
**NEW BURDENS BUT FEW BENEFITS:
AN EXAMINATION OF THE
BANKRUPTCY COUNSELING AND
EDUCATION REQUIREMENTS IN
MASSACHUSETTS**

June 2007

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CENTER



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National Consumer Law Center
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Acknowledgments:

The views expressed in this report are those of the authors alone and do not necessarily reflect the views of its funders or those who provided editorial review. This report was developed with support from The John H. and H. Naomi Tomfohrde Foundation and the George H. and Jane A. Mifflin Memorial Fund. The authors thank Travis Plunkett, Legislative Director with Consumer Federation of America and Sheryl Serreze and Hale and Dorr Legal Services Center of Harvard Law School for their valuable support and comments. At NCLC, thanks to Carolyn Carter for substantive and editorial advice and Svetlana Ladan for technical support. We also thank all of the credit counseling agency staff and directors and leaders from the National Foundation for Credit Counseling and Association of Independent Consumer Credit Counseling Agencies for sharing their insights and for giving us access to their briefings and courses. We could not have prepared this report without their assistance. Very special thanks to the consumers who were willing to share their experiences with us.

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EXECUTIVE SUMMARY

Introduction

The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) created a number of new hurdles for consumers seeking bankruptcy relief. These include requirements that consumers receive counseling from a non-profit credit counseling agency within 180 days of filing for bankruptcy and complete a financial education course prior to receiving a final bankruptcy discharge.

The first section of this report centers on the procedural issues associated with counseling and education, including accessibility and affordability. The remaining sections focus on the substance of the counseling briefings followed by a review of education courses.

The data collected for this report is from counseling and education providers in Massachusetts. However, since a majority of these providers offer services in multiple states, the conclusions have national implications.

Key Findings

Accessibility of Counseling Briefings and Education Courses

1. Internet Access Often Required

Most of the information concerning the counseling and education requirements is located online. This is a problem particularly for consumers who do not use or do not have access to the Internet, including many *pro se* debtors.

In Massachusetts, 28.6% of counseling providers require the Internet for their briefings, in some cases with a telephone follow-up. Fifty percent of education providers required Internet access.

2. Language Barriers

It is difficult for limited English speakers to find information about services in other languages. This is particularly true for languages other than Spanish.

3. Affordability Issues

The required fee for counseling in Massachusetts for a single filer does not vary much, with 5 in 6 providers charging \$50 and none exceeding \$55. The lowest fee charged is \$30 for a single filer. Some agencies charge extra for joint petitioners with the maximum total cost charged for both filers at \$75. However, the median cost for joint petitioners is still \$50. The cost varies much more dramatically for approved debt education providers with the least expensive course costing \$16.95 per person and the most expensive at \$100.

4. Inconsistent Fee Waiver Policies

The Executive Office of the United States Trustee (EOUST) has not provided an industry standard for fee waivers. We found considerable variation in fee waiver policies among the agencies and education providers surveyed. For credit counseling agencies, policies on obtaining a fee waiver include exemptions for individuals whose household income is less than 150% of the federal poverty level (30.8%), those with *pro bono* legal representation (23.1%), those who receive all or part of their income from social security or disability insurance (7.7%), and those who are deemed eligible after individual budget analyses based on some combination of these requirements (38.5%).

Fee waivers are offered for debt education courses under similar provisions as those granted for credit counseling sessions. The most frequently utilized individual criteria for exemption for debt education are if the filer is receiving *pro bono* legal services (11.1%) and if the filer's household income is below 150% of the federal poverty level (25.9%). Over half of debt education providers issue waivers on a case-by-case basis considering a combination of several factors (55.6%).

Information about waivers is often not readily available. Only two-thirds of counseling providers and 56% of education course providers had fee waiver information accessible on their websites. When information was provided, it was often difficult to find.

RECOMMENDATIONS TO IMPROVE ACCESSIBILITY AND AFFORDABILITY

1. Ensure the availability of in-person services.
2. Expand outreach to consumers who cannot use the Internet or do not have access to the Internet.
3. Expand services for limited English speakers.
4. Fee-Related Recommendations:
 - Establish uniform fee limits and fair fee reduction guidelines for counseling.
 - Mandate an expedited process for obtaining a reduction or waiver for those in need.

- Require that information about fee schedules and waivers be provided to debtors upon first contact with a provider, not just before services are provided.

Effectiveness of Counseling Briefings

It is more difficult to quantify whether the counseling briefings are effective. An April 2007 GAO report noted the lack of outcome measurements as a critical problem. A possible evaluation standard is whether the programs are meeting the goal expressed by BAPCPA proponents of informing consumers of choices other than bankruptcy. This is a dubious goal because of the limited non-bankruptcy alternatives that are available to financially distressed consumers.

As measured by the numbers of consumers that are choosing agency-offered debt management plans (DMPs), the results are dismal. The agency directors we interviewed stated that they were placing very low percentages of bankruptcy counseling clients into debt management plans (DMPs). These reported rates ranged from lows of 0 or 1% up to a high of 4%.

The consumers interviewed for this report often described the briefings as interesting and helpful, but all reported that the briefings offered no legitimate alternative to bankruptcy.

Key Concerns with Counseling:

1. Some agencies provide advice about the appropriateness of bankruptcy, in conflict with government policy. Agencies are only supposed to make consumers aware of the opportunities in counseling.
2. In some cases, agencies provided legal advice in violation of government policy and regulation and possibly state lawyer licensing laws.
3. The report documents numerous instances of inaccurate information given about bankruptcy, particularly on agency web sites.

Lack of Effective Alternatives to Bankruptcy

Counseling briefings cannot be worthwhile as long as there is a lack of effective alternatives to offer consumers in financial distress. The report documents the problems with current bankruptcy alternatives, including:

- 1. Direct Negotiations with creditors are limited and often require high lump sums.**
- 2. Creditor-sponsored DMPs are useful only for some consumers and concessions have been reduced in recent years.**
- 3. Debt Settlement**

The main problems with debt settlement are, first, that the consumers targeted by debt settlement companies are generally the least likely to benefit. Second, very few consumers ever complete a debt settlement program. In the meantime, consumers in debt settlement programs continue to face collection efforts. Their debts also continue to grow as creditors pile on fees and interest accrues. Third, debt settlement fees are so high that the consumers do not end up saving much in the “reserve accounts.” There are also potential tax consequences if debts are written off.

The BAPCA has an important provision that requires debt settlement in certain circumstances. The debtor’s repayment offer must be made at least 60 days before the petition is filed and provide for payment of at least 60% of the amount of the debt. These are often called 60/60 plans. The problem is that agencies report they are not proposing these plans. Few creditors have stepped up in this area.

RECOMMENDATIONS TO IMPROVE COUNSELING BRIEFINGS

1. The EOUST Should Publicly Disclose Key Counseling Information to Clients and The Public

Although in practice many consumers will be referred to counselors through their attorneys, it is important for the EOUST to provide information that allows consumers the ability to shop around and compare various agencies. This will also help creditors, consumer organizations, Congress, and other outside observers assess the practices and performance of these agencies.

2. Agencies Must Discuss and Offer 60/60 Plans.

3. Agencies and Creditors Should Work Together to Develop Flexible Work-Out Plans.

4. The EOUST Should Monitor Information Provided by Agencies to Search for Inaccuracies and Institute a Penalty System for Persistent Offenders.

There are various ways to accomplish this goal. One possibility is for the Executive Office of the U.S. Trustee (EOUST) to provide standardized information about bankruptcy for all agencies to use. The EOUST would be responsible for updating this information.

5. Enforce Consumer Protections Laws Against Deceptive and Abusive Debt Settlement and Credit Counseling Companies.

Effectiveness of Education Courses

There have been anecdotal reports that the pre-discharge educational courses are more effective than the counseling briefings, but little in-depth evaluation. Further, there is a dearth of reliable information about whether financial education affects behavior and little evidence that consumers file bankruptcy because of lack of financial knowledge.

The report highlights the following concerns:

1. **The courses are not targeted to bankruptcy filers.** This does not necessarily violate current policy or regulations, but it does violate basic common sense. Consumers should be addressed as a unique audience looking not only for information about how to recover financially, but also about how to handle the immediate aftermath and consequences of bankruptcy.
2. **Many of the courses and accompanying materials contain erroneous and inconsistent information**
3. **Many courses omit important information.**
4. **There are serious variations in philosophy and tone, including differences in attitudes toward debt. These biases are not disclosed ahead of time.**
5. **There is considerable variation in the level of rigor among the courses.**

Recommendations to Improve Education Courses

1. Require Effective Evaluation

The EOUST should carefully monitor the effectiveness of all of the courses that are being offered and to base the final rule it issues on these course largely on a thorough analysis of debtor education pilot projects that are mandated by the Act.

2. Require that the courses include certain topics specific to the needs of consumers coming out of bankruptcy.

In order to ensure agencies are giving out accurate information, the EOUST should develop and update a standardized list of topics to cover and provide the information to agencies. This information should include rights regarding credit reporting of bankruptcy discharges, rights with respect to reaffirmation, and other issues that are most pressing after bankruptcy filing.

3. The EOUST should develop and require use of standardized information explaining the bankruptcy process.

The EOUST should develop this information and make it available on the EOUST web site. This will alleviate concerns about inaccurate information and will ensure that the information is general and does not cross the line into legal advice.

4. The EOUST should monitor agency web sites and materials for inaccurate information and assess penalties against those with repeated violations.

5. Agencies Must Disclose Affiliations and Biases

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INTRODUCTION

The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) created a number of new hurdles for consumers seeking bankruptcy relief. These include requirements that consumers receive counseling from a non-profit credit counseling agency within 180 days of filing for bankruptcy and complete a financial education course prior to receiving a final bankruptcy discharge.

The counseling and education mandates have been among the most controversial changes in the bankruptcy law. There is heated rhetoric on both sides with respect to the purpose and value of these requirements. This report goes beyond the rhetoric and analyzes how the counseling and education provisions are being implemented, whether the process is fair and accessible, and most important, whether the programs are providing benefits for consumers.

The first section of the report centers on the procedural issues associated with counseling and education, including accessibility and affordability. The remaining sections focus on the substance of the counseling briefings followed by a review of education courses.

The data collected for this report is from counseling and education providers in Massachusetts. However, since a majority of these providers offer services in multiple states, the conclusions have national implications.

METHODOLOGY

As of December 2006, the Executive Office for U.S. Trustees (EOUST) had approved fifteen pre-filing credit counseling providers and forty-five pre-discharge debt education providers for Massachusetts.¹ To gather information on each of these providers and their courses, we visited each provider's website, collecting data on the cost, availability, and delivery of each course. Specifically we looked for the cost of the service, instructions and provider-imposed requirements for obtaining a fee waiver, method of course delivery, hours of operation, languages provided, extra resources available on site, and any other

¹ Since December 2006, several new providers have been approved for both credit counseling and education. This report includes information only from providers approved as of December 2006. Throughout this report, the pre-filing counseling services are referred to as "briefings" and the pre-discharge services as "educational courses" or "education courses."

provider-specific information relevant to the courses. We also collected general information on the layout of each site and examined selected consumer educational resources provided on the site for informational errors.

After these initial website visits, we called all of the providers and asked them to outline their courses and provide information on their fee policies and payment methods. We requested any information not readily accessible on their website. We asked each provider if we could view the internet portion and any written material for the approved courses and briefings.

