

**CONSUMER CREDIT COUNSELING AND
THE BANKRUPTCY ABUSE PREVENTION AND
CONSUMER PROTECTION ACT OF 2005**

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CREDIT COUNSELING AND BANKRUPTCY

A. Credit Counseling as a Precondition of Bankruptcy Filing.

1. An individual is not eligible for relief under any chapter of the Bankruptcy Code unless, within 180 days of the bankruptcy filing, the debtor received “an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis” from an approved nonprofit budget and credit counseling agency. 11 U.S.C. § 109(h).

2. Approved credit counseling must satisfy the following requirements:

- (1) The counseling may take the form of an individual or group briefing;
- (2) Counseling may be conducted in person, by phone, or by internet;
- (3) Counseling must be provided by an approved nonprofit budget and credit counseling agency;
- (4) Counseling must outline available credit counseling opportunities and performs a budget related analysis.

3. At the time of the petition filing, the credit counseling requirement may be waived for 30 days if the debtor certifies that:

- (1) There were exigent circumstances that justify waiver;
- (2) The debtor requested credit counseling services from an approved agency but could not obtain counseling within 5 days of the date of the request; and
- (3) The court approves the waiver request. 11 U.S.C. §109(h)(3)(A).

The waiver, upon approval by the court, may be extended for an additional 15 days for a total of 45 days after the date of the filing of the petition.

4. The credit counseling is not required if the debtor lives in a district for which the United States trustee determines that approved credit counseling agencies are not reasonably able to provide adequate services for debtors seeking bankruptcy relief. 11 U.S.C. §109(h)(2)(A).

5. The debtor may be completely exempted from the counseling requirement if, after notice and hearing, the court determines that the debtor is unable to complete the

requirements because of incapacity, disability, or active military duty in a military combat zone. 11 U.S.C. §109(h)(4).

4. Proof of credit counseling and budget analysis..

11 U.S.C. §521(b) requires the debtor to file with the petition:

- (1) Certification from the approved credit counseling agency that describes the counseling provided to the debtor; and
- (2) Copy of the debt repayment plan proposed by the agency, if any.

B. Financial Management Counseling as a Requirement for Discharge.

1. A debtor may not obtain a discharge of debts in either a Chapter 7 or a Chapter 13 case unless the debtor completes an instructional course concerning personal financial management. 11 U.S.C. §727(a)(11), §1328(g)(1).

2. For purposes of receiving a discharge, the instructional course on personal financial management must be approved by the United States trustee. 11 U.S.C. §111(a)(2).

3. The approved course on personal financial management may be offered either by an approved budget and credit counseling agency or other provider approved by the United States trustee. 11 U.S.C. §111(b)(1).

4. The requirement of a course on personal financial management may be waived if the debtor lives in a district for which the United States trustee determines that approved credit counseling agencies are not reasonably able to provide adequate services for debtors seeking bankruptcy relief. 11 U.S.C. §727(a)(11).

5. The requirement of a course on personal financial management may be waived if, after notice and hearing, the court determines that the debtor is unable to complete the requirements because of incapacity, disability, or active military duty in a military combat zone. 11 U.S.C. §727(a)(11), §1328(g)(1).

4. Proof of completion of the course on personal financial management.

The statute does not specify how the debtor must prove that he or she has satisfied the requirement of completion of a course on personal financial management.

C. Credit and Financial Management Counseling Services in Minnesota

In Minnesota, there are several ways in which debtors may obtain credit and budget counseling as well as personal financial management education. Person-to-person counseling sessions, telephonic counseling, and internet counseling are offered by a wide variety of agencies and individuals.

1. Licensed Debt Prorate Agencies

Licensed debt prorate agencies are currently the largest providers of financial counseling services in Minnesota. Providers of debt prorating services are licensed annually through the Minnesota Department of Commerce pursuant to Minn. Stat. §332. Providers may be individuals, partnerships, or corporations. Licensing requirements focus primarily on record keeping, money handling, and related financial oversight. The Department of Commerce does not evaluate or monitor the quality of financial counseling and education offered by these licensed providers.

Currently, there are nine licensees providing debt prorating services in Minnesota, ranging from one-person offices to ten or more counselors:

Lutheran Social Services of Minnesota
Village Family Services, Inc.
Family Means
Caritas Family Services
Family Service Rochester, Inc.
Metropolitan Financial Management Corp. dba Auriton
Family Life Services, Inc.
Minnesota Credit Association
Personal Money Management

(For an interesting view of the potential problems of misuse of funds received by a debt prorating agency, see State ex rel. Heitkamp v. Family Life Services, Inc., 2000 ND 166, 616 N.W.2d 826.)

In addition to debt prorating, all the above agencies offer various forms of budget counseling, financial management advice, and credit education. The three largest agencies - Lutheran Social Services, Village Family Services, and Family Means - offer formal educational programs as well as person-to-person counseling, telephonic counseling, and internet counseling. Village Family Services offers its own internet

financial and budget counseling program (see attachment) administered by its own financial counselors; Lutheran Social Services offers internet financial and budget counseling through a link with the National Foundation for Credit Counseling (NFCC).

