

**Comments of the
Community Legal Services of Philadelphia
Consumer Federation of America
National Association of Consumer Bankruptcy Attorneys
National Consumer Law Center**

**Regarding
Proposed Rules on Application Procedures and Criteria for Approval of Nonprofit Budget and
Credit Counseling Agencies**

**United States Department of Justice
28 CFR Part 58
Docket No: EOUST 102**

Community Legal Services of Philadelphia¹, The Consumer Federation of America², the National Association of Consumer Bankruptcy Attorneys³ and the National Consumer Law Center on behalf of its low-income clients⁴ make the following recommendations regarding the proposed rules on application procedures and criteria for approval of nonprofit budget and credit counseling agencies mandated by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Before focusing on areas of concern below, we want to express our support for many of the proposed changes. We appreciate the Trustee's willingness to listen to consumer voices in developing these proposals. In particular, we support the proposed requirement that counselors provide consumers the opportunity to have the agency negotiate an alternative payment schedule as set forth in 11 U.S.C. §502(k) and the addition of specific fee and fee waiver guidelines. The explicit prohibition of unauthorized legal advice and ban on most referral payments are also critical for consumers. The comments below focus on key areas where we believe additional changes are necessary to ensure that consumers are protected throughout the briefing process.

¹For over 40 years, Community Legal Services (CLS) of Philadelphia has provided the highest quality legal assistance to low-income Philadelphians who cannot afford legal counsel when they most need it. Created by the Philadelphia Bar Association in 1966, CLS is widely recognized as one of the most sophisticated, respected legal services programs in the nation. It is also one of the largest and most experienced. In particular, CLS is recognized nationally for its expertise in consumer bankruptcy and for its path breaking work on language access issues.

² Consumer Federation of America (CFA) is a non-profit association of 300 consumer groups, with a combined membership of more than 50 million people. CFA was founded in 1968 to advance the consumer's interest through advocacy and education.

³ Established in 1992, NACBA is the only organization dedicated to serving the interests of consumer bankruptcy attorneys and protecting the rights of consumer debtors in need of bankruptcy relief. The Association's twin missions are to help consumer bankruptcy attorneys more effectively represent their clients and ensure that the voices of consumer debtors and their attorneys are heard in the halls of congress, before the Judiciary, in the Executive Branch and in other arenas where consumer debtors are affected.

⁴ The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states that represent low-income and elderly individuals on consumer issues. In addition, NCLC publishes and annually supplements practice treatises which describe the law currently applicable to all types of consumer transactions, including *Consumer Bankruptcy Law and Practice* (8th ed. 2006 and Supp.).

I. Definition of “Counseling Services”: The UST Should Follow the Statutory Language and Require Agencies to Outline Counseling Options Only

The Bankruptcy Code provides guidance on the content of the counseling sessions. Section 109, which includes the counseling mandate, states that approved counseling agencies must outline the opportunities for available credit counseling and assist individuals in performing budget related analysis. A related provision, section 111(c)(2)(E), requires that approved agencies must be capable of providing “adequate counseling with respect to a client’s credit problems that includes an analysis of such client’s current financial condition, factors that caused such financial condition, and how such client can develop a plan to respond to the problems without incurring negative amortization of debt.” Section 111(c)(1) requires that agencies provide adequate counseling with respect to client credit problems.

The UST’s proposed definition of “counseling services” does not follow the statutory language.⁵ Instead, the definition states that services shall at a minimum include “performing on behalf of, and providing to, each client a written analysis of each client’s current financial condition, which analysis shall include a budget analysis, consideration of all alternatives to resolve a client’s credit problems, discussion of the factors that caused such financial condition, and identification of all methods by which the client can develop a plan to respond to the financial problems without incurring negative amortization of debt.”

These factors are derived directly from the statute except for the requirement that agencies consider all alternatives to resolve a client’s credit problems. We are extremely concerned about the UST’s interpretation of the statute in this instance.