We spoke directly with 36 counseling and education providers. We collected affordability and accessibility data from all of these providers. We were also granted access to review seven credit counseling briefings and fifteen debt education courses.² In addition to calling for information and material requests, we randomly selected and called five credit counseling agencies and five education providers posing as consumers to ascertain cost and fee waiver policies.

Finally we worked with Harvard Law School's Hale and Dorr Legal Services Center to gather information from clients who had gone through the counseling and education courses. We created a short survey that was administered over the phone by Hale and Dorr advocates to nine chapter 7 bankruptcy clients.

All discussions of the approved courses are based on the data we collected, which remains on file with the authors of the report.

RULES AND REQUIREMENTS FOR COUNSELING AND EDUCATION

The United States Trustee is given authority under BAPCPA to approve the counseling agencies and financial education courses.³ The Executive Office of the U.S. Trustee (EOUST) has published instructions, application forms, and interim rules governing both counseling and education. The EOUST has also issued answers to specific questions and posted those answers on the EOUST web site.

With respect to counseling, the EOUST requires that credit counseling agencies be non-profit and have an independent board of directors, board of trustees, or other governing body, the majority of which are i) not employed by such Agency and ii) will not directly or indirectly benefit financially from the outcome of the counseling services provided by such Agency. Agencies must have provided counseling for the past two years or currently employ in each office location that serves clients at least one office supervisor with experience and background in providing credit counseling for no less than two of the last three years. All agencies must also be in compliance with all applicable laws and regulations of the United States and each state in which the agency conducts services.

² Course information included both online and paper-based materials.

³ 11 U.S.C. § 111(b). The EOUST published an interim final rule at 71 Fed. Reg. 38076 (July 5, 2006).

Any fees charged must be reasonable.⁴ The agency must also provide services without regard to a client's ability to pay and not withhold a certificate of counseling because of a client's inability to pay.⁵

The EOUST has also set rules with respect to administration of debt management plans (DMPs) for those agencies that offer these plans and other requirements with respect to qualifications of counselors and required disclosures.

There are similar rules for education providers. These providers, however, need not be non-profit. They are required to employ trained teachers with adequate experience and training in providing effective instruction and services. The EOUST has also developed a list of the minimum topics that must be covered in the courses.

The only absolute exception to the counseling and education requirements is if the debtor is incapacitated, disabled or on active military duty in a combat zone.⁶ A debtor may seek to defer the requirement until after the petition is filed, but only if the debtor must file immediately due to exigent circumstances and the debtor requested a briefing from an approved agency and was not able to obtain it within five days of the request.⁷ To date, courts have been very restrictive in interpreting these provisions.⁸

EVALUATING THE COUNSELING AND EDUCATION REQUIREMENTS

Most of the reports that have evaluated the programs to date have focused on the counseling rather than the education requirement. One consistently reported result is that nearly all consumers seeking pre-filing counseling are in very serious financial distress and very few consumers are choosing options other than bankruptcy. One agency director told us that virtually none of the pre-filing briefing consumers qualified for anything other than bankruptcy protection.⁹

Steve Bartlett, President of the Financial Services Roundtable has stated that, "Early on, most of the pre-bankruptcy counseling is not especially useful because it's only occurring for people right before they go into bankruptcy...The flaw is that bankruptcy counseling is only occurring at the end of the process when you have little option. That's not what we wanted or the agencies wanted."¹⁰

Some believe that these trends are related to the relatively low bankruptcy filing numbers since the passage of BAPCPA and that the numbers of consumers placed in DMPs

⁴ Interim Final Rule § 58.15(e).

⁵ Id.

⁶ 11 U.S.C. § 109(h)(4).

⁷ 11 U.S.C. § 109(h)(3)(A).

⁸ See, e.g., *In re Dixon*, 338 B.R. 383 (8th Cir.BAP 2006).

⁹ See also Caroline E. Mayer, Washington Post, "Bankruptcy Counseling Law Doesn't Deter Filings", January 17, 2006 at A01, (Agencies say that most debtors are in such deep financial trouble that they cannot qualify for a debt management plan).

¹⁰ Sheryl Jean, Key Aspects of Bankruptcy Law Not Working Out as Envisioned", Billings Gazette, July 16, 2006.

will increase as the overall bankruptcy numbers increase. However, as discussed in detail below, even if the bankruptcy numbers grow, consumers will likely choose other options only if those options are effective. The most serious problem is that there are few, if any, effective alternatives to bankruptcy for consumers with serious financial problems.

The education mandate has generally received higher reviews in the media and from agency directors. However, there has been little objective analysis of these courses to date. The EOUST is required to establish and study a pilot education program, but results of this study are not yet available.¹¹ The Government Accountability Office (GAO) noted that the pilot was still being evaluated as of March 2007.¹²

The agency directors we interviewed seemed to think that the education would prove to be most worthwhile in the future for consumers who end up in financial trouble again. Others simply told us that education “certainly can’t hurt.” Whether this is sufficient to warrant the investment of money, time and energy that the education mandate requires is discussed further below.

The National Foundation for Credit Counseling (NFCC) has also reported that its member agencies are suffering financial problems due to the unfunded counseling and education mandate. According to the NFCC, some member agencies have been diverting resources from other counseling services and financial education programs to fulfill bankruptcy counseling obligations.¹³ However, the majority of directors we spoke with said that they have not had to cut any other services in order to meet the demand for bankruptcy counseling and education.

RESULTS OF NATIONAL CONSUMER LAW CENTER INVESTIGATION

This first section of the report examines how well the process is working with respect to accessibility and affordability. Both counseling briefings and education courses are discussed. The following sections focus on the substance of the counseling and education sessions.

¹¹ §105 of BAPCPA.

¹² U.S. Government Accountability Office, “Bankruptcy Reform: Value of Credit Counseling Requirement Is Not Clear” GAO-07-203 at 27 (April 2007). (Hereafter “GAO Report.”). According to the GAO, the judicial districts in which the curriculum was tested were the Northern District of Illinois, District of New Jersey, Northern District of Texas, Eastern District of Virginia, Western District of Virginia, and Eastern District of Washington.

¹³ National Foundation for Credit Counseling, “Meeting the Mandate, Consumer Counseling and Education under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), A Six Month Progress Report” at 9-10 (April 19, 2006). Available at: <http://www.nfcc.org/Newsroom/NFCC%206%20month%20report%20FINAL.pdf>.

COUNSELING AND EDUCATION

Accessibility

1. Technology

In order to take the required counseling and education courses, filers must be able to locate and access information about these courses. The EOUST website has a listing of all approved courses by state that includes the web address, street address, and phone number for the providers.¹⁴ Perhaps the greatest initial roadblock to accessing this information is lacking the necessary technology. Most of the information concerning the counseling and education requirements is located online. In fact, when we visited the bankruptcy court clerk for the District of Massachusetts and requested material on filing for bankruptcy, we were directed to the EOUST's website. While a few paper handouts describing the process were available, only one mentioned the counseling and education requirement and no list of providers was immediately available in hard copy. The GAO also emphasized that *pro se* debtors might have problems accessing information about the counseling and education requirements.¹⁵

Requiring access to the Internet to get information is a problem because there is still a significant percentage of Americans who do not use or do not have access to the Internet. Although access has continued to expand, according to a 2005 study conducted by the Pew Internet and American Life Project, "Thirty-two percent of American adults, or about 65 million people, do not use the internet and not always by choice."¹⁶ Demographic groups less likely to use or have access to the internet include Americans 65 years or older, African-Americans, and those who have not graduated from high school.¹⁷ In addition to the digital divide between internet users and those who do not use the web, only slightly more than half of Americans who have home internet access (53%) have the high-speed internet required by many of the courses.¹⁸

Several courses we reviewed have specific software and system requirements, including updated operating systems and the use of high-speed internet (needed to run video in the course) that filers may not have. Additionally, websites and courses for multiple providers require pop-ups to be enabled--a function that many internet browsers protect against. An individual who is not skilled with computer usage may find it difficult to change the settings to allow the pop-ups used by the course.

For those who do have the software capability and know-how, some providers have posted a wealth of bankruptcy and financial management resources on their websites including budget calculators, planners, and glossaries. Some of the agencies also have online

¹⁴ See http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm.

¹⁵ GAO Report at 37.

¹⁶ Fox, Susannah, Digital Divisions, Pew Internet and American Life Project, 2, available at http://www.pewinternet.org/pdfs/PIP_Digital_Divisions_Oct_5_2005.pdf, Oct 5, 2005.

¹⁷ Id. at 6-7

¹⁸ Id at 10-12.

interactive chat features that allow visitors to the site to speak with a counselor about any problems or questions online without having to wait for an available phone counselor.

Table 1: Delivery Method of MA Credit Counseling and Debt Education (by percent)

	Credit Counseling	Debt Education
Internet Required*	28.6 %	50.0%
Telephone Only	14.3	13.6
Internet or Phone	50.0	34.1
In Person Only	7.1	2.3

*This category includes courses that are entirely on-line and courses that are mostly on-line with a follow-up telephone component.

In Massachusetts, nearly 1 in 3 counseling providers (28.6%) require the internet for their briefing. The internet component generally contains basic information about proper budgeting, money management, and potential alternatives to bankruptcy. These agencies often require consumers to fill in relatively detailed budget matrices that are later analyzed during a follow-up telephone component.

Half of all debt education courses require online capabilities. In addition, for a few companies who offer both internet and phone briefings and education courses, consumers are charged up to \$20 more for the telephone session.

Nationally, the GAO found that between July and October 2006, 50% of pre-discharge education sessions were conducted by Internet, 29% by telephone, and 21% in-person.¹⁹

In our limited survey of consumers in Massachusetts, over half of respondents (55%) completed the credit counseling online, with about 1 in 3 opting for telephone counseling, and 1 individual choosing in-person counseling. Two respondents had some difficulty with the counseling (both completed online sessions), but the vast majority reported no problems. With respect to education courses, almost 9 in 10 consumers (89%) chose to pursue education online, one individual opted for in-person, and no respondents took the debt education course over the telephone. Two-thirds of the respondents found the course to be very easy to take, while the rest expressed some difficulty.

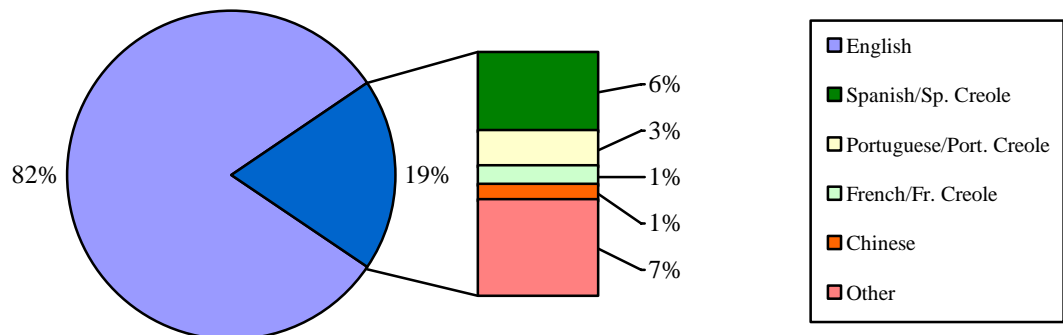
Whether taken by internet, telephone, or in person, all the sessions require consumers to evaluate the content and delivery of the course before receiving their

¹⁹ GAO Report at 27.

certificate of completion. This requirement supplies a mechanism for providers to collect and analyze opinions about their course offerings to help improve them for future use. Several of the providers we spoke with said they had already made adjustments to their courses based on this feedback.

