section 505(b)(1) to the Code. Section 505(b)(1) provides that the clerk shall maintain a list under which a Federal, State or local governmental unit may designate an address for service of prompt determination requests and describe where further information concerning additional requirements for filing such requests may be found. The proposed amendment to the rule provides, in relevant part, that the United States "may file a statement designating an address for service of requests under § 505(b) of the Code, and the designation shall describe where further information concerning additional requirements for filing such requests may be found." The proposed amendment also provides as follows:

> The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes ~~these~~ the mailing addresses designated under this subdivision, but the clerk is not required to include in the register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory.

To the extent that a governmental unit, such as the Internal Revenue Service, uses an address for service of prompt determination requests that is different from its general mailing address, the statement in Rule 5003 that the clerk is not required to include in the register more than one mailing address for each department of the United States is inconsistent with the statutory provision requiring the clerk to maintain a list of addresses for the service of prompt determination requests. The rule further compounds the potential problem for governmental units using a different address for prompt determination requests by providing that "mailing notice to only one applicable address is sufficient to provide effective notice." Consistent with the requirements of section 505(b)(1), Rule 5003 should require the maintenance of a separate list of addresses designated by governmental units for the service of prompt determination requests. It should be noted that the Service published on May 30, 2006, Revenue Procedure 2006-24, which obsoleted Revenue Procedure 81-17 and instructs that prompt determination requests should now be mailed to the Centralized Insolvency Operation in Philadelphia, Pa. The Service's local Insolvency units have been advising bankruptcy clerks to maintain this address for prompt determination requests.

Form 1, Voluntary Petition

The proposed amendment to the voluntary petition form concerning "Type of Debtor" should be amended to include a separate check box for LLCs and LLPs.

The Committee Note indicates that the section of the form labeled "Type of Debtor" has been revised to make it clear that a limited liability corporation ("LLC") and limited liability partnership ("LLP") should identify itself as a "corporation." The treatment of LLCs and LLPs for purposes of income and employment tax liabilities may differ from that received by corporations, thus affecting the types of tax claims that may be filed against such entities. Therefore, a separate check box should be included for these types of entities rather than including them in the checkbox for corporations.

Form 6B, Schedule B – Personal Property

The instructions in proposed amended Schedule B should be expanded to include a statement requiring debtors to list all personal property even if the property is excluded from the bankruptcy estate. Many more types of assets are now considered to be property excluded from a bankruptcy estate but that determination is not always easy or straight forward. Accordingly, debtors should be instructed to list all property interests,

even if they believe the asset(s) to be excluded, so that questions as to whether certain assets should be included or excluded in the estate can be fully addressed.

Schedule B – Personal Property is amended to require the debtor to list any interest in an education IRA, as 11 U.S.C. § 541(b)(5), added to the Code in 2005, makes special provision for them. See Item # 11 of amended Schedule B. Under sections 541(b)(5) and (b)(6), certain funds placed in an education individual retirement account and certain funds used to purchase a tuition credit or certificate or contributed to a qualified State tuition program are excluded from the bankruptcy estate. Similarly, property listed under Item # 12, interests in IRA, ERISA, Keogh, or other pension or profit sharing plans, or Item # 20, contingent and noncontingent interests in an estate of a decedent, death benefit plan, life insurance policy, or trust, may be excluded from the bankruptcy estate under section 541(c)(2). Debtors should be reminded that they must include all their property interests even if they believe that the property interest is excluded from the bankruptcy estate. Accordingly, a statement should be added to the instruction portion of the form that states:

"Do list all personal property even if the property is excluded from the bankruptcy estate. If you believe that property is excluded from the estate then you should make a notation to that effect."

II. Comments on Bankruptcy Rules 3007 and 3015

In addition to our comments on the proposed amendments, we suggest the following changes to modify certain rules and language to more closely reflect the sense that Congress intended when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Rule 3007. Objections to Claims

Rule 3007 should be amended to implement the sense of Congress that a Chapter 13 debtor be prohibited from objecting to a claim for a tax with respect to which a return is required to be filed under 11 U.S.C. § 1308 until such return has been filed as required.

Section 716(e)(2) of the 2005 Act provides that it is the sense of Congress that the Judicial Conference of the United States should, as soon as practicable after the date of enactment of the legislation, amend Rule 3007 so that in Chapter 13 cases, no objections based on section 1308 returns could be filed until after the returns are filed. This change is necessary to prevent the filing of an objection to the government's claim before the debtor has satisfied the filing requirement, and could be implemented by adding the second sentence as follows:

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. In a chapter 13 case, no objection to a claim for a tax with respect to which a return is required to be filed under § 1308 may be filed until after such return has been filed. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment or a Chapter 13 Individual's Debt Adjustment Case

Rule 3015(f) should be amended to implement the sense of Congress that an objection to confirmation of a Chapter 13 plan filed by a government unit on or before 60 days after the debtor files all returns required under 11 U.S.C. §§ 1308 and 1325(a)(7) be considered timely for all purposes.

Section 716(e)(1) of the 2005 Act provides that it is the sense of Congress that the Judicial Conference of the United States should, as soon as practicable after the date of enactment of the legislation, amend Rule 3015(f) in Chapter 13 cases, so that an objection to the confirmation of a plan filed by a governmental unit on or before the date that is 60 days after the date on which the debtor files all tax returns required under sections 1308 and 1325(a)(7) will be considered timely for all purposes as if such objection had been timely filed before such confirmation. This amendment is necessary to assure that an objection to confirmation based upon a return that is filed under section 1308 and that is filed within a reasonable period of time following the filing of such return will not be prejudiced notwithstanding that that claim is filed post-confirmation.

Because Rule 3015(f) governs the timeliness of objections to confirmation in all chapters, and because this rule change is only with respect to objections to confirmation in Chapter 13, it might be more appropriate to have this amendment appear in a new subsection (i.e., new section 3015(g)). Additionally, this would necessitate some conforming amendments as follows:

(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, before confirmation of the plan, except as provided for in subpart (g). An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(g) OBJECTION TO CONFIRMATION IN CHAPTER 13. An objection to the confirmation of a plan filed by a governmental unit after confirmation of a plan is timely for all purposes if it is filed on or before the date that is 60 days after the date on which the debtor files all tax returns required under section 1308, plus any extension of time in which the governmental unit may file a proof of claim granted by the court under Rule 3002(c), and the court shall rule on such objection as if it had been timely filed before confirmation.

(~~g~~h) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

Further, the phrase "Family Farmer's" should be deleted from the caption to Rule 3015 to reflect the new scope of Chapter 12, which covers family fishermen as well as family farmers, as follows:

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 ~~Family Farmer's~~ Debt Adjustment or a Chapter 13 Individual's Debt Adjustment Case

A global change should be made throughout both the captions to the rules and the rules themselves to reflect this change in the scope of Chapter 12.

Thank you for this opportunity to submit comments on behalf of the Office of Chief Counsel, Internal Revenue Service. Questions regarding this submission should be directed to attorney Donza M. Poole of this office at (202) 622-3620.

Sincerely,

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