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To Rules_Comments@ao.uscourts.gov
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Subject Comments of the National Association of Consumer Bankruptcy Attorneys on Proposed Bankruptcy Rules

Dear Mr. McCabe:

I am submitting these comments on the Proposed Amendments to the Federal Rules of Bankruptcy Procedure on behalf of the National Association of Bankruptcy Attorneys ("NACBA"). The over 2600 members of our organization represent hundreds of thousands of consumer debtors every year and have a strong interest in having bankruptcy rules that are both fair and practical.

We wish to say, first, that we think the Committee did a remarkable job in drafting so many appropriate rules in such a short period of time. From my days on the Committee, I know the enormous amount of work that must have been involved. We also wish to reiterate the comments we made earlier, to the extent they were not adopted. We will not repeat those comments here, but would refer the Committee to those prior comments.

In particular, we continue to feel strongly that the forms should not take legal positions and that Rule 4002 should not be amended to add still more document requirements to the already burdensome and expensive document requirements enacted by the 2005 legislation. We note that at least one or two bankruptcy courts chose not to adopt this provision of Interim Rule 4002, a rather extraordinary step, presumably because they felt the same way.

1. Proposed Rule 1007(b)(1)(F) requires the filing of "a record of any interest that the debtor has in an account or program of the type specified in § 521(c) of the Code." This proposed rule suggests, but does not quite say, that a separate record of education savings must be filed in addition to the other documents required, such as the schedules. The Code does not define what a "record" is, nor does the proposed rule, leaving a practitioner to guess what might be sufficient to satisfy the rule. Because Item 11 on Schedule B of Official Form 6 already requests all particulars regarding such accounts, completion of that schedule ought to be sufficient to meet the requirements of the Code. However, the Official Form also states that a separate "record" should be filed.

The rules should provide that setting forth those particulars on the schedule provides the required record of the debtor's interest, rather than leaving a potential trap for the unwary debtor or practitioner who does not know what else might be required. Just as the rules and forms define what papers satisfy section 521(a)'s requirement that a schedule and statement of affairs be filed, so too should they define what paper satisfies the requirement of a "record." There is no policy justification for requiring the filing of yet another document in addition to all the added paperwork required by the 2005 legislation. If the trustee wishes to see account statements or other documents pertaining to such an account in a particular case, he or she is free to request them.

2. Section 109(h)(3) provides that the exigent circumstances exception

to the credit counseling requirement is triggered when the debtor "submits to the court a certification that" meets certain requirements. Nonetheless Exhibit D to the petition states that the debtor must file a motion for determination by the court. The rules and forms should require only a certification of exigent circumstances, as stated in the statute, not a motion. Pro se debtors do not know how to file motions, and it would be easier and more efficient if there were a contested matter only if the certification was challenged or the court was unsure whether to find the certification "satisfactory" under the statute.

3. Sections 727(a)(11) and 1328(g) provide that the debtor is not entitled to a discharge if the debtor has not completed a personal financial management instructional course. Conversely, one would assume that a debtor cannot be denied a discharge on this basis if the course is completed. However, the deadlines in proposed Rule 1007(c) can create a situation in which the debtor is entitled to a discharge under the statute, but would be denied that discharge. This could happen, for example, if the debtor filed the course completion certificate on the 46^th day after the meeting of creditors in a chapter 7 case.

The best solution would be for a warning notice to be sent about 30 days before the discharge would be entered if the debtor has not yet filed the certificate. However, a debtor should be entitled to discharge if a course is completed anytime before the discharge otherwise would be entered. The courts should easily be able to verify from the docket, probably electronically, whether the course was completed before entering discharge order, just as they verify that the other prerequisites in Rule 4004(c) have been met.

The rules should also provide a simple and inexpensive procedure for the debtor to cure a failure to complete the course by the time a discharge would be entered. The purpose of the instructional course provision is to provide education to debtors, not to deny a fresh start. If a debtor obtains the required education after the closing of a case without a discharge, the rules should provide that the case shall be reopened and a discharge entered with no fee or only a minimal fee. Such a provision would encourage debtors to obtain the education that Congress wanted them to receive and would grant them the fresh start to which they are otherwise entitled.

4. NACBA opposes the proposed change to Rule 4003(b)(1) lengthening the normal period for exemption objections to 60 days. This extension would delay the discharge and, usually, the closing of any no-asset chapter 7 case in which the section 341 meeting is continued. It would also leave debtors' property in limbo, with potential restrictions on use or transfer, for much longer in every routine chapter 7 case. A party normally can examine the exemptions claimed well before the creditors' meeting and can always ask for an extension of time to object to exemptions if that is necessary. Trustees can and regularly do hold the section 341 meeting open if there are exemption issues, which automatically prevents the objection time period from running. We are not aware of any cases in which the automatic extension to 60 days would have made a difference. Indeed, it is extremely unusual for any parties other than trustees to object to exemptions. The primary effect of this rule change would be simply to delay the prompt administration of cases.

While we do not believe the proposed new Rule 4003(b)(2) is necessary, and we predict it would almost never be utilized, we do wish to point out that it could be more clearly drafted. As drafted, it is not clear that the debtor would receive notice of the objection if the exemption was asserted by another on the debtor's behalf.

5. In addition, we suggest adding to the proposed Rule 4004(c)(1)(K) a provision that would delay the discharge in the situation where a motion for approval of reaffirmation agreement is pending. Such motions, normally by pro se debtors, will often contain improper calculations and it may not always be apparent that a presumption of undue hardship arises. This would also ensure that the last sentence of section 524(m), which can be read to require conclusion of a reaffirmation hearing before the discharge, would not preclude the court from disapproving a proposed reaffirmation agreement that is sought by a motion.

6. Finally, we suggest a national rule that would adopt the procedure created by a number of local rules to deal with the "automatic dismissal" provision in section 521(i). These courts send a notice to the debtor within about 20 days after the petition if the clerk believes any required paper is missing. The debtor has notice that the clerk believes the filing is incomplete and a chance to cure the deficiency (or to argue that the paper is not required or has, in fact, been filed.) Similarly, any party believing a paper is missing should be given a deadline of about 20 days after the petition to allege that a paper is missing, and in the absence of such an allegation should be precluded from later arguing that a document required by section 521(a) was not filed. Such a procedure would ensure that debtors have an opportunity to prevent dismissal of their cases for deficiencies they may not even know exist. It would also ensure that no party (such as, perhaps, a preference defendant) could argue that the case has been automatically dismissed after the 45 days have run and there is no opportunity to correct the error.

Thank you for the consideration that I know the Committee will give to these comments.

Very truly yours,

Henry J. Sommer
President

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