2. Language Barriers

Figure 1: Primary Language Spoken in Massachusetts



According to the 2000 U.S. Census, almost 1 in 5 Massachusetts residents (18.7%) spoke a language other than English at home.²⁰ Nearly eight percent of Massachusetts residents said they spoke English “Less than Very Well.”²¹ The most frequently spoken languages in Massachusetts other than English were Spanish/Spanish Creole, Portuguese/Portuguese Creole, French/French Creole, and Chinese.²²

A key problem for limited English speakers is that information about services in other languages is scattered in different sections of the various web sites. Information about Spanish services is most accessible. The list of approved providers on the EOUST web site indicates whether the provider offers Spanish language services. According to information available to consumers on either the EOUST website or individual agency websites, approximately 2 in 3 of the approved credit counseling providers in Massachusetts (64.3%) offer their briefings in Spanish. Most of these providers also have parallel Spanish websites. Of the approved debtor education providers, only 40% provide their course in Spanish (although several providers surveyed said they were hoping to hire bilingual counselors).

Although most of the agency web sites have detailed Spanish language sections, the U.S. Trustee Spanish website has no information about approved credit counselors and debt

²⁰ United States Census Bureau, “Language Use and English-Speaking Ability” (2003), 5, available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

²¹ Id.

²² United States Census Bureau, Language Spoken at Home: Geographic Location Massachusetts (2000), available at http://factfinder.census.gov/servlet/QTTable?_geo_id=04000US25&-qr_name=DEC_2000_SF3_U_QTP16&-ds_name=DEC_2000_SF3_U.

education providers.²³ In fact, the Spanish Trustee website has not been updated since passage of the 2005 Bankruptcy Act.²⁴

It is more difficult to obtain information about services in languages other than English and Spanish. A list of other languages is provided in a section of the EOUST web site that is separate from the list of approved providers. These listings are divided by language and then by state. For the most part, consumers looking for other services are directed to one large agency that utilizes a translator service. It is likely that other agencies have more language offerings, but a number of agency directors told us that they avoided publicizing this capability for fear of “opening the floodgates.”

The GAO reported anecdotal evidence that limited English speaking populations may face challenges accessing counseling and education. It reported that the EOUST is undertaking steps to make it easier to identify providers that offer translation services and services in specific foreign languages.²⁵ It found that two large providers can conduct sessions in at least 15 languages and using a translation service contractor, can provide sessions in about 150 languages.

The GAO also emphasized that the lack of translations of written materials may be an even greater problem. Our interviews affirmed this issue. Many agency directors told us that they felt reluctant to offer more phone or Internet services in other languages until they were clear about the extent of their obligations to provide written translations.

In response to a question about language access, the EOUST has stated that agencies should make every reasonable effort to accommodate clients with limited or no proficiency in English. Such accommodation may include providing services in the client’s language, permitting community volunteers, friends or family to attend and provide translation, or referring to an agency that offers services in that language.²⁶ The instructions do not specify whether agencies must provide written translations.

These instructions are less than what is mandated in Executive Order 13166 (“Improving Access to Services for Persons with Limited English Proficiency,” August 11, 2000) and the Department of Justice’s general language plan. The Executive Order requires federal agencies to develop and implement a system by which limited English speakers can meaningfully access services without unduly burdening the fundamental mission of the agency.

3. Access for Disabled Consumers

Some of the internet briefings and courses we reviewed contain automatic audio clips of the written material to assist visually impaired consumers. However, these sessions generally did not repeat all the written material contained on each web page. In addition, the

²³ See http://www.usdoj.gov/spanish/ustp_spanish.html.

²⁴ Last updated April 19, 2001 according to website available at

http://www.usdoj.gov/ust/r15/Forms/Bankruptcy_Info_Sheet_Spanish.htm.

²⁵ GAO Report at 5.

²⁶ See http://www.usdoj.gov/ust/eo/bapcpa/ccdc/cc_faqs.htm#acc_issue1; “Frequently asked Questions: Access.”

courses did not provide an interactive method for filling in the online budget analyses for visually impaired consumers, making the presence of an attorney or other party necessary to complete this portion.

Numerous providers interviewed for this report indicated that they were flexible in assisting consumers who were unable to read or did not have easy access to the Internet. For those consumers with visual impairments or without access to or comfort with necessary technology, approximately 3 in 5 of the Massachusetts approved credit counseling providers (64.3%) offer courses solely over the telephone. Almost half of the debt education providers offer a telephone session (47.7%). Many of the telephone courses for the debt education are conducted as conference calls with multiple parties attending the same phone session.

The GAO's national report also mentioned that certain populations may experience challenges in accessing counseling and education sessions.²⁷ The GAO wrote that individuals with limited literacy skills may have problems as well as disabled, elderly, or incarcerated debtors. However, the GAO could not find any data on the nature and extent of these difficulties.

Providers generally offer conference calls at a variety of times including evening and weekends appointments to accommodate different needs. Periods are set aside during the calls for the participants to ask questions. Some conference call systems allow callers to hear the questions posed by all other participants, while some systems allow callers only to hear the counselor. One provider in Massachusetts offers only in-person counseling sessions. A larger agency offers in-person counseling, in addition to their internet and phone courses, at several locations across the state. This provides an alternative for consumers who prefer face to face interaction.

Affordability

1. Are Fees Reasonable?

The other major factor determining a consumer's ability to complete the required sessions is the affordability of the courses. Providers must "charge a reasonable fee, and provide services without regard to ability to pay the fee."²⁸ However, the EOUST has not set a dollar limit for reasonable fees. The agency has stated that, based on information provided by the industry, counseling services generally should be available for a fee ranging from free to \$50.

The EOUST requires agencies to advise the client of the fee schedule before services are provided and inform the client that services are available for free or at a reduced rate. Agencies must issue certificates to any client who completes counseling regardless of whether a client agrees to participate in a DMP and without regard to ability to pay.

²⁷ GAO Report at 36.

²⁸ Interim Final Rule §58.15(e).

Table 2: Cost of MA Credit Counseling and Debt Education

	Credit Counseling	Debt Education
Average Cost	\$47	\$41
Most Expensive	\$55	\$100
Least Expensive	\$30	\$16.95
Median	\$50	\$50

Our survey of Massachusetts providers found that the required fee for counseling for a single filer does not vary much, with 5 in 6 providers charging \$50 and none exceeding \$55. The lowest fee charged is \$30 for a single filer. Some agencies charge extra for joint petitioners with the maximum total cost charged for both filers at \$75. However, the median cost for joint petitioners is still \$50. The National Foundation for Credit Counseling (NFCC) has reported that their agencies received an average fee from clients for all types of counseling delivery of \$38.47.²⁹

The cost varies much more dramatically for approved debt education providers with the least expensive course costing \$16.95 per person and the most expensive at \$100. The average course cost is just over \$41 with the median course costing \$45. For companies with explicit provisions for joint filers, the average course costs just under \$55 with the cheapest costing \$33.90 and the most expensive costing \$80.

2. Fee Waivers

Table 3: Fee Waiver Policy for MA Credit Counseling and Debt Education (by percent)

	Credit Counseling	Debt Education
Income <150% Federal Poverty Level	30.8%	25.9
Pro Bono Legal Services	23.1	11.1
Income from SSI or Disability	7.7	7.4
Case by Case or Combination of Above Factors	38.5	55.6

The EOUST has not provided an industry standard for fee waivers. Not surprisingly, we found that there was considerable variation in fee waiver policies among the agencies and education providers surveyed. For credit counseling agencies, policies on obtaining a fee waiver vary, including exemptions for individuals whose household income is

²⁹ National Foundation for Credit Counseling, “Consumer Counseling and Education Under BAPCPA: Year One Report” at 10 (Oct. 16, 2006).

less than 150% of the federal poverty level (30.8%), those with pro bono legal representation (23.1%), those who receive all or part of their income from social security or disability insurance (7.7%), and those who are deemed eligible after individual budget analyses based on some combination of these requirements (38.5%).

Fee waivers are offered for debt education courses under similar provisions as those granted for credit counseling sessions. The most frequently utilized individual criteria for exemption for debt education are if the filer is receiving pro bono legal services (11.1%) and if the filer's household income is below 150% of the federal poverty level (25.9%). Over half of debt education providers issue waivers on a case-by-case basis considering a combination of several factors (55.6%).

Some providers surveyed claimed that because of the small volume of requests, they generally grant waivers to all consumers that request them. The NFCC reports that its agencies waived fees in 16% of pre-filing sessions and 13% of pre-discharge education classes.³⁰

The various agencies surveyed differ greatly in the process by which they approve fee waiver requests. Several, particularly those that utilize a budgetary analysis to verify if the consumer is eligible for a waiver, make the determination during the course of the telephone counseling session or during phone registration or phone request. These systems greatly lessen any paperwork burden that might fall on petitioners. Others require petitioners to submit written letters explaining why they require the waivers and supply documents including past tax filings, pay stubs, and bank records. Some of these agencies request that the petitioner send by facsimile a copy of completed Schedules I and J, which are the Official Forms filed in bankruptcy cases that list the debtor's current income and expenses. If the waiver is based on the petitioner obtaining pro bono legal services, agencies often require a letter from an attorney confirming the arrangement. Still others deal directly with the attorneys to determine if the petitioner is eligible for a waiver.

The GAO noted this variation in industry practice, finding that the three largest providers ranged from 4% to 26% of clients receiving fee waivers for credit counseling briefings and from 6% to 34% for debtor education courses.³¹ The GAO also noted that the three largest all used different criteria. Providers generally also said that they allowed counselors to use their discretion to waive fees in additional circumstances as well.

Due to lack of standardization, it is difficult for a consumer to assess whether she qualifies for a waiver. Contradictory policies have also emerged. For example, one agency's policy on fee waivers is puzzling given the apparent purpose of the statutory mandate. Its website generally describes waivers as available for consumers who are receiving free legal services or are receiving disability income. However, the website's payment instructions specify that the disability waiver is available only for consumers receiving Social Security Disability Income (SSDI) payments. Unlike the Supplemental Security Income (SSI)

³⁰ National Foundation for Credit Counseling, "Consumer Counseling and Education Under BAPCPA", Year One Report at 3 (October 16, 2006), available at: http://www.nfcc.org/NFCC_Year_One_Bankruptcy_Report2.pdf.

³¹ GAO at 4.

program, which provides limited benefits based on financial need to disabled people who have little or no other income, the SSDI program is not needs-based and provides payments based on a consumer’s contributions into the Social Security system. If fee waivers are to be provided to those consumers with the least ability to pay, then certainly the agency’s disability exemption should be provided to those receiving SSI.

Another key problem is that information about waivers is not generally readily available.

Table 4: Massachusetts Agencies Providing Fee and Fee Waiver Information on Website (by percent)

	Credit Counseling	Debt Education
Fee Information	87%	84
Fee Waiver Information	67	56

Almost 90% of MA credit counseling providers had information about the cost of their course available on their website. A similar number of debt education providers had fee information readily available (84%). However, the number of credit counseling providers with fee waiver information accessible on their website dropped to only two-thirds (67%), and for debt education providers, was only slightly more than half (56%).