It does not appear that these licensed agencies currently have the capacity and facilities to provide in-person or telephonic financial counseling for the number of debtors filing bankruptcy annually in Minnesota at this time. This obviously may change as agencies attempt to respond to the expected increased demand for debtor financial counseling.

2. Other Non-Profit or Governmental Agencies

A variety of other governmental, quasi-governmental, non-profit agencies provide budget and financial counseling in Minnesota unrelated to debt prorating. This counseling function is directly related to those agency public or charitable assistance programs rather than the consumer debt repayment purposes of debt prorating agencies. Financial counseling and budgeting are viewed as necessary tools for successful implementation of other agency programs for problems such as chemical dependency, family crisis intervention, mortgage foreclosure prevention, and compulsive gambling. Representative agencies include the following:

- The Salvation Army
- Heartland Community Action Agency
- Community Action for Suburban Hennepin
- The Pines Mental Health Center
- Northside Residents Redevelopment Council
- Twin Cities Habitat for Humanity
- City of St. Paul Housing Information Office
- Carver County HRA
- South Eastern MN Community Action Council
- Tri-County Action Program

The financial counselors working at most of these organizations are familiar with, and frequently refer clients to, the first three listed consumer credit counseling agencies licensed as prorating agencies in Minnesota for consumer debt repayment purposes.

To the extent that the United States Trustee's office will recognize the financial counseling function provided by these non-prorate agencies as satisfying the requirement of credit counseling and budget analysis required by 11 U.S.C. §109(h), debtors wishing to file bankruptcy can use their prior counseling experiences with these agencies to satisfy

this precondition and avoid duplicate counseling.

3. How to Work With Credit Counseling Agencies

For attorneys who undertake pro bono bankruptcy representation, qualified consumer credit counseling agencies offer many advantages now that bankruptcy and consumer credit counseling have been linked by federal statute. What was once an uncertain and occasionally a competing relationship has been legislated into a cooperative partnership, and pro bono attorneys should take advantage of it. Consumer credit counseling agencies now have the gatekeeper role they have long sought and attorneys can request these agencies to provide financial counseling at a nominal or modest cost to the debtor.

Consumer credit counseling agencies can perform two important functions, among others, which will make pro bono representation easier for the volunteer attorney handling a Chapter 7 case.

(1) Identification of Creditors

For attorneys undertaking pro bono representation, a troublesome part of the Chapter 7 petition preparation is obtaining a complete and accurate list of creditors from the debtor. Individuals qualifying for pro bono representation often have limited writing, record keeping, and other financial organizational skills. Assembling the list of creditors with complete mailing addresses is a continuing challenge for the debtor's attorney; creditor lists have to be revised frequently as pro bono debtors discover new creditors, new addresses, and new amounts. For example, who among us has not dealt with the NSF-check artist-client who has "remembered" another 8 merchants from an overdrawn or closed checking account, in addition to the 46 already listed, five days after the petition was filed?

Credit counseling agencies, with their access to credit reports and other national creditor databases, can provide an in-person counseling session with sufficient time to sort through a debtor's shopping bag of unopened bills and invoices in order to assemble a complete list of creditors, mailing addresses, and amounts owed. The screening function carried out by a credit counseling agency can save the pro bono attorney a lot of time that would otherwise be spent on compiling a list of creditors. Pro bono attorney referral services should be encouraged to refer clients to an attorney only after they have their filing fee and their credit counseling certification.

(2) Budget Review

Similarly, a credit counseling agency can help the debtor construct monthly estimates of income and household expenses prior to pro bono attorney consultation. Those estimates can be used by the attorney to complete Schedule J. Not only does this reduce the amount of time that the attorney has to spend on completion of the bankruptcy petition, it also affords the attorney a credible source to rely on if a creditor or the United States trustee questioned the accuracy of the income and expense estimates.

(3) Financial Management Education

Before the new legislation, a debtor only had to appear at the §341 hearing with his or her photo identification and social security card and respond to the trustee's limited questions. Although even this limited responsibility has challenged debtors, the pro bono attorney could usually leave the hearing room confident that the attorney's role was completed and that the debtor would automatically receive the Chapter 7 discharge. It will not be as easy any more.

The requirement of 11 U.S.C. §727(a)(11) that a debtor may not obtain a discharge of debts in a Chapter 7 case unless the debtor completes an instructional course concerning personal financial management is going to impose an additional, and significant, responsibility on the debtor's attorney. Once this requirement takes effect, debtor attorneys will have to make sure that the pro bono debtor (1) is given adequate notice of this requirement, (2) is directed to appropriate providers of this counseling service, and (3) reminded again after filing that a discharge will not issue if this requirement is not satisfied. Since denial of discharge because the debtor failed to complete this educational component defeats the whole purpose of filing bankruptcy, and wastes the pro bono attorney's time, referring agencies should be encouraged to assume some responsibility in encouraging the debtor to complete this component before the §341 hearing.