We presume that the UST does not actually want agencies to counsel consumers about ALL alternatives. There are many debt relief alternatives that have been widely discredited and should not be part of any “outlining of alternatives.” Debt termination or debt elimination, for example, has been described by the FRB as “totally bogus” and the OCC has warned against these schemes as well.⁶ Debt settlement, as detailed in an NCLC report, is also extremely problematic.⁷ The FTC describes debt settlement programs as “risky” and warns consumers of various abuses.⁸

Rather than listing the alternatives that can be discussed and those that cannot, the UST should follow the statutory language and explicitly limit agencies to advising consumers of counseling options and to performing budget related analyses. In this way, potentially damaging non-counseling options such as debt settlement and debt termination would automatically be excluded.

Following the statutory language is also essential to help protect against counselors providing unauthorized legal advice. The proposed rules rightly affirm that unless otherwise authorized by law,

⁵ Proposed 28 C.F.R. §58.12(b)(12).

⁶ See Federal Reserve Board, Division of Banking Supervision and Regulation, SR-04-03 (January 28, 2004), available on-line at <http://www.federalreserve.gov/boarddocs/SRLETTERS/2004/sr0403.htm>; OCC Alert 2003-12 (Oct. 1, 2003), available at www.occ.treas.gov/ftp/alert/2003-12.doc.

⁷ See National Consumer Law Center, “An Investigation of Debt Settlement Companies: An Unsettling Business for Consumers” (March 2005), available on-line at http://www.nclc.org/issues/credit_counseling/content/DebtSettleFINALREPORT.pdf.

⁸ See Federal Trade Commission, “Facts For Consumers: Knee Deep in Debt”, available on-line at <http://www.ftc.gov/bcp/online/pubs/credit/kneedeep.shtm>.

counselors must not give legal advice.⁹ The UST has further explained on its web site that counselors must not advise consumers on whether or not to file for bankruptcy. This decision, according to the UST, can be made only by the consumer and his or her attorney. In addition, this advice “...may constitute legal advice which could be deemed to be the unauthorized practice of law and be actionable by State authorities.”¹⁰

A consideration of “all alternatives” to resolve a client’s credit problems, if strictly interpreted, would require counselors to help consumers choose between different alternatives and help identify which are more likely to resolve credit problems. In most cases, this type of individualized tailoring of alternatives falls into the category of legal advice. Yet credit counseling agencies rarely have attorneys on staff to provide counseling or supervise nonattorney counselors. General concerns about unauthorized legal advice are especially acute in the pre-bankruptcy filing context where inferior or biased advice comparing bankruptcy with other options can severely harm consumers, many of whom have no other viable choice but to file bankruptcy.

The unauthorized practice of law issue is not the only concern. Another problem is that credit counselors typically know very little about the bankruptcy process and even more important have historically been biased against bankruptcy.¹¹ After all, credit counseling was created by the credit card industry as an alternative to bankruptcy. These origins, combined with continued reliance on creditor funding, create an institutional bias among many credit counselors that unfortunately leads in many cases to insufficient or misleading advice to consumers. These ties to creditors have been a concern of state and federal regulators, including the I.R.S., which has been clear that organizations are not nonprofit if they rely too heavily on client fees and creditor payments. This concern is not merely academic. The courts and agencies that have confronted this issue understandably worry that agencies that rely heavily on creditor funding will be reluctant to go against their funders’ interests by recommending bankruptcy to consumers.

There is not a single requirement in the Code that agencies provide consumers with substantive advice about whether or not to file bankruptcy or even that they be “fully informed” by counselors of the bankruptcy process. The appropriate action in these cases is for agencies to refer clients to knowledgeable lawyers to get legal advice.

II. The UST Should Amend the Provisions that Address Access for Limited English Speakers

We appreciate the fact that EOUST has acknowledged the importance of providing counseling in languages other than English. However, unless EOUST is willing to declare that credit counseling is not available to all limited English proficient (LEP) debtors unable to access counseling in their primary language, it is obligated to impose strict requirements on the agencies so that all debtors are able to participate in counseling without regard to their English language skills.¹² The proposed rules are not

⁹ Proposed 28 C.F.R. 58.20(b).

¹⁰ See http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_faqs.htm#coun_issue6.