Of those providers that list fee and waiver information on their website, several have made the information very difficult to find—listing it in disclosures and other hidden sections. In a number of instances providers had separate consumer and attorney portals on their websites and information about fees and waivers was only listed in the attorney section. Consumers looking for information about fees and waiver policies, especially those filing *pro se*, may not think to look in this section.

Another problem is that in many cases, these waivers are not triggered automatically but only once requested by the client or attorney. This is particularly problematic for those debtors that are unrepresented by attorneys.

One agency was unique in providing fee waivers to consumers who are facing an imminent loss of property from certain collection actions, such as a home foreclosure, wage garnishment, auto repossession or utility shutoff. This agency reported that if the consumer indicates in response to counselor questions that such actions are pending, the fee waiver is automatically provided.

The EOUST is now requiring agencies to provide information about the number of certificates issued at no cost, numbers issued at reduced cost, and those at regular cost. Assuming that this information is made publicly available, this data will be tremendously helpful in getting a more complete picture of agency fee waiver policies.

For those consumers who pay for the course, most of the providers surveyed accepted a variety of payment methods. All surveyed accept money order and most accept checks, credit cards, and debit cards. Some agencies also allow (for those clients with representation) the attorney to pay the agency directly and presumably the client is billed by the attorney. A small number of internet course providers utilize PayPal Inc., an electronic money transmitting system by which consumers pay PayPal using debit card, credit card, or bank account and the money is transferred to the agency. An email address is required to utilize this service.

COUNSELING AND EDUCATION

RECOMMENDATIONS TO IMPROVE ACCESSIBILITY AND AFFORDABILITY

1. Ensure the availability of in-person services.

Although it appears that most consumers choose Internet or phone delivery, it is critical to ensure that consumers continue to have a choice of in-person counseling as well.

2. Expand outreach to consumers who cannot use the Internet or do not have access to the Internet.

Information about counseling and education must be available in other formats, particularly for those consumers seeking information in-person at the courts. Consumers without access to the Internet and *pro se* debtors are most likely to need additional outreach. This is especially important at the courts where unrepresented debtors often go to find information.

3. Expand services for limited English speakers.

Limited English proficiency consumers must have access to services in their languages. To help promote language accessibility, the EOUST should at a minimum clarify the extent to which an agency providing non-English language services must also supply translations of written materials. The EOUST should expedite this process by developing translations of key documents and making those documents available for agency use. If services are not available to a limited English speaker, the individual should be eligible for a waiver from the requirements.

4. Fee Issues

a. Establish Uniform Fee Limits and Fair Fee Reduction Guidelines for Counseling

It is critical for the EOUST to require a standardized minimum fee waiver policy. The GAO also made this recommendation, calling on the EOUST to clarify the Bankruptcy Act's requirement that the required counseling and education be

provided regardless of a client's ability to pay by providing formal guidance on what constitutes "ability to pay."³²

Some agencies argue that setting a minimum standard will unleash a "race to the bottom" among agencies. They assert that agencies will only offer the minimum. However, this is not inevitable as all agencies will still have the discretion to develop and administer less restrictive policies. Consumers, on the other hand, will benefit by knowing ahead of time of the existence of a policy and the criteria.

A number of agency directors also pointed to the EOUST statement that an evaluation of "ability to pay" must include consideration of the client's personal financial situation as reflected in the budget analysis and must be determined on a case-by-case basis.³³ Some agencies assert that this statement prohibits them from setting blanket fee waiver policies and requires them to grant waivers only on a case-by-case basis. The agencies making this argument do not, however, take into account the clear language of the statute that services must be provided "without regard to ability to pay." The EOUST should clarify this issue by developing a standard fee waiver policy.

b. Mandate an expedited process for obtaining a reduction or waiver for those in need.

While proof of income or other documentation may be reasonable to require, these requests should be waived in emergency cases, such as consumers facing tight foreclosure deadlines. In such emergency situations, every effort should be made to make an immediate decision on the waiver request based on the consumer's self-certification of income or other factors. These consumers can later submit supporting documentation if necessary.

c. Require that information about fee schedules and waivers be provided to debtors upon first contact, not just "before services are provided."

The EOUST should require that credit counseling agencies disclose fee and waiver information in a conspicuous manner when promoting or providing information to the public about its bankruptcy counseling services. This information should also be clearly available on agency web sites.

³² GAO at 5.

³³ See EOUST website (http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_faqs.htm) in Frequently Asked Questions section:

Q: What determines an individual's "ability to pay"?

A: Ability to pay must be determined on a case-by-case basis. One factor that must be considered is the client's personal financial situation as reflected in the budget analysis that is completed pursuant to the statute.

SPOTLIGHT ON COUNSELING BRIEFINGS: CONTENT AND EFFECTIVENESS

INTRODUCTION

The new mandates began during a time of considerable turmoil in the credit counseling industry. The industry has been under fire from government and state regulators, consumer groups, and others for serious abuses. One of the most serious abuses is that some credit counseling agencies, which are almost entirely non-profit, operate as for-profit companies in disguise, selling debt management plans rather than providing holistic counseling and education.

Since 2004, the IRS has been auditing 63 credit counseling agencies, representing more than half of the revenue in the industry. To date, the audits of 41 organizations, representing more than 40 percent of the revenue in the industry, have been completed. All of the completed audits have resulted in revocation, proposed revocation or other termination of tax-exempt status.³⁴

There appears to be some sentiment that the EOUST approval process is a new stamp of credibility for the troubled industry.³⁵ This is problematic for a number of reasons. First, the EOUST is evaluating agencies based only on the specific criteria required by the bankruptcy code. It is by no means a general endorsement of quality. Second, the extent of EOUST follow-up and enforcement activity is unclear. The GAO found that few concerns have been raised about the competence of the approved providers.³⁶ This is encouraging. However, according to the GAO, the tax-exempt status of four providers was being examined by the I.R.S.

According to the GAO, the Trustee program as of October 2006 had rejected 96 applications to provide counseling or education services. In addition, 123 applications were withdrawn before being approved or rejected. In total, 64% of the applications had been approved, 32% either rejected or withdrawn, and 4% were still being reviewed. According to the GAO, the Trustee is developing procedures for conducting audits of selected providers that have been approved. These “Quality Service Reviews” are expected to include on-site reviews.³⁷

³⁴ Press Release, Internal Revenue Service, IRS Takes New Steps on Credit Counseling Groups Following Widespread Abuse, IR-2006-80 (May 15, 2006), *available at* <http://www.irs.gov/newsroom/article/0,,id=156996,00.html>.

³⁵ See Andrea Coombes, MarketWatch, “A Safer credit-counseling world?”, marketwatch.com, Jan. 10, 2007.

³⁶ GAO Report at 3.

³⁷ GAO Report at 14.

SUBSTANCE OF BRIEFINGS

Counseling agencies are required to provide, at a minimum, adequate briefings, budget analysis and credit counseling services to clients. The services must include an outline of available counseling opportunities to resolve a client's credit problems, an analysis of the client's current financial condition, discussion of the factors that caused the financial condition, and assistance in developing a plan to respond to the client/s problems without incurring negative amortization of debt. The average length is 60-90 minutes.

Most of the information provided in the briefings we viewed can be grouped into one of four categories: general financial information, money management and budgeting, discussion of credit and credit reporting, and alternatives to bankruptcy. Each course provides at least a basic description of chapter 7 and chapter 13 bankruptcies and the benefits and limitations of each.

Money management tips and budgeting usually make up the most substantial portion of the credit counseling session. The briefings emphasize the need to create a detailed budget, and generally supply the tools to do so. For paper-based materials, extensive charts are provided to detail both weekly and annual spending on a variety of categories and subcategories including housing, transportation, food, personal necessities, and entertainment. Emphasis is placed on tracking expenditures as a method of cutting down on expenses. These budget sections were generally informative and thorough.

For on-line briefings, consumers are asked to enter their spending information into blank fields which are then analyzed and used, in many cases, in other portions of the course. One particularly descriptive briefing provides the consumer with budget analysis broken down categorically. Based on a generic ideal expenditure scheme, the course takes the spending amounts entered by consumers and compares them to the ideal spending amount based on a consumer's income. The briefing then provides a list of major expenses within each category.

After discussions of budgeting, the next largest substantive area presented in the briefings is usually a description of bankruptcy alternatives. The final substantive area discussed by most of the briefings is credit scoring and the use of credit by consumers.

KEY CONCERNS WITH COUNSELING BRIEFINGS

1. Legal Advice?

A few agencies provided advice about the appropriateness of bankruptcy for a particular consumer. This is in conflict with EOUST statements that agencies should not be advising consumers in any way whether bankruptcy is an appropriate choice. The EOUST has been clear that this would constitute prohibited legal advice.³⁸

³⁸ U.S. Department of Justice, Executive Office for United States Trustees, "Instructions for Application for Approval as a Non-Profit Budget and Credit Counseling Agency," April 2006, available at http://www.usdoj.gov/ust/eo/bapcpa/ccde/docs/CC_Application_Instructions.pdf.

There is a good reason why there is no requirement in the Act that agencies provide consumers with substantive advice about whether or not to file bankruptcy. For one thing, agencies that do so might violate state laws against practicing law without a license. For another, most counselors do not have the knowledge or objectivity to offer unbiased advice about bankruptcy because the credit counseling industry has traditionally had an institutional bias against bankruptcy.

With respect to discussion of alternatives, the agencies are only supposed to make consumers aware of the opportunities in counseling.³⁹ The question is what this means in practice. Agencies that follow this prescription might provide relatively harmless, although not particularly useful, information. However, most agencies go beyond informing consumers that counseling is an option and discuss numerous other possible alternatives to bankruptcy.

Our survey of Massachusetts counselors found that three potential alternatives are universally discussed: Debt Management Plans (DMPs), settlement of older debts, and hardship negotiations. Other alternatives mentioned by courses are borrowing from friends and family, utilizing home equity, or simply returning property. The courses generally discuss the harms and benefits of each alternative and offer information about the potential effects on a consumer's credit rating.

A generic list of possible options might be helpful to consumers as long as that information was standardized and objective. However, some of the agencies we surveyed go further and attempt to recommend specific options for specific consumers. These are the clearest examples of potentially unlawful legal advice.

2. Inaccurate Information About Bankruptcy

An additional problem is the content of the advice, even if just general advice. While agencies should not be discouraged from providing general information about bankruptcy, it is important that the information be accurate. In some cases, the information was simply wrong, often because it had not been updated following changes in the law.⁴⁰ In other cases, abbreviated discussions of certain topics which overlook critical information were provided, proving that a little information can be dangerous.

The worst offender is an agency which has an extensive discussion of bankruptcy on its website. In truth, the information would have been quite helpful if it had been updated to reflect the BAPCPA law changes. Since BAPCPA has been in effect for over a year and a half, the failure to remove such patently inaccurate information is a serious concern. For example, this agency's website still describes motions that can be brought under § 707(b) for "substantial abuse," which was the standard before the BAPCPA amendments, and fails to include any discussion of the means test. It provides a detailed discussion of the disposable

³⁹ Interim Final Rule §58.15(f).

⁴⁰ One agency's website at least provided the following disclaimer: "This information is based on the bankruptcy law as of January 21, 2001." Of course, retaining bankruptcy information that is so potentially outdated, especially in light of the major amendments to the bankruptcy law in 2005, is a questionable practice.

income test for chapter 13 cases but does not mention that a different test is used for above-median income debtors based in part on the means test. Similarly, it contains a lengthy discussion about paying the bankruptcy filing fee in installments but no discussion of the new fee waiver provisions. Reaffirmation agreements are covered in detail but none of the new disclosure requirements and hardship approval provisions is mentioned.

Several of the agencies provide inaccurate information about the costs of filing bankruptcy because they have not updated their information to reflect filing fee increases. For example, these agencies continue to list the filing fee for a chapter 13 as \$189 even though it was increased to \$274 more than a year ago on April 6, 2006. One agency lists the chapter 7 filing fee as \$175 rather than the current fee of \$299. Another agency had inaccurate information about other dollar amounts, noting that the jurisdictional debt amounts listed for chapter 13 debtors are adjusted every year. In fact, these amounts are adjusted every three years.⁴¹

Several agencies surprisingly gave wrong information about the time deadline under the Bankruptcy Rules for filing the certificate of completion of the financial education course. For example, several agencies state that “you will have 60 days from your first meeting date with the creditors in court to complete your pre-discharge debtor education requirement.” However, the certification that the debtor has completed the course must be filed with the bankruptcy court within 45 days after the first date set for the meeting of creditors in a chapter 7 case, and no later than the last payment made by the debtor as required by the plan or the filing of a motion for hardship discharge in a chapter 13 case.⁴² Given the problems that some debtors have faced in completing the course in a timely manner and incurring additional costs to reopen their bankruptcy cases to file the course completion certificate so as to obtain a bankruptcy discharge, this is certainly one area where agencies should be diligent in providing accurate information.

3. Is Counseling Worthwhile?

It is difficult to measure whether consumers actually benefit from the briefings. There are few quantitative measures of counseling success. One possible measure is to assess whether the programs are meeting the goal expressed by BAPCPA proponents of informing consumers of choices other than bankruptcy, of which these consumers can actually take advantage. This is a dubious goal because of the limited non-bankruptcy alternatives that are available to financially distressed consumers, as discussed below. Yet, this was the purpose given by many proponents. For example, Senator Jeff Sessions of Alabama, who is often recognized as the author of the credit counseling and credit education requirements, stated during debate on the Senate Floor that the counseling mandate was necessary because, “In many instances, the deceptive and fraudulent advertising practices of bankruptcy mills lure consumers into bankruptcy unnecessarily. Debtors should know that there are many ways to get back on their feet financially—such as entering into voluntary repayment arrangements.”⁴³

⁴¹ 11 U.S.C. § 104(b).

⁴² Interim Bankruptcy Rule 1007 (c).

⁴³ Congressional Record, March 10, 2005, p. S2472.

By this measure, the results have been dismal so far. The agency directors we interviewed stated that they were placing very low percentages of bankruptcy counseling clients into debt management plans (DMPs). These reported rates ranged from lows of 0 or 1% up to a high of 4%. Some directors claimed that the consumers were advised by their attorneys not to consider other options.

The Government Accountability Office (GAO) affirmed these low percentages, finding in an April 2007 report that anecdotal evidence suggests that by the time most consumers receive the counseling, their financial situations are dire, leaving them with no viable alternative to bankruptcy.⁴⁴

Over time, there may be other ways to measure whether consumers that receive pre-bankruptcy counseling and education fare better after the bankruptcy process. In the meantime, we must rely mainly on anecdotal reports from consumers and their attorneys about the process.

We surveyed nine Boston area chapter 7 bankruptcy filers, all subject to the current credit counseling and debt education requirements, to obtain anecdotal evidence about their experiences with the consumer and education programs. A majority found the counseling to be interesting and helpful, though one respondent said the material was difficult to understand, if ultimately useful knowledge to have.

Most important, all of those surveyed felt the counselors could offer them no legitimate alternative to bankruptcy. One consumer expressed that she might have been saved from bankruptcy had she had the information and counseling sooner. In a 2006 article on BAPCPA in the *Baltimore Sun*, another filer echoed this sentiment explaining “It was stuff I already knew...I was past that point...everything was so far behind.”⁴⁵ Another client, in a 2006 interview with the *Billings Gazette*, affirmed that the counseling was unable to provide a better alternative to bankruptcy.⁴⁶ One of the respondents in our survey resented the counseling and felt it was simply a way for the organization providing it to make more money.

Similar trends were evident in response to education courses. All respondents cited the information as very helpful, though one noted it was a little difficult to understand at times. The general sense from respondents for both the credit counseling and debt education was that the information itself was worth knowing and ultimately helpful, but given far too late to be useful. These results are skewed to some extent because these consumers all had *pro bono* attorney representation and did not have to pay for the briefings or education courses.

The GAO highlighted this general concern in an April 2007 report. In fact, the title of the report is “Value of Credit Counseling Is not Clear.” To address this issue, the GAO

⁴⁴ GAO Report at 4.

⁴⁵ Ambrose, Eileen, “Bankruptcy Filings on rebound: Banks Backed Strict New Law to Reduce Number”, *The Baltimore Sun*, April 17, 2006.

⁴⁶ Jean, Sheryl, “Key Aspects of Bankruptcy Law Not Working Out as Envisioned,” *Billings Gazette*, July 16, 2006.

emphasized the need to track and monitor outcomes. Although tracking outcome information in general can be useful, it is unclear how the GAO expects outcome information to be interpreted. For example, would it be considered a success if an increasing percentage of consumers do not file bankruptcy after a briefing? Some proponents of the requirement might say so but such a situation would not be a success at all if these consumers continue to suffer financial distress.

Outside the bankruptcy context, other studies have attempted to quantify the long-term success of credit counseling by measuring consumer credit scores over time⁴⁷ However, given that consumers who enter bankruptcy often make extensive changes to their finances over a fairly short period of time, it would quite likely be very difficult to isolate the impact of a single one-hour counseling session. Regardless of the goals of the briefings, it seems clear that they should be determined to be ineffective unless consumers have reasonable alternatives to bankruptcy at the time they receive the services.

This is not a merely theoretical argument. Consumers are being forced to pay for these programs with high fees and with their valuable time. It is essential to make this investment of time and money worthwhile. If not, the requirements will serve mainly to punish financially distressed consumers and make it harder for them to access the bankruptcy system.

It is also important to emphasize that even effective alternatives to bankruptcy will not prevent financial distress as long as creditors are allowed to engage in abusive practices and push high rate credit on vulnerable consumers. The problem is not just that too much credit is available, but that the wrong kind of credit is aggressively pushed in the subprime mortgage, small loan, and credit card markets. Credit cards and credit in general offers great conveniences for many consumers. For those who use credit cards only for convenience, the advantages often outweigh the costs. For those who borrow, severe trouble and financial distress is often just one or two missed payments away.⁴⁸ It is essential to prohibit the most abusive practices of credit card companies and other creditors so that consumers can avoid the worst debt problems before they start.

LACK OF EFFECTIVE BANKRUPTCY ALTERNATIVES

The problems with errors and inconsistencies in discussing the alternatives are serious. However, the most important problem with the entire counseling program is that there are few, if any, good alternatives to present to consumers. The options that are universally discussed are reviewed below, including an analysis of the advantages and disadvantages of each.

⁴⁷ For preliminary research in this areas, see MICHAEL E. STATEN, JOHN M. BARRON, EVALUATING THE EFFECTIVENESS OF CREDIT COUNSELING 2 (May 31, 2006), *available at* http://www.consumerfed.org/pdfs/Credit_Counseling_Report061206.pdf.

⁴⁸ See generally National Consumer Law Center, *The Cost of Credit: Regulation, Preemption, and Industry Abuses* (3d ed. 2004 and Supp.).

1. Direct Negotiations with Creditors

All of the agencies in our survey recommended direct negotiations with creditors as one possibility for consumers seeking bankruptcy. The idea is that instead of pushing consumers harder when they start getting behind on credit cards, creditors could offer programs to help resuscitate financially distressed borrowers. This is what occurs fairly routinely in the mortgage industry.

It is difficult to get information about these types of work-out programs. For an August 2006 report, we called loss mitigation representatives at MBNA, HSBC, Capital One, Discover, J.P.Morgan/Chase, Citi, and American Express.⁴⁹ Only four of the representatives returned our calls. These four all refused to speak publicly about their company's credit card loss mitigation. They acknowledged that such information was not readily available on their web sites or elsewhere. They told us that they would discuss this information with customers only. Every situation is different, according to these representatives, and they claimed to have a wide array of programs to fit customer needs. One creditor specially said that they would not release the information because they did not wish to reveal trade secrets. Although all of the representatives said that they try to be flexible, those who would speak at all about the topic acknowledged that if the balance is too high, there is usually nothing they can do to help the consumer.

Based on interviews with clients and advocates and other reports, it does appear that creditors will offer settlements in some cases. The usual creditor line is that they are willing to work with people in financial difficulty because they want to retain their customers.⁵⁰

However, they usually require a fairly sizable lump sum. At least one agency acknowledges this in its on-line counseling session, stating that direct negotiations with creditors is a practical solution for consumers only if their debts are not growing by more than they can afford to pay, if creditors seem willing to work with consumers, and if the consumer thinks that financial problems are temporary. It is highly unlikely that the typical consumer on the verge of filing for bankruptcy would meet any of these conditions.

Many creditors claim that banking regulator safety and soundness guidelines prevent them from offering more flexible programs. In fact, federal regulators have developed guidelines that set some restrictions in order to preserve safety and soundness of the financial system. For example, the agencies have issued guidance that workout programs should generally strive to have borrowers repay credit card debt within 60 months.⁵¹ Some creditors have cited this guidance and apparent lack of flexibility as a key impediment to setting up work-outs with consumers.⁵²

⁴⁹ National Consumer Law Center, "The Life and Debt Cycle: Part Two: Finding Help for Older Consumers with Credit Card Debt" at

8 (September 2006), available at: http://www.nclc.org/news/content/rising_debt_part2.pdf

⁵⁰ See, e.g., Kathleen Day and Caroline E. Mayer, *Credit Card Penalties, Fees Bury Debtors*, WASHINGTON. POST, March 6, 2005 at A01.

⁵¹ More information about the federal guidelines can be found on the web site of the Federal Financial Institutions Examination Council, <http://www.ffiec.gov>.

⁵² See, e.g., Letter from American Bankers Association to Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of Thrift Supervision Re: Credit Card Lending-Account Management and Loss Allowance Guidance (September 23, 2002), available at <http://www.aba.com/NR/rdonlyres/DC65CE12-B1C7-11D4-AB4A-00508B95258D/26583/CreditCardLendingGuidancefinalcmt9230993.pdf>.

Yet, during extraordinary crises such as Hurricane Katrina, creditors have agreed to and have been encouraged to put aside these restrictions, at least for a time. In addition, one counseling agency director we interviewed explained that creditors in his experience are willing to interpret the guidelines flexibly when they believe it is in their interests.

2. Creditor-Sponsored Debt Management Plans

While creditor workouts in-house are kept very secretive, it is more commonly known that creditors offer debt management plan work-outs through credit counseling agencies. Through debt management plans (also called DMPs), consumers send the credit counseling agency a monthly payment, which the agency then distributes to creditors. In return, creditors usually agree to waive fees and reduce interest rates. The creditor will often agree to re-age the account as well.

All of the briefings we reviewed discuss DMPs as an option. A few discuss advantages and disadvantages, but not in great detail. It is possible that the agencies review these plans in greater depth over the phone with consumers.