¹¹ See generally Lea Krivinkas, “Don’t File! Rehabilitating Unauthorized Practice of Law-Based Policies in the Credit Counseling Industry”, *Amer. Bankruptcy L.J.* (Winter 2005).

¹² Even if stricter requirements are imposed, there will continue to be cases in which limited English proficient debtors are unable to timely obtain counseling in which they can meaningfully participate. For example, even the largest national provider of telephone interpreting service cannot always get interpreters on the phone in certain languages upon request, or even with an appointment and it offers no service in certain other languages. Accordingly, EOUST should act under § 109(h)(2)(A) to waive counseling requirements for LEP speakers of designated languages in any district in which it cannot guarantee timely

sufficiently strict as drafted. We propose that further changes be made.

§ 58.12 (b)(26). The definition of “limited English proficiency” is not consistent with existing federal standards and is not likely to work well. Part (i) of the definition requires an unqualified “inability” to speak, read, write or understand English, improperly suggesting that the person be completely unable to communicate in these ways in English to be considered LEP. Many individuals considered LEP for DOJ purposes¹³ are able to speak, understand, read or write *some* English, but not to the extent necessary to meaningfully participate in the given program or service. And because language proficiency is context specific, it is important to bear in mind the purported educational goal and debt analysis requirements of credit counseling. The level of language and vocabulary needed to accurately gather facts and beneficially discuss matters like income, expenses, assets, debts and bankruptcy is such that a person with low English proficiency will not be able to meaningfully participate or benefit from a session conducted in English.

The alternative (ii) definition is not well drafted. In order to qualify under this provision, consumers must actually use languages other than English in their daily affairs. Because real consumers can do this only if the businesses they use are able to conduct business in the consumer’s language, the standard could be too high to meet and is wholly dependent not on the person’s English language skills but on the availability of businesses catering to LEP customers.

The definition could be improved with the following language in recognition of the limited context of the rule:

(26) The term “limited English proficiency” applies to individuals: (i) who do not speak English as their primary language and (ii) whose ability to fully participate in and benefit from credit counseling will be impaired if not conducted in the individual’s primary language.

Alternatively, the accepted federal definition also would be more accurate:

(26) The term “limited English proficiency” applies to individuals who: (i) do not speak English as their primary language and (ii) have a limited ability to read, write, speak, or understand English.

§58.20(j) Minimum Qualifications - Language services.

EOUST has properly recognized that in order to be minimally qualified, an agency must be able to provide services in languages other than English. It is appropriate to set certain general rules in this regard so that the obligation is clear. In practice, it is quite difficult to set effective standards on language access in a few sentences without reference to external guidelines. The proposed rule has a number of deficiencies.

Understanding the economics of contracted language services is important. Interpreted sessions should take about three times longer than same language sessions. But the cost of a telephone based interpreter service, for example, would exceed fifty dollars in a time far shorter than an hour. Unless providers hire bilingual counselors, or incur substantial up front investment to translate web based

service.

¹³ The definition of limited English proficiency in the DOJ Guidance is “[i]ndividuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English.” DOJ Guidance to Federal Financial Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 F.R. 41455, 41459 (June 18, 2002). The standards applicable to federal grantees also apply to programs and activities conducted by federal agencies. Executive Order 13166, 65 F.R. 50121 (August 16, 2000).

training content, they are likely to lose money on each session provided in a second language through the use of an interpreter. As a result, many agencies will provide properly accessible services only if compelled to do so¹⁴, unless they are somehow able to transform credit counseling into a profitable loss leader. It is therefore essential that EOUST set generally mandatory standards, provide language services or reimbursements to agencies or change the rule so that LEP debtors can readily obtain waivers.

The first sentence of the proposed subsection is both circular and vague, although it admirably sets a simple general rule. The circularity is the result of the requirement that agencies provide services in the languages of the debtors the agency serves without recognizing that by later allowing rejection of customers who don't speak English well, the obligation is meaningless. The vagueness results from requiring services only in "major population groups" which is not defined as a term. In addition, the formulation permits agencies not to provide language appropriate counseling to "minor population groups", who might very well end up with no provider available. The general rule also must mandate that any language services be provided free of charge.