DMPs, as currently constituted, are useful only for some consumers. Creditors call the shots when it comes to concessions offered through DMPs. They rarely reduce the amount of principal that consumers owe them, never as part of a DMP. Agencies really have only three concessions to offer that creditors will allow. First, creditors can “re-age” a credit card account of a consumer who enters a DMP. Re-aging is basically a way of erasing a delinquent history and starting over again by re-labeling a past due account as “current.”

Most creditors will re-age an account no more than twice in five years, the maximum allowed by federal financial service regulators. According to a number of credit counseling directors, most creditors will only re-age an account if it is more than sixty days delinquent. Some creditors will not re-age at all. Another concession that issuers generally grant is to waive or reduce fees, such as fees for late payments or for exceeding the allowable credit limit.

Many creditors will also reduce interest rates. These policies vary tremendously and in general, creditors have cut back on interest rate reductions in recent years. Some companies, such as MBNA (now Bank of America) and Discover, apply a wide range of concessions depending on the risk profile of the consumer. Bank of America tends to keep most rates below 10%, according to credit counseling industry counselors, while Discover generally starts at 10% and has a majority of its accounts at higher rates. Credit counselors also report that some creditors, such as Wells Fargo, may not reduce rates at all for variable accounts.

More recently, some creditors have established additional restrictions. According to interviews with agency directors, American Express (AmEx), for example, has a complex, four month enrollment process. The finance charge is not adjusted during the enrollment period and fees are not waived. Some accounts are not eligible for DMPs, the agencies say, but they claim that AmEx does not have written criteria. Further, the agencies say that they are not given reasons for refused proposals. According to the agencies, Am Ex and other creditors are too quick to drop consumers from DMP for missed payments.

Because of inconsistent and reduced concessions, it appears that only consumers with at least some disposable income left over each month are able to get out of debt

through DMPs. One director told us that the plans are increasingly inappropriate for consumers with severe financial troubles and certainly for those consumers on the brink of bankruptcy. He said that many of the new consumers entering DMPs at his agency have decent credit histories, but have been victims of creditor policies like universal default in which a creditor imposes huge increases in interest rates due to a problem the consumer may be having with another creditor or for other reasons such as a decrease in credit scores. The DMP allows these consumers to restore more reasonable interest rates and continue to repay. This is not the typical profile of a consumer seeking to file bankruptcy.

It would be easier to measure the effectiveness of these plans if the agencies were more up-front about the experiences of their clients entering DMPs. However, it is difficult to find this type of data.⁵³ In response to an inquiry, the President of the Association for Independent Consumer Credit Counseling Agencies (AICCCA) David Jones initially explained the problems with DMP retention statistics. He stated his belief that the focus should be on the effectiveness of counseling sessions and not on retention rates. According to Mr. Jones, “DMP retention rates are, at best, a moving target that has little meaning or value as a statistic when applied to service delivery.”⁵⁴

When further pressed, Jones stated that DMP retention rates have not changed much over the years. He said that most legitimate agencies are able to retain between 96 and 97% of their DMP portfolios every month, but the greatest attrition is in the first three months. On an annual basis, he said, the result is that between 36% and 48% of consumers drop off of DMP rolls. The reasons include: improved financial condition, desire to manage their own DMP activity, loss of resolve, disenchantment with the process, bankruptcy, poor concessions, and family-related issues.

Mr. Jones said that AICCCA has not done a study on the effect of reduced concessions on consumers considering a DMP. However, he claimed that retention rates were about the same when the creditor concessions were much better. The issue, according to Jones, is more closely connected to the number of consumers that can be well served with the DMP option in the first place than it is to overall retention rates.

The National Foundation for Credit Counseling (NFCC) told us that they no longer collect DMP retention information. Since 2004, they have only asked their members to provide them with information about the total number of DMP accounts they hold and the number of new DMP accounts added quarterly. In 2001, the National Foundation for Credit Counseling reported completion rates of about 26% with about 20% leaving for self-administration.⁵⁵

A 1999 Visa study found that one-third of those who dropped out of DMPs (34.3 percent) said they would have stayed on if creditors had waived or reduced additional interest or fees. Almost 42% of the clients who dropped off a DMP had either filed or were

⁵³ For preliminary research in this areas, see MICHAEL E. STATEN, JOHN M. BARRON, EVALUATING THE EFFECTIVENESS OF CREDIT COUNSELING 2 (May 31, 2006), *available at* http://www.consumerfed.org/pdfs/Credit_Counseling_Report061206.pdf.

⁵⁴ Information was provided by David Jones to NCLC by e-mail in February 2007.

⁵⁵ Statistics provided with permission from the National Foundation for Credit Counseling. Data is derived from the 2001 Member Activity Report, p. 25.

going to file bankruptcy. Nearly half of these consumers said they would have been able to stay out of court with improvements in the DMP process.⁵⁶

DMP retention rates are far from perfect statistical tools. Still, we believe it is important for consumers to get some sense of the likelihood of improved financial circumstances if they enter a DMP. The agencies' refusal to provide this information is troubling.

The EOUST is now requiring approved agencies to complete an activity report (Appendix E) which includes information about DMPs active at the start of the reporting period and DMPs active at the end of the reporting period. Agencies will also be required to provide information about DMPs closed during the reporting period with and without completed plans. It is critical that the EOUST provide this information to the public in an easily accessible format.

3. Debt Settlement

General

There is generally nothing wrong with consumers attempting to settle a debt if this makes sense for them. However, the alternative discussed by the counseling agencies is settlement through a debt settlement company. Negotiation and settlement services are different from debt management mainly because the debt settlement agencies do not send regular monthly payments to creditors. Instead these companies generally keep the consumer's funds in separate accounts, holding the money until the company believes it can settle debts for less than the full amount owed.

The main problems with debt settlement are, first, that the consumers targeted by debt settlement companies are generally the least likely to benefit. Second, very few consumers ever complete a debt settlement program. In the meantime, consumers in debt settlement programs continue to face collection efforts. Their debts also continue to grow as creditors pile on fees and interest accrues. Third, debt settlement fees are so high that the consumers do not end up saving much in the "reserve accounts." Finally, it is unclear what if any professional services most debt settlement companies offer to assist debtors.⁵⁷ There are also potential tax consequences if debts are written off.

It is especially difficult to get information about the performance of debt settlement companies. Over the past few years, NCLC has sent requests for information to two trade associations, The United States Organizations for Bankruptcy Alternatives (USOBA) and The Association of Settlement Companies (TASC). The former claimed that its members were reluctant to provide information and then sent very general responses to a list of questions. TASC has yet to respond to a questionnaire sent last year.

⁵⁶ "Credit Counseling Debt Management Plan Analysis", Visa U.S.A. Inc., January 1999. A representative sample of 481 consumers who dropped off a DMP was surveyed.

⁵⁷ See generally National Consumer Law Center, *An Investigation of Debt Settlement Companies: An Unsettling Business for Consumers* (March 2005), *available at* http://www.nclc.org/action_agenda/credit_counseling/content/DebtSettleFINALREPORT.pdf; *See also* In re Sinnot, 845 A. 2d 373 (Vt. 2004) (Describing the lack of actual work performed by a law firm offering debt settlement services).

TASC did, however, provide information to the Maryland Senate Finance Committee.⁵⁸ TASC claimed that their members' debt settlement plan completion rates vary from 35 to 55%, with the average at 50%. However, "completion" is defined as more than half of the enrolled debts to all of the enrolled debts having been settled before the client elects to leave to finish the remainder on their own. This is a very low standard for "completion."

TASC also claims that most clients contacting a debt settlement company have already stopped paying. Their internal standards prohibit a member from telling a consumer to stop paying. TASC acknowledges that some creditors treat debt settlement companies with hostility, but that others are starting to work with them.

In reporting amounts saved by clients, we have found that debt settlement companies tend to base the amount saved on the amount owed by clients when they first entered the plan. This simply ignores that fees and interest accrue during the plan. Without better information, it is difficult if not impossible to present a consumer with an honest assessment of the relative merits of bankruptcy, debt settlement, and debt management. Yet, nearly all of the briefings we reviewed mention for-profit debt settlement companies as providing viable alternatives to bankruptcy.

Mandated Debt Settlement

The BAPCPA has an important provision that requires debt settlement in certain circumstances. The debtor has the right to seek a reduction in an unsecured creditor's claim if the creditor unreasonably refuses to negotiate, prior to the filing of the bankruptcy, a "reasonable alternative repayment schedule."⁵⁹ The debtor must attempt to negotiate the plan through an approved nonprofit agency. If the creditor unreasonably refuses to negotiate such a plan, a debtor who later files bankruptcy may bring a motion or objection to the claim, requesting that the court reduce the creditor's claim by no more than 20% of the claim amount.

For this provision to apply, the debtor's repayment offer must be made at least 60 days before the petition is filed and must provide for payment of at least 60% of the amount of the outstanding debt, over a period not to exceed the debt's repayment period. For this reason, these plans are often referred to as "60/60" plans. In addition, no part of the debt under the alternative schedule can be nondischargeable. According to Professor Pottow, this "forced haircut" provision suggests that Congress is not above squeezing creditors.⁶⁰

The problem is that although the bankruptcy law has now been in effect for over a year and a half, agencies report that they are not proposing these plans. As a result, most

⁵⁸ State of Maryland, Department of Labor, Licensing and Regulation, The Commissioner of Financial Regulation and The Office of the Attorney General, "Maryland Debt management Services Act: Report to The Senate Finance Committee and House Economic Matters Committee (2006).

⁵⁹ 11 U.S.C. §502(k).

⁶⁰ John A.E. Pottow, Private Liability for Reckless Consumer Lending, 2007 U. Ill. L. Rev. 405, 465 (2007).

consumers do not know about them. Only one of the counseling agencies mentioned this possibility in its on-line counseling.

One agency director told us that most agencies do not dare to send these proposals to creditors because the agencies have no power. Credit counseling agencies may be reluctant to do so because they rely on creditor funding, which may be based on the numbers of submitted plans that are approved. At least one creditor has stepped up on this issue and formally notified counseling agencies of a new “less than full balance” product. The creditor claims that this is an “industry first” and was developed in support of the 2005 Bankruptcy Law.

Other creditors should be pressured to develop similar alternative payment and settlement plans. If agencies are unable to do so because they fear losing creditor funding, they are no longer acting as true charitable non-profits and should not be allowed to maintain tax-exempt, non-profit status. Agencies should be working first and foremost on behalf of consumers. Further, they are required by the bankruptcy law to make these proposals upon consumer request. If an agency refuses to make such a proposal, the agency should be reported to the trustee for attempting to frustrate the provisions of the Code.

Even if the agencies and creditors finally begin complying with the law, there is still a question whether the 60/60 plan is likely to benefit consumers on the brink of bankruptcy. David Jones at AICCCA believes that these plans would be beneficial. He said that a typical agency enrolls only about 15% of those who ask for assistance in a DMP. Of the remaining 85%, he thought that about 20% could benefit from a 60/60 repayment plan. He emphasized that the option should be made available prior to the payment of a non-refundable bankruptcy attorney retainer.

The AICCCA and NFCC have both stated that they are working with creditors to resolve systemic issues such as how monthly repayments would be recorded by creditors, re-aging policies, creditor compensation for agencies, and possible tax consequences for consumers. Jones said that they hope to have a workable product available for the majority of creditors later in 2007.

A spokesperson for the Financial Services Roundtable (a trade association for creditors) stated that the 60/60 plans have not come up in their discussions, but this is largely because creditors cannot discuss their individual programs with other creditors for fear of anti-trust violations. He did say that they have discussed some policy issues with the EOUST. For example, they have confirmed with the EOUST that a Fair Share arrangement with a counseling agency would not in any way prohibit a counseling agency from proposing a 60/60 plan.

The creditors have expressed concern about what happens to a 60/60 plan agreement if the consumer begins repaying, but later declares bankruptcy. It is unclear, however, what the down side is for creditors. If the debtor defaults on the plan, the full

outstanding debt would become due. If the debtor files bankruptcy later, the creditor would benefit from the additional payments it might not otherwise have received.⁶¹

Despite some expressions of optimism, it seems reasonable to conclude that most consumers about to file for bankruptcy are unlikely to benefit from these plans. They also might be able to do better in bankruptcy, especially Chapter 13 repayment plans. Regardless, the 60/60 plans are required by law and eligible consumers have the right to request and receive these plans.

The problems with getting 60/60 off the ground are indicative of more universal roadblocks to developing flexible repayment options. There is resistance from agencies that are reluctant to put forward new ideas and unwilling to use their limited resources to develop new approaches. According to Jones, “The environment is not currently conducive to the development of new approaches even though changing credit/debt conditions indicate that changes are needed.” Other agency directors confirmed this sentiment. They expressed powerlessness compared to the credit industry. They also admitted that they are dependent on creditors and unlikely to make a lot of waves. Others pointed to the federal regulatory barriers described above.

Still others in the credit counseling industry claimed that they were reluctant to mention the 60/60 plans because they feared that it would be considered legal advice. This concern seems misplaced since as long as counselors are reciting a list of general possibilities, including a 60/60 plan, they should not be considered to be providing legal advice. Discussing a 60/60 plan seems no different than discussing a DMP or other possible alternatives. The problem with legal advice arises if the counselor recommends a particular strategy for a particular consumer.

If creditors are to be pushed, it is very unlikely that this will come from the credit counseling industry. Credit counselors are still too dependent on creditors for survival. On the other hand, creditors have not yet been willing to innovate on their own initiative.

RECOMMENDATIONS TO IMPROVE COUNSELING BRIEFINGS

1. The EOUST Should Publicly Disclose Key Counseling Information to Clients and The Public

Section 111(c)(2)(D) of the Bankruptcy Code requires that agencies provide full disclosures to a client, including funding sources, counselor qualifications, possible impact on credit reports, and any costs of such program that will be paid by the client and how such costs will be paid. The list is illustrative, not exhaustive. Two very important additional disclosures that we would recommend are the percentage of all counseling consumers who are placed in Debt Management Programs (DMPs) and the percentage of these consumers

⁶¹ While creditors may have had a concern about having to return payments made by a debtor just before filing bankruptcy (within 90 days of bankruptcy) as a “preference,” Congress fixed that potential problem for them by adding new Code § 548(h). This provision prohibits the recovery as a preference of any payments under an “alternative repayment schedule” created by an approved counseling agency.]

who complete these DMPs (as the data becomes available.) and those who have been retained in DMPs for particular periods of time.

The EOUST has begun to collect some of this information from agencies through the required Activity Report. We urge the EOUST to make this information conspicuously available on its web site crucial information that consumers can use to comparison shop. This information should not only include the list of approved agencies, but their disciplinary history with the EOUST, the fees each agency charges and fee waiver policies it uses, the number of clients who were counseled in the last year, the number of clients who entered DMPs, and the number who successfully completed DMPs (and/ or have been retained in DMPs for particular periods of time.)

Although in practice many consumers will be referred to counselors through their attorneys, it is important for the EOUST to provide information that allows consumers the ability to shop around and compare various agencies. This will also help creditors, consumer organizations, Congress, and other outside observers assess the practices and performance of these agencies.

2. Agencies Must Discuss and Offer 60/60 Plans

The EOUST should require that all approved agencies that offer DMPs must at a minimum develop plans that provide for repayment of at least 60 percent of principal over time. This is required by the bankruptcy law and consumers should be informed of this right.

3. Develop Additional Flexible Work-Out Plans

Agencies and creditors must work together to develop other work-out options for consumers, including work-out programs for the most vulnerable consumers, such as elders living on fixed incomes and more significant concessions in DMPs.

4. The EOUST Should Monitor Information Provided by Agencies to Search for Inaccurate Information and Institute a Penalty System for Persistent Offenders.

There are various ways to accomplish this goal. One possibility is for the EOUST to provide standardized information about bankruptcy for all agencies to use. The EOUST would be responsible for updating this information.

5. Enforce Consumer Protections Laws Against Deceptive and Abusive Debt Settlement and Credit Counseling Companies.

There are many remedies available to challenge the abusive practices of debt settlement companies, including state debt management laws and unfair and deceptive acts and practices law. Law enforcement, state regulators, and private consumers should enforce these remedies and crack down on offenders.

SPOTLIGHT ON EDUCATION: CONTENT AND EFFECTIVENESS

INTRODUCTION

To receive a discharge in a Chapter 7 or chapter 13 case, the consumer must submit proof of completion of an instructional course concerning financial management. Leslie Linfield, President of the Institute for Financial Literacy describes the requirement as “...the first law that mandates adult financial literacy.”

There is widespread belief among counselors and the media that the education mandate is more beneficial than pre-filing counseling briefings . However, there has been little study of the content of the courses. Further, the effectiveness of the educational courses has been evaluated mainly by notoriously ineffective “smile sheet” evaluations that participants fill out after completing the course.⁶²

Most of the evaluations of the education courses to date simply note that participants have expressed satisfaction with the courses and have exhibited greater financial knowledge after taking the course. The NFCC, for example, reports that consumers have shown improvement in financial knowledge of 10 to 40% at least in the short-term as a result of bankruptcy-related counseling.

Accessibility and affordability issues with respect to education courses were discussed above. This section focuses on the content of the courses.

CONTENT OF EDUCATION COURSES

The EOUST has specified the minimum topics that must be covered. These are:

1. Budget Development

- setting short-term and long-term financial goals as well as developing skills to assist in achieving these goals.
- Calculating gross monthly income and net monthly income
- Identifying and classifying monthly expenses as fixed, variable, or periodic.

2. Money Management

- keeping adequate financial records
- developing decision-making skills required to distinguish between wants and needs, and to comparison shop for goods and services
- maintaining appropriate levels of insurance coverage, taking into account the types and costs of insurance

⁶² For a discussion of “smile sheets”, see generally Karen Gross and Susan Block-Lieb, “Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education” 13 Am. Bankr. Inst. L. Rev 549, 551 (Winter 2005).

- saving for emergencies, for periodic payments, and for financial goals.
3. Wise Use of Credit
 - the types, sources and costs of credit and loans
 - identifying debt warning signs
 - appropriate use of credit and alternatives to credit use
 - checking a credit rating
 4. Consumer Information
 - public and non-profit resources for consumer assistance
 - applicable consumer protection laws and regulations, such as those governing correction of a credit record and protection against consumer fraud.

The EOUST requires providers to offer learning materials and teaching methodologies designed to assist debtors in understanding personal financial management.⁶³

RESULTS OF NATIONAL CONSUMER LAW CENTER INVESTIGATION

1. The Courses Are Not Targeted To Bankruptcy Filers

The most striking result was that only two of the courses targeted their advice to consumers coming out of bankruptcy. One course acknowledges at the outset that the consumer watching the video is coming out of bankruptcy. Another opens its education materials by stating that “There is no doubt that the decision to file bankruptcy is a difficult one.” Both of these courses continued with a mixture of general information and some information targeted at the bankruptcy filer audience.

In contrast, the other courses we reviewed were for the most part generic financial literacy courses, some better than others, that are not specifically geared toward consumers who have already filed for bankruptcy.

The lack of targeting does not necessarily violate current EOUST policy or regulations. In fact, the EOUST gives only very basic guidance on the topics that must be covered. Instead, the failure to make the materials more relevant to this audience violates basic common sense. These consumers should be addressed as a unique audience looking not only for information about how to get back on their financial feet, but also advice about how to handle the immediate aftermath and consequences of bankruptcy. As we recommend below, the EOUST should address this concern in regulations and require that certain topics of most concern to consumers coming out of bankruptcy be included in the courses.

⁶³ Interim Final Rule §58.25(f).

We found, for example, that one course advised consumers that if they have a budget surplus, they should first pay off credit card debt. This advice simply ignores the fact that most consumers coming out of bankruptcy will have just discharged most credit card debt. Yet another states that bankruptcy is not an easy way out of financial troubles and when it comes to access to credit, there is nothing quite as damaging as bankruptcy. Although there is some truth to this information, it is targeted to those who have yet to decide whether to file for bankruptcy. The audience for these courses, in contrast, has already made that decision and need information about how best to address the likely consequences.

In addition, there are unique concerns for bankruptcy filers that, with a few exceptions, are generally ignored. For example, not a single course warns consumers that there may be a problem with how debts discharged in bankruptcy are listed on their credit report.⁶⁴ Yet a common problem for consumer debtors is that credit reports are not updated after bankruptcy to change the reporting of a discharged debt from being listed as “charged off” or showing a balance owed to being listed as “included in bankruptcy” and having zero balance owed.⁶⁵ The failure to update this information can have a significant negative impact on a consumer’s credit score and will undermine the consumer’s ability to obtain a fresh financial start. While general information about how to check credit reports is provided in the education courses, the agencies should discuss the importance of checking credit reports shortly after the bankruptcy discharge is received to ensure that debts discharged in bankruptcy are correctly reported and not listed as having a balance owed, and to file disputes with credit reporting agencies if the information is not correct.

Only a few courses specifically warned consumers that they would be likely targets for offers of high rate credit coming out of bankruptcy. Instead, the majority of courses gave general information about some high cost credit options to avoid. Much of this advice was helpful, but even just a few sentences acknowledging that the individual taking the course had just filed for bankruptcy would make the material much more relevant.

None of the courses discuss the significance of the bankruptcy discharge and concerns about creditor attempts to collect on discharged debt. For debts reaffirmed by the debtor, no information is provided about the need to maintain payments and the consequences of default. While agencies cannot provide specific legal advice on these topics, general information about the discharge and its enforceability would be extremely helpful for debtors who have filed bankruptcy without an attorney.

Ironically, most of the courses omit issues that are likely to be most pressing for this audience, but nearly all cover issues such as investing in mutual funds and stocks. These issues may be important in the longer-term for consumers coming out of bankruptcy, but are not likely to be their most immediate and pressing concerns.

⁶⁴ All debts discharged in the bankruptcy case should show a zero balance and be noted as having been included in the bankruptcy. *See* Fed. Trade Comm’n, Official Staff Commentary § 607, item 6; see also National Consumer Law Center, Fair Credit Reporting § 7.8.4.10.2 (5th ed. 2002 and Supp.).

⁶⁵ It has been suggested that nearly two thirds of credits reports involving debts discharged through chapter 7 bankruptcy proceedings contain these types of errors. *See* Acosta v. Trans Union, LLC, 240 F.R.D. 564 (C.D.Cal. Mar 06, 2007).

2. Erroneous and Inconsistent Information

One common mistake involved the number of years negative information is reported on credit reports. Many agencies, for example, said that Chapter 13 information can be reported for only 7 years, when in fact the Fair Credit Reporting Act provides that all bankruptcy cases may be reported for a period of ten years.⁶⁶ While agencies may wish to inform consumers that credit reporting agencies typically report chapter 13 bankruptcies only for 7 years, consumers should be advised that they can be reported for the longer 10 year period.