The second sentence needs qualification to recognize that bilingual staff and interpreters must be fit to perform counseling in another language or to provide interpreting. Many service providers are not aware that self identified "bilingual" staff are often not actually fluent in two languages. Likewise, providers often use bilingual staff to interpret without having ensured that they have the needed training and skills to interpret effectively. It is foreseeable that untrained, unprofessional interpreters will undermine the efficacy of the counseling session and transmit information inaccurately to both parties.

The third sentence needs to say more. It is essential that the language information be readily available in any advertising and on Internet sources, including the provider's, if any, and EOUST's.

The final sentence is an open invitation to providers to refuse service to LEP debtors and instead refer them to another provider. The end result is that an astute reader of the rule as proposed will conclude that it need not do anything to add any language capacity and indeed might rationally conclude that reducing second language services is perfectly acceptable. The end result is that the policy, when combined with EOUST's interpretation of the waiver provisions, may well result in a situation in which LEP debtors have to choose one of the following: 1) eliminate bankruptcy as an option; 2) in violation of existing federal standards, proceed with counseling using a debtor supplied volunteer such as a child or struggle through it in the absence of proper language support without meaningfully participating in the counseling; or 3) file without counseling and seek a waiver over the UST's objection with attendant risks of dismissal. The options available to speakers from "minor" population groups will be most limited.

Two groups of agencies would be compelled to provide language appropriate services under the rule. Those that receive federal grants would be required to comply with the language access guidance of their funding source by providing services generally to LEP debtors. In addition, those who provide services exclusively to a small, well defined population in which an LEP language group is indubitably a "major" population group that it is otherwise compelled to serve due to its location or mission will be covered. Such groups, however, are likely to be staffed to provide bilingual services already but will be of no use to those who do not reside in their service area or to speakers of other languages.

Because of the difficulty of crafting concise and effective guidelines that will result in LEP debtors having ready access to counseling services from which they can benefit, the incorporation of

¹⁴ Some already are. Agencies that are federally funded, such as HUD counseling agencies, would be required under Title VI guidance to provide language services in all of their services.

external standards with certain modifications is the most effective way to ensure language access. We recommend the following substitute language:

(j) Language services to clients and potential clients. An agency shall:

(1) Notwithstanding whether the agency receives financial assistance from DOJ, devise, implement and annually certify compliance with a written Language Assistance Plan which meets the standards set forth in the DOJ LEP Guidance, 67 F.R. 41455 (6/18/02) applicable to DOJ grantees and which is made available upon request;

(2) Communicate orally and in writing with clients or potential clients with limited English proficiency in their primary language, at no charge to the client or potential client, through the use of demonstrably bilingual counseling staff or in conjunction with competent, trained interpreters or translators provided by the agency and not the client;

(3) When as a result of extraordinary circumstances an agency is unable to provide a limited English proficient potential client with timely services in his primary language, it shall provide the debtor with a letter so stating and shall employ its best efforts to expeditiously direct such person to one or more approved agencies that can provide counseling services in the primary language of the client or potential client.

(l) Mandatory disclosures to clients and potential clients. Add the following:

(1) The agency's fee policy and its policy to provide free language services to persons with limited English proficiency;

(12) In any print or electronic advertising of its services, including an Internet website, plainly disclose that the agency will provide free language services to LEP clients and potential clients. The agency shall further disclose the specific languages other than English in which it is capable of providing direct (uninterpreted) counseling sessions for each method of delivery.

(o) Agency records.

(5) Records concerning ...[LEP].

(i) Of the number of such clients, including the specific language or special need involved as well as the method of delivery;

(ii) Of which languages ~~are~~ were offered, which languages were needed, and the numbers of each;

(iv) Supporting any justification, including the specific extraordinary circumstances involved, if the agency did not provide services to such clients or potential clients.

The proposed rules no longer include specifications regarding applications and forms required to

be filed with EOUST for the agency application and approval process. We recommend that the paperwork be modified to require certifications of compliance with the language requirements and to capture language related data to be reported. This would include:

1. Certification that the agency has prepared and implemented a language access plan that is compliant with the rules and the DOJ Guidance.
2. If data on counselors is required, to include information regarding second language fluency, training in interpreting for bilingual staff, and training in working with interpreters for monolingual staff together with the numbers of other customer service staff with such skills or training.

Should these broader changes be rejected, the proposal could nonetheless be improved with the following changes to Section 58.20(j) as well as the recommended changes to (l), (o) and the forms and certifications:

(j) Language services to clients and potential clients. An agency shall communicate, in writing and orally, in Spanish and the languages of the major population other significant limited English proficient language groups served by residing in the geographic area in which the agency offers or provides services. The agency shall provide or arrange for demonstrably bilingual personnel, competent, trained interpreters, or the use of communication technology, as needed, in such languages. The agency shall inform any client with limited English proficiency of the languages offered at no charge in providing counseling services, the relevant methods of delivery involved and whether counseling will be offered directly in the second language or with the assistance of an interpreter. Whenever an agency cannot provide timely counseling services to a client or a potential client due to extraordinary circumstances related to a person's limited English proficiency, the agency shall employ its best efforts to expeditiously direct such person to one or more approved agencies that can provide counseling services in the language of the client or potential client and shall immediately provide to the client or potential client a written certification of its inability to provide counseling services.

III. The UST Should Not Require Attachment of a Budget Analysis to the Certificate

Without statutory authority, the proposed rule adds a requirement that if the counselor determines a viable alternative to bankruptcy is available to the client to resolve his or her credit problems, the counselor must attach the client's budget analysis to the certificate.¹⁵

This proposal is potentially very damaging to consumers due to the unreliability of the budget information collected during the prebankruptcy briefing. Counselors prepare the budget analyses based

¹⁵ Proposed 28 C.F.R. §58.22(b)(2).

on the limited information that consumers provide during the briefing. While most consumers and counselors presumably do the best they can under the circumstances, there is no requirement or even expectation that the budget information will be verified. Verification is not possible given the limited scope of the prebankruptcy briefing and given that many consumers are receiving the briefing by phone or Internet. Submitting these estimates with the certificate could prejudice consumers if the bankruptcy court uses this analysis as a basis of comparison with the accurate, carefully completed figures listed in the formal bankruptcy petition.

A further problem is that this requirement is triggered only if the counselor determines that a viable alternative to bankruptcy is available to the client. Counselors are not qualified to make this determination. In fact, they cannot make this determination given the limited scope of the session and incomplete information they receive during the briefing. Further, as discussed above, the UST has made it clear that counselors should not at any time be helping a client choose a particular alternative.

IV. The Presumptive \$50 Fee Limit Should Include All Fees Charged to a Consumer, Including Any Separate Fees Charged for Certificate Issuance

The \$50 presumptively reasonable fee limit should include any fees previously paid by the client and any funds received on the client's behalf, including any separate fees charged for certificate issuance. The proposed rules allow agencies to charge separate fees for issuance of certificates or replacement certificates as long as such fees are disclosed and the client gives written consent.¹⁶ The UST should make clear that any separate fees properly charged pursuant to this provision should count toward an overall, cumulative limit of \$50 instead of allowing agencies to create a loophole and unreasonably increase fees charged to clients.

V. Fee Waiver Disclosures Should be More Specific

We support the UST's proposed fee waiver standards. We also agree with the mandatory disclosure of the agency's policies enabling clients to obtain counseling services for free or at reduced rates.¹⁷ This will help address the current inconsistency in the granting of fee waivers.

Our recommendation is to expand this disclosure provision to require agencies to disclose at a minimum that any consumer that meets the minimal criteria of income below 150% of the poverty line should qualify for a waiver. In addition, agencies should be required to disclose any specific criteria that they use in making fee waiver determinations. This will help reinforce the proposed standardization in the granting of fee waivers and imposition of an "eligibility floor."

VI. The UST Should Clarify the "Written" Disclosure Requirement for Phone and Internet Counseling

The Trustee has added a few new agency disclosure requirements, including that agencies obtain written consent of the client before commencing services if they charge a separate fee for certificate issuances. We recommend that the UST provide guidance with respect to the form of this disclosure if counseling is done by phone or Internet. For example, it would seem to be unduly burdensome for a consumer receiving counseling by phone to somehow submit a written document to the agency.

¹⁶ Proposed 28 C.F.R. §58.22(g).

¹⁷ Proposed 28 C.F.R. §58.20(1)(2).

We recommend that the rules specify that consumers may consent electronically if services are received through the Internet. With respect to phone briefings, the rules should allow counselors to document in their records that they gave the disclosures and that the consumer consented. Requiring a written signature when counseling is offered by phone would cause harmful delays for consumers.

VII. The UST Should Revise the Definition of “Debt Repayment Plan” to Ensure Consumer Control

The definition of debt repayment plan poses some potential problems for consumers.¹⁸ A plan is defined as any written document, suggested, drafted, or reviewed by an approved agency. This may allow counselors, rather than consumers, to unfairly control debt repayment plan terms. Counselors could propose plans that do not necessarily meet the consumer’s needs and that are not approved by the consumer. We strongly recommend that the definition be amended to explicitly provide that a debt repayment plan must be agreed to by the client.

VIII. Include Information about the EOUST in Complaint Procedures

The complaint procedures set forth in §58.20(m) should require agencies to establish internal complaint procedures and to disclose in writing to consumers that they can lodge complaints not only with the agency, but also with the EOUST, providing an address, email address, and phone number for the EOUST.

IX. Commercial Use of Information and Sale of Related Services

The proposed protections against the commercial use of information obtained by agencies are insufficient.¹⁹ Agencies should not be permitted to market any services to clients and potential clients or to sell information about clients either with or without their consent. Such consents are often contained in small print that debtors do not carefully read or understand, so that § 58.20(p)(10) and (11) are not sufficiently protective. Debtors are essentially involuntary customers of these agencies and should not be subject to any marketing or other commercial activity as a result of having been forced to jump the counseling hurdle to bankruptcy.

At the same time, § 58.21(d) could be read to prohibit the discount some agencies give to debtors who choose to purchase both the prepetition briefing and the postpetition financial management from the same agency. There is no purpose to possibly raising debtors’ costs by prohibiting such discounts.

X. Restore the Explicit Provision Regarding Preemption

The proposed rules mirror the interim final rule in requiring agencies to comply with all applicable laws and regulations of the United States and each state in which the agency provides services.²⁰ However, the UST inexplicably removed the provision in the interim rules that the regulations are not intended to preempt any applicable law or regulation governing the conduct or operations of an agency.²¹

¹⁸ Proposed 28 C.F.R. §58.12(b)(15).

¹⁹ Proposed 28 C.F.R. §58.20(p)(10).

²⁰ Proposed 28 C.F.R. §58.20(a).

²¹ 28 C.F.R. §58.15(c).

We urge the restoration of the provision regarding preemption, clarifying that the federal rules do not preempt more protective state laws.

XI. The UST Should Require Key Data Disclosures to Clients and The Public

Section 111(c)(2)(D) 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 such client and how such costs will be paid. The statutory language is illustrative, not exhaustive.

Although we do not believe that extensive disclosures are particularly helpful for consumers, we do recommend that additional, targeted disclosures be required that cite the percentage of all consumers that the agency places in DMPs and as the data becomes available, percentage of pre-filing customers placed in DMPs. In addition, consumers should be given information on the percentage of consumers that complete the DMPs.

Even if the UST decides not to require this type of disclosure to consumers at the time they seek assistance from the agency, this information should at a minimum be available to consumers, their attorneys, other advocates, and the public through a public web site. This web site should include not only a list of approved agencies, but also provide basic information about agency funding sources, board of directors, staff, and basic DMP performance information as discussed above. Agencies must provide much of this information in “Appendix E”, which must be filled out every six months. However, it is unclear whether this information can be accessed by interested consumers and their advocates.

Although in practice many consumers will be referred to counselors through their attorneys, it is important for the UST to provide information that allows consumers the ability to shop around and compare various agencies. This will also help advocates and others assess the performance of these agencies.