In some cases, the advice is contradictory. One course, for example, at one point advises consumers that if they have a credit card with 20% interest and a car payment with 3% interest, they should pay the higher rate debt first. Later, they correctly point out that secured debt (such as a car loan) should always be paid before unsecured debt.

Most of the providers cover similar topics, but some provide contradictory information. For example, a number of courses give estimates of the percentages consumers should be spending in different expense categories. Unfortunately, these vary widely among the different courses. This leaves open the question of whether there is correct information that should be provided on this topic or whether it is acceptable to inform some consumers that they should pay no more than 25% on housing, others no more than 30 or 35.

3. Important Information is Omitted

There is a great deal of randomness regarding which topics are covered by each provider. As a result, some go into great detail on particular topics. One course, for example, gives a history of usury limits. Others barely scratch the surface of important topics. In addition, some courses contain long tangents about particular topics such as taxes, while some include nothing at all about taxes.

All of the courses inform consumers that they can get annual free credit reports. However, they all omit a discussion of other ways to get free reports, such as consumers receiving public assistance or unemployed consumers.

Most of the courses discuss secured credit cards with little or no warning about the costs of these cards. Only two courses we reviewed mention that secured cards often have fees and interest rates associated with their use.

4. Variations in Philosophy and Tone

At least a few courses honestly advertise a particular bias. The director of one course, for example, states at the outset that he believes that “debt is dumb.” This is the exception. Instead, most providers claim to have no particular agenda. The information in the course, however, may indicate otherwise.

⁶⁶ 15 USC 1681c(a)(1).

For example, one course we reviewed was particularly hard on consumers that take out predatory loans. The course materials state that consumers can blame lenders if they want, and those that engage in these practices should be blamed, but “...the fact is that if you are a victim, you have no one to blame but yourself.” According to this course, “No lender should be able to fool an individual into paying more interest on a loan than necessary, just as no merchant should fool you into paying more for a car battery or a pair of shoes when competitors are charging less.” This is biased information that fails to mention that many consumers are steered into expensive products, often on the basis of race. More important, the seemingly objective advice contains a hidden political philosophy or agenda that is inappropriate in a financial literacy course.

This philosophy can overlap with the erroneous information. For example, the course described above says that a lender is not doing anything illegal if it “...does all the right things and still charges you interest rates and fees that are higher than you should be paying given your credit history.” According to the course, the lender is “...simply getting you to pay more than you have to. It is no different than shopping for a car and paying more than you would if you bothered to negotiate a lower price.” In fact, the lender may be doing something illegal by engaging in unlawful discrimination or failing to comply with other federal or state laws.

These variations will make a big difference to certain consumers. One course, for example, takes issue with the common advice that consumers coming out of bankruptcy should begin rebuilding credit by getting credit. His course, for the most part, pronounces a philosophy of avoiding credit as much as possible. Other courses very directly advise consumers to apply for a loan to purchase a car or other purchase and to find a co-signer if necessary.

There is not necessarily a right or wrong set of advice for these consumers. Instead, there is a dispute among counseling and education professionals about how to best counsel these consumers. The EOUST has ignored this issue by failing to suggest the goals of the education. As Professors Gross and Block-Lieb discuss, should the course be designed to discourage the use of credit and to signal to debtors that they are over spenders and that overspending is deviant? Or should the course, instead, presume that debtors will, of necessity, re-enter the credit market after emerging from bankruptcy and endeavor to give them the tools to make wise and thoughtful credit decisions? Should the course encourage debtors to adopt specific practices, such as promoting savings or should it be content rich but value neutral? Should goals be different for different audiences?⁶⁷

5. Variation in the level of rigor.

The providers told us that the EOUST requires them to attempt to ensure that the individual taking the course spends sufficient time on each section. We found in taking the various courses that these measures were inconsistent. As a result, it was very easy to race

⁶⁷ Karen Gross and Susan Block-Lieb, “Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education”, 13 Am. Bankr. Inst. L. Rev. 549, 563 (Winter 2005).

through certain courses as long as we could answer the relatively straightforward quizzes. Others required us to spend a certain amount of time on certain sections.

There was also great variation in the level of difficulty. We cannot necessarily conclude that more rigor is better. In fact, less can be more, but some of the courses clearly required a much higher reading level and education level.

IS EDUCATION WORTHWHILE?

As with counseling, it is difficult to quantify the value of financial education courses. One problem is the lack of an established causal connection between poor financial literacy and financial trouble.

In fact, there is very little evidence that consumers file bankruptcy because of problems with financial literacy. The NFCC claims otherwise. They report that “poor money management/excessive spending” is the number one reason consumers intended to file for bankruptcy.⁶⁸ This data is misleading for a number of reasons. First, the NFCC acknowledged that in some cases (43%) clients identify the reason that caused them to seek bankruptcy protection while in other cases (48%) the client and/or a counselor determine the reason. They agree that further study is needed to define the category of “poor money management.” The NFCC has not explained whether the client or counselor is given a list of possible reasons or whether they are responding to an open-ended question. These are serious data collection flaws that affect the accuracy of the conclusions.

Some suggest that education may be useful, but is most useful when it is voluntary.⁶⁹ Overall, there is a surprising dearth of reliable information about whether financial education affects financial behavior.

This is not to say that financial literacy is unimportant. The providers that told us that “it can’t hurt” are probably right on one level. In fact, there are numerous studies showing serious problems with the levels of financial literacy nationwide.⁷⁰ The more important question in this context is whether the benefits of requiring consumers that have just filed for bankruptcy to take a financial literacy course outweigh the costs in time and money and the possible diversion of resources away from more financially solvent consumers.

⁶⁸ National Foundation for Credit Counseling, “Consumer Counseling and Education Under APCPA”, Year One Report at 7 (Oct. 16, 2006), available at: http://www.nfcc.org/NFCC_Year_One_Bankruptcy_Report2.pdf.

⁶⁹ See, e.g., Susan Block-Lieb, “Mandatory Protections as Veiled Punishments”, 69 Brook. L. Rev. 425 (Winter 2004).

⁷⁰ For example, in a 2005 study, among adults 65 and older, 23 percent had below basic prose literacy, 27 percent had below basic document literacy and 34 percent had below basic quantitative literacy. National Center for Education Statistics, “National Assessment of Adult Literacy: A First Look at the Literacy of America’s Adults in the 21st Century”, NCES 2006-470 (Dec. 15, 2005), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2006470>.

The answer lies in part in whether the lack of education is causing financial distress. Is a consumer earning minimum wage going to avoid bankruptcy by becoming a better budget manager? Is this possible even if his income does not increase?

Although lack of financial literacy may be one factor affecting bankruptcy, numerous studies have found that other causes are more important. A number of studies have found that bankruptcy is most often caused by factors outside of a consumer's control such as medical debt or divorce. A recent study of consumers of all ages investigating the link between medical expenses and bankruptcy filings found that over 25 percent of debtors surveyed cited illness or injury as a specific reason for filing for bankruptcy with about the same number of filers reporting uncovered medical bills of \$1000 and higher.⁷¹ A 2006 study of consumers seeking counseling prior to bankruptcy found that about 30% cited illness or injury as a cause of financial distress.⁷²

A recent study by Professors Porter and Thorne examined the behavior of consumers after filing for bankruptcy.⁷³ This is an important, but often, neglected demographic. The study found that more than one-third of post-bankruptcy families in the study said that their situations were the same or worse than at time of bankruptcy. One in four said that paying expenses was an ongoing struggle. One key trait of those who continued to struggle was lack of adequate steady income. Professors Porter and Thorne conclude that a true and lasting economic transformation requires more than erasing past debt; it requires families to retool their financial lives and close the gap between income and expenses. The key determinant of financial health after bankruptcy is income stability.

RECOMMENDATIONS TO IMPROVE EDUCATION COURSES

1. Require Effective Evaluation

We urge the EOUST to carefully monitor the effectiveness of all of the courses that are being offered and to base the final rule it issues on these course largely on a thorough analysis of debtor education pilot projects that are mandated by the Act. The EOUST should seek input from all players, including consumer groups and education specialists.

2. Require that the courses include certain topics specific to the needs of consumers coming out of bankruptcy.

In order to ensure agencies are giving out accurate information, the EOUST should develop and update a standardized list of topics to cover and provide this information to

⁷¹ David U. Himmelstein, Elizabeth Warren, Deborah Thorne, and Steffie Woolhandler, *Market Watch: Illness and Injury as Contributors to Bankruptcy*, HEALTH AFFAIRS-WEB EXCLUSIVE (February 2, 2005), available at <http://content.healthaffairs.org/cgi/content/full/hlthaff.w5.63/DC1>.

⁷² Institute for Financial Literacy, "First Demographic Analysis of Post-BAPCPA Debtors" (April 2006), available at <http://www.financiallit.org/news/white/2006-04-16%20First%20Demographic%20Analysis%20of%20Post%20v.2.pdf>.

⁷³ Katherine Porter and Dr. Deborah Thorne, "The Failure of Bankruptcy's Fresh Start", 92 *Cornell L. Rev.* 67 (November 2006).

agencies. This information should include rights regarding credit reporting of bankruptcy discharges, rights with respect to reaffirmation, and other issues that are most pressing after bankruptcy filing.

3. The EOUST should develop and require use of standardized information explaining the bankruptcy process.

The EOUST should develop this information and make it available on the EOUST web site. This will alleviate concerns about inaccurate information and will ensure that the information is general and does not cross the line into legal advice.

4. The EOUST should monitor agency web sites and materials for inaccurate information.

The EOUST should monitor agency web sites and other materials for errors and other problems and assess penalties against those with repeated violations.

5. Agencies Must Disclose Affiliations and Biases

Agencies should be required to disclose up-front any affiliations with religious or other organizations and state their philosophies. Alternatively, the agencies could provide a short summary of the goals of their course that consumers could review prior to signing up.

6. Require Standardized Time Keeping

All courses should be required to keep time in a standardized manner. This will help prevent consumers from shopping around to find the “easiest” courses.

CONCLUSION

Our review of the Massachusetts providers led to some positive results. The consumers we interviewed for the most part felt that the courses and briefings were interesting and that they learned new information. In general, there is sufficient capacity to meet the needs of consumers that have access to the Internet, speak English, and are not disabled. However, there are still very serious problems to address. Key concerns include the confusion over fee waiver policies, unauthorized provision of legal advice and circulation of inaccurate information. There are also problems related to lack of services for limited English speakers, disabled consumers, and those with limited reading skills or limited computer access or skills.

The key concern is whether the briefings and education courses are effective. These are difficult questions to answer, although the preliminary evidence clearly indicates that briefings are not effective in the way that Congress intended. Measuring effectiveness is difficult, but critical in order to justify the time and expense consumers must incur in order to meet these mandates.

These questions can only be answered once we collectively have a better sense of the goals of the briefings and education. This is an important first step. However, even if this step is taken seriously, the mandates will only be meaningful if they help lead consumers to better choices. Good alternatives to bankruptcy simply do not exist for the vast majority of consumers in serious financial distress. These alternatives are unlikely to emerge as long as creditors and agencies have no incentives to develop such plans. We must work together—creditors, agencies, consumers, policymakers, and advocates—to create these types of alternatives if we truly wish to help consumers rebuild their financial